FEDERAL COMMUNICATIONS COMMISSION REPORTS

DECISIONS AND REPORTS OF THE FEDERAL COMMUNICATIONS COMMISSION OF THE UNITED STATES

Volume 94, Second Series

February 1–April 30, 1984

REPORTED BY THE COMMISSION

(Digests have been added for convenience,
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FEDERAL COMMUNICATIONS COMMISSION

February 1-April 30, 1984

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ERRATA

Page 508—Add the phrase "By the Commission:" in the caption.
Page 852—Include dissenting statement of Commissioner Jones.

Dissenting Statement
of
Commissioner Anne P. Jones

In Re: In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I (Exchange Carrier Association)

An essential component of the Commission's access charge plan adopted in the *Third Report and Order* in this docket last December was the Exchange Carrier Association (ECA). In effect, the ECA will replace the traditional industry mechanism of settlements and division of revenues administered by AT&T. In many respects, the ECA replicates in form and function the existing mechanism for pooling and distributing industry revenues among local exchange carriers. So long as rate averaging and arbitrary jurisdictional cost allocation remain attributes of the structure of the telephone industry, some mechanism for revenue pooling is necessary.

My objection to the ECA, both in December and now, is that such an organization is both inconsistent with and inimical to the development of a competitive telecommunications industry. As I said last December, "I object to the creation of the ECA and question the Commission's authority to mandate the existence of such an organization. As a matter of public policy, the ECA is unnecessary since pooling is unnecessary .... I fear, however, that the ECA organization contemplated by the Commission's [access charge plan] will prove a hazard to telecommunications competition." [1] My views on the ECA in December are unchanged today, and as a matter of policy and principle I cannot support the *Supplemental Order* presently before the Commission that defines the composition of the ECA's board of directors.

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[1] Separate statement of Commissioner Anne P. Jones Concurring and Dissenting in Part *In Re:* MTS and WATS Market Structure, CC Docket 78-72, Phase I, April 4, 1983, pp. 42-43.

The existing industry settlements and division of revenue process and its successor, the ECA, are institutions consistent with a closed-entry, regulated monopoly industry. They are inherently mechanisms for industry cooperation and potential collusion, not vigorous competition. I think the Commission should realize that regulatory policy that attempts to preserve traditional industry practices may seriously impede the ongoing evolution of a telecommunications industry that is destined to be competitive. In a sense, the creation of the ECA reflects a certain hesitancy by the Commission to accept the full implications and consequences of its pro-competitive policies. The day is long past, however, for the Commission to second-guess the wisdom of its pro-competitive decisions. I am confident that competition is the proper foundation of our policies toward the telephone industry. Thus, the Commission should move ahead with its pro-competitive agenda, not linger over the past.

In my view, the ECA is a vestige of the past and an impediment to the future. I can support neither the ECA in concept nor rules governing its organization. Therefore, I respectfully dissent from the Commission's decision to adopt rules for the establishment and management of the ECA.

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TABLE OF ABBREVIATIONS

AM—Amplitude Modulation.
Act—Communications Act of 1934, as amended, 47 U.S.C. 151 et seq.
Amer. B/cing Cos.—American Broadcasting Companies.
Amer. Tel. & Tel.—American Telephone and Telegraph.
Assn—Association.
B/c—Broadcast.
B/cers—Broadcasters.
CATV—Community Antennae Television.
Col. B/cing Sys.—Columbia Broadcasting System.
ComSat Corp.—Communications Satellite Corporation.
Co.—Company.
Corp.—Corporation.
CP—Construction Permit.
FCC—Federal Communications Commission.
FR—Federal Register.
FM—Frequency Modulation.
Inc.—Incorporated.
ITT World Comm.—International Telephone and Telegraph World Communications.
National B/cing Cos.—National Broadcasting Companies.
NPRM—Notice of Proposed Rulemaking.
Rule—Rules and Regulations of the Federal Communications Commission.
Satellite Act—Communications Satellite Act, 47 U.S.C. 701 et seq. (1962).
TV—Television.
UHF—Ultra High Frequency.
VHF—Very High Frequency.

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Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Advanced Business Communications*

FCC 83–187

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of ADVANCED BUSINESS COMMUNICATIONS, INC For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 1361-DSS-P/LA-82 1362-DSS-P/LA-82 1363-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. Advanced Business Communications, Inc. (ABCI) has filed applications to construct and operate a new domestic satellite system. ABCI proposes to construct three domestic satellites, and requests authority to launch and operate two of these satellites. The third satellite is to be held in reserve as an on-ground spare. Public notice of these applications was given on April 28, 1982. Comments were filed by American Satellite Company (ASC) and Satellite Business Systems (SBS). For the reasons discussed below, we grant ABCI's applications.

2. ABCI is a new corporation formed specifically to construct, launch and operate the proposed satellite system in the 12;14 GHz bands for common carriage. ABCI holds no other authorizations, permits or licenses from the Commission. The three satellites of the ABCI system will each carry 20 transponders with a bandwidth of 43 MHz, and the satellites will have the capability of providing service

to Alaska and Hawaii. They are designed for an expected mission lifetime of eight years. Construction of the three ABCI satellites is to commence in January 1984. The first launch is planned late in 1986 with the second planned for early 1987. ABCI requests the assignment of orbital locations between 85° and 125° West Longitude. It plans to provide data, video and audio service on a nationwide, as well as, regional basis. The satellites are designed to provide flexibility in geographical coverage by switching individual transmitters aboard the satellites to different spacecraft antenna beams.

3. ABCI estimates the cost of its three satellite system to be $260 million. It offers no evidence, however, of financial commitment for the satellite systems construction beyond the very limited initial contribution of its seven shareholders. It expects to raise the necessary financing subsequent to the Commission's grant but prior to January 1, 1984.

4. The principal objection raised with regard to these applications is that ABCI has completely failed to demonstrate its financial qualifications to operate the proposed satellite system. ASC states that, before being assigned an orbital location, an applicant should be required to demonstrate basic financial qualifications. Alternatively, ASC suggests that an applicant be required to submit proof that a financial institution stands ready irrevocably to commit adequate funding contingent only upon Commission grant of the applications. Under either of these standards, ASC believes that ABCI is manifestly unqualified. ABCI responds that either standard is in practice unreasonable under current economic conditions. Such requirements could exclude new entrants who could stimulate the competitive marketplace in terms of technical and service innovations. Instead of rigorous or traditional financial criteria, the Commission should allow ABCI to demonstrate its qualifications by awarding a construction contract for the satellites within a reasonable period of time. Other issues raised regarding ABCI's technical qualifications and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[1]

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4;6 GHz and 12;14 GHz

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[1] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83-183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domestic satellite services. *See Report and Order, supra.* We are taking these actions to continue the opportunities for initial entry by new companies such as ABCI into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all of the applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant them without the need to resort to a comparative hearing. However, we recognize that ABCI has not yet been able to adequately demonstrate full financial qualifications to construct and operate its proposed system. We have also addressed this issue in today's *Report and Order, supra,* and have decided that conditioned grants, rather than denial or evidentiary hearings, will better serve the public interest in the prompt and efficient supply of domestic satellite services in the future. Consequently, we will issue construction and launch authorizations to ABCI conditioned on their demonstrating their full financial qualifications, as set forth in our *Report and Order, supra,* no later than December 31, 1983. In the event that ABCI has not fulfilled this requirement by that date, the authorizations will automatically become null and void.

6. Accordingly, IT IS ORDERED that Application File Nos. 1361-DSS-P/LA-82, 1362-DSS-P/LA-82 and 1363-DSS-P-82 ARE GRANTED and Advanced Business Communications, Inc. IS AUTHORIZED to construct three domestic communication satellites in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

7. IT IS FURTHER ORDERED that Advanced Business Communications, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83-186, adopted today.

8. IT IS FURTHER ORDERED that Advanced Business Communications, Inc. shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today.

9. IT IS FURTHER ORDERED that these authorizations shall become null and void in the event Advanced Business Communications, Inc. fails to demonstrate its financial qualifications by December 31, 1983 in accordance with the policies and criteria specified in the *Report and Order*, FCC 83–184, adopted today in CC Docket 81–704.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions

of this authorization, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch (no later than)*[2]
ABCI I	January 31, 1984	August 31, 1986	December 31, 1986
ABCI II	January 31, 1984	October 31, 1986	February 28, 1987
ABCI III	January 31, 1984	December 31, 1986	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Advanced Business Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. Advanced Business Communications, Inc. is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[2] We have specified these dates to quantify the applicant's dates of "late 1986" and "early 1987".

Common Carrier, Customer-provided Equipment
Common Carrier, Interconnection
Dataphone Digital Service, Interstate
Telephone Equipment, Registration of

> Notice of proposed rulemaking adopted for registration under Part 68 of the Commission's Rules of channel service units for direct connection to Dataphone Digital Service. Order deciding that channel service units are customer-provided equipment under *Computer II*.
> *–Amendment of Part 68*
> CC Docket No. 81–216

FCC 83–268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of

Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network

and

Notice of Inquiry into Standards for Inclusion of One and Two-Line Business and Residential Premises Wiring and Party Line Service in Part 68 of the Commission's Rules

CC Docket No. 81–216
RM-2845
RM-2930
RM-3195
RM-3206
RM-3227
RM-3283
RM-3316
RM-3329
RM-3348
RM-3501
RM-3526
RM-3530
RM-4054

THIRD NOTICE OF PROPOSED RULEMAKING

(Adopted: June 2, 1983 Released: June 14, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

I. INTRODUCTION

1. By a *Notice of Proposed Rulemaking and Notice of Inquiry* in Docket No. CC 81–216 (NPRM-NOI), 85 FCC 2d 868 (1981), the Commission sought public comment on a number of rulemaking

petitions and on its inquiry into other issues germane to Part 68 of the Commission's rules.[1] Part 68 provides the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus (in the aggregate "customer premises equipment" or "CPE") may be made to the nationwide network without harm and without a requirement for the interposition of telephone company-provided protective circuit arrangements (PCAs).[2] Part 68, the Commission noted, was developed, among other purposes, to eliminate the discrimination fostered by telephone companies that had required the interposition of telephone company-provided PCAs where customer-provided terminal equipment was directly connected yet did not require such PCAs where comparable telephone company-provided terminal equipment was connected.

2. In the Notice of Proposed Rulemaking (NPRM) portion of the NPRM-NOI proceeding, the Commission considered, among other things, a petition for rulemaking filed by Independent Data Communications Manufacturers Association (IDCMA), RM-3530, which sought amendment of Part 68 of the rules to permit the registration and direct connection of customer-provided equipment to American Telephone and Telegraph Company's (AT&T) Digital Data System [or Dataphone Digital Service] (DDS).[3] DDS is a digital communications service which terminates at the customer's premises in either a telephone company-provided channel service unit (CSU) or data service unit (DSU). The CSU provides a controlled, amplitude balanced interface in a modified bipolar format to the customer's data equipment. It also contains remote loop-back circuitry to test the DDS facilities between the customer's location and the serving telephone company office. The DSU, in contrast, performs all the functions of the CSU and provides bipolar conversion, *i.e.*, proper coding and decoding of signals, timing recovery, synchronous sampling, formatting, and generation and recognition of control signals. AT&T offered both the CSU and DSU in conjunction with the provision of DDS.[4]

3. IDCMA's petition claims that AT&T's requirement for a

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[1] One of these issues involves the inclusion of non-system premises wiring under Part 68. A Second Notice of Proposed Rulemaking and Order (Second Notice), FCC 82-495, released November 12, 1982, proposes such rules and includes the Commission's decision not to expand Part 68 to include party line service.

[2] A PCA is an electronic device that prevents harmful voltages or signals emanating from customer-provided equipment or premises wiring from entering the telephone network.

[3] The remaining rulemaking matters will be resolved in forthcoming Commission orders.

[4] Since IDCMA filed its rulemaking petition, AT&T has unbundled the DSU and offers it as CPE, subject to stock depletion. DDS is now offered with the CSU as the standard "interface." We therefore need only consider IDCMA's petition as it relates to the CSU. (*See* AT&T Tariff No. F.C.C. 271.)

telephone company provided CSU "imposes unreasonable and discriminatory interconnection restrictions upon all DDS subscribers". IDCMA further states that subscribers to DDS "should have the option of providing their own equipment without being forced to use and pay for interposed telephone company-supplied protective arrangements."[5] IDCMA compares the requirement for a CSU with the former requirement for a Data Access Arrangement on the switched analog network,[6] which no longer is required.

4. IDCMA has offered a technical proposal which encompasses specification changes involving power limitations, longitudinal balance and means of standard connection, and grandfathering of equipment presently connected to a DDS line. Equipment registered to meet the proposed specifications would be directly connectible to DDS lines.[7]

5. In the NPRM, the Commission observed that a decision to register CSU-like devices and permit their direct connection to DDS would set a precedent for interconnection with future digital private line or MTS/WATS services. It therefore decided to more closely examine the likelihood of unjust and unreasonable discrimination between customer-provided terminal equipment that includes CSU-like circuitry and telephone company-provided digital services that include the CSU. It also decided to examine the effects that a mandatory telephone company-provided CSU which inherently protects against network harm might have on interconnection and product innovation.

6. To complete the record on these and related issues the Commission asked interested persons to comment on the following questions:

> 1. Is it necessary from a technical or policy viewpoint for DDS to utilize the CSU? Is there any version of the DDS offering that does not incorporate the CSU, e.g., customer premises to customer premises DDS circuits? Is the CSU generally intended to test the service or just the facilities utilized to provide the service?
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> 2. What is the likelihood that CSU-like devices will be required on other current or future digital service? What is the likely timetable for the introduction of digitization at the customer-loop level, for private line and MTS?
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> 3. Will all future CSU-like devices utilized in conjunction with the services in question 2 inherently provide network protection? Is such protection readily separable from the other functions of these devices?
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> 4. Should CSU-like devices be considered part and parcel of their attendant services? If so, should they be required to rely solely on line-supplied power; and should they be transparent, i.e., offer no modification to the structure of the bit stream passing through them? Under what conditions, if any, should such devices be registrable?

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[5] IDCMA Petition at 2.

[6] Id. at 8.

[7] *See* attachment to IDCMA proposal at 1 and 2.

5. On which side of the network interface will the CSU-like device be located? How will its location affect the definition of "demarcation point"?

Pending resolution of these issues, the Commission decided to hold in abeyance disposition of RM-3530 and to consider the CSU to be part and parcel of DDS for purposes of Part 68 registration.

7. While several parties offered comments to these questions, much of what was submitted revisited the arguments raised earlier in response to notice of RM-3530. Nonetheless, these comments, in conjunction with the earlier filings, provide us with an adequate record on which to base our final decisions herein. For the reasons set forth below, we reach the following conclusions: first, that CSUs and CSU-like devices [*see*para. 26] should be accorded the same regulatory treatment as customer-premises equipment (CPE) as set forth in our *Computer II* decision;[8] second, we will offer for public comment rule amendments to Part 68 offered by IDCMA in RM-3530; three, in order to expedite the interconnection of CSU and digital network channel terminating equipment [NCTE] - like devices pending adoption of final rules, we will require AT&T to file appropriate tariff revisions to institute an interim plan specifying reasonable technical standards; and, finally, we will offer for public comment a proposal submitted by AT&T to amend Section 68.3 of the rules to permit an alternative termination circuit for use in 2-wire loop simulator circuits (RM-4054).

II. COMMENTS OF THE PARTIES

8. In the following paragraphs, we summarize the responses of the commenters to the questions raised in the NPRM.

Question 1: Need for the CSU

9. In this question, we asked interested parties to comment on the necessity, from a technical or policy viewpoint, for DDS to utilize the CSU. Further, in order to better understand the options currently available to subscribers, we asked whether DDS could be obtained without the CSU at all. Finally, we asked whether the CSU, to the extent it provides a testing function, is intended to examine the facilities alone, *i.e.*, the loops and spans, or the service, *i.e.*, the overall performance of DDS, including certain circuitry within the CSUs themselves.

10. IDCMA states that it is not necessary that DDS utilize telephone company-provided CSUs. It argues that DDS connections are actually no more than facility links between the customer premises and the Bell hub office, with "limited distance baseband

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[8] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 439 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, ___ U.S.L.W. ___ (1983).

modems" at the end of these links. (IDCMA Comments at 34) It argues that the "functions performed by the CSU include data transmission and testing functions which have historically been incorporated within customer-provided terminal equipment." IDCMA also argues that the test features of the CSU are "simple and incidental" to the CSU's data transmission function.

11. For its part, AT&T states that the transmit[9] and receive functions[10] of the CSU are essential to meeting the performance standards specified in its DDS Technical Reference PUB 41021.[11] AT&T argues that the CSU provides the customer with a stable interface where there exist variations in local loop facility parameters, and when technological changes occur in the network. (AT&T Comments at 65–66) Moreover, AT&T notes, the remotely activated loop-back testing function of the CSU[12] "is necessary to support the high level of availability of DDS channels" and to reduce the need for maintenance personnel visits to customer locations. (AT&T Comments at 66–67) AT&T concludes that requiring the telephone company to rely on customer-provided CSU-like devices would raise problems with regard to service operation and maintenance. (AT&T Comments at 68)

12. In its reply, IDCMA notes the underlying principle of Part 68—that direct connection to the network should be allowed—and urges that well-established, pro-competitive policies should not be abandoned merely because AT&T voices concern about joint engineering and operational requirements, service guarantees, and remote testing capabilities. Functions of the sort performed by the CSU, states IDCMA, are routinely performed by independently manufactured equipment used on other services, notably the limited distance modems used on local area data channels (LADC). (IDCMA Reply at 21–22) Further in this regard, IDCMA argues that service guarantees are largely due to terminal equipment reliability, which independent manufacturers can produce in the competitive market-

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[9] According to AT&T, in the transmit direction (customer-to-network), the bipolar signal is accepted from the customer via a transformer coupling, is amplitude-controlled, amplified, and transformer coupled to the cable pairs of the local channel. (AT&T Comments at 64–65).

[10] In the receive direction, states AT&T, the signal (from network to customer) is received from the cable pairs via a transformer coupling and applied to an automatic line build-out network (which compensates for variations in cable pair characteristics), is amplified, and amplitude-controlled for transformer coupling to the customer's equipment.

[11] PUB 41021 - Digital Data System Channel Interface Specification, dated March 1973.

[12] AT&T states, "to support remote maintenance activities, the CSU also includes a remotely activated loopback relay. This device, when activated by reverse of DC current on the cable pairs, disconnects the customer signal and connects the receive direction to the transmit direction, so that test signals sent from the telephone company central office (CO) are returned to the CO." (AT&T Comments at 64)

place. In response to AT&T's claim for a need to provide a stable network interface, IDCMA argues that the four-wire access line used to provide DDS is itself a "clearly defined and stable interface." (IDCMA Reply at 23–24)

13. In its reply, AT&T again argues that the CSU is an integral part of the network and therefore is not terminal equipment. AT&T controverts IDCMA's statement with regard to customer testing, stating that where the customer's equipment performs the testing there is no ascertainment of fault responsibility, *i.e.*, it cannot be determined whether the circuit or customer equipment is causing the service failure. (AT&T Reply at 55) AT&T also disagrees with IDCMA's reference to the CSU as a modem, or data set, arguing that the CSU performs a broader range of functions, *viz.*, signal shaping, amplification, and remote loopback testing. (AT&T Reply at 56) AT&T again asserts its position that the "telephone company must have the means to provide, test and restore service based on the known characteristics of the channel equipment it provides and depends on, and it cannot delegate that responsibility to its customers." (AT&T Reply at 57)

14. IBM in its reply suggests that AT&T has not met its burden to demonstrate that the functions of the CSU must be performed by the telephone company. IBM states that independent manufacturers can design and produce CSU-like devices with the same degree of reliability as AT&T, and DDS performance standards can be met just as well through customer-provided equipment. (IBM Reply at 3–4) Computer and Communications Industry Association (CCIA), for its part, views the CSU as a customer premises terminal device that is not an integral part of the network. (CCIA Reply at 2)

15. In its responsive comments, IDCMA asserts that by bundling the CSU as part of the DDS offering that includes a performance guarantee, AT&T is completely foreclosing competition for the CSU. In this regard, IDCMA notes that the DDS tariff excludes customer-provided equipment from AT&T's performance guarantees[13] and argues that the best performance guarantee is a competitive marketplace for CSUs. (IDCMA Responsive Comments at 6) IDCMA also disagrees with AT&T's claim that there are active elements in the office channel unit (OCU)-CSU loop, suggesting instead, at least for low speed DDS, that there is only a local loop with no interposed devices. In its responsive comments, AT&T asserts that IBM's characterization of the CSU as a PCA is incorrect, noting, as before, that the CSU performs additional functions which "are critical to the underlying maintenance and service plan of DDS." (AT&T Responsive Comments at 24–25) AT&T also states that IDCMA and others' arguments concerning the ability of independent manufacturers to

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[13] IDCMA refers to AT&T Tariff F.C.C. No. 267, § 2.2.1.

produce CSUs are irrelevant; that service responsibility is the focal issue. (AT&T Responsive Comments at 26)

Questions 2 and 3: Digitization Timetable and Protection

16. In the NPRM, the Commission noted that a determination to view the CSU as an integral part of the DDS offering could set a precedent for all future digital services, with possible impact on interconnection policy generally. NPRM at para. 57. Accordingly, the Commission inquired as to the likelihood of future digital services requiring CSU-like devices, and the likely timetable for the introduction of local loop level digitization. In the event that future network plans call for a fundamental redesign of the CSU and its successors, the Commission also inquired as to the effects any such redesign would have upon the network protection feature currently offered by the CSU.

17. In its comments, AT&T states that the 1.544 Mbps DDS service requires span regenerators and regeneration circuitry in the CSU. Moreover, the high speed CSU (designated model 551A) permits identification of a particular regenerator on the local loop which may have failed, a function AT&T notes is not usually needed for the lower DDS speeds (which uses a model 550A CSU). As to future services, AT&T states that it is likely that CSU-like devices will be necessary, since digital network services generally require similar terminal devices. AT&T introduces "network channel terminating equipment" (NCTE) as a general category of CSU-like devices that among other functions, perform "technical, maintenance, and channel provisioning requirements" for high speed data services. (AT&T Comments at 72)[14] As to the likely timetable for the development of digital customer loops for voiceband services, AT&T states that while the widespread use of digital technology to serve individual customers' station sets is not yet economical, it anticipates deployment of up to 64 kbps digital facilities by 1985, and widespread use by 1990.

18. In its comments on this question, IDCMA defers to the carriers' expectations regarding developing digital services. However, it expresses concern that a Commission decision to view the CSU as an integral part of DDS would impede equipment innovation for those future services. (IDCMA Comments at 35) IDCMA asserts that it makes no technical or economic sense to require a separate box to provide protective functions when both can be incorporated in customer-provided equipment.

19. IBM expresses its concern that inclusion of the CSU in the provision of network service would "result in a return to a modified form of telephone company-provided protective arrangement." IBM also counsels that interfaces to digital communications services

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[14] *See* para. 26, *infra*, for further discussion regarding the NCTE.

should encourage maximum freedom of customer-to-carrier interconnection and product innovation, particularly as standards are developed in connection with the Integral Services Digital Network, a new digital communications service concept currently under development both in the United States and abroad. (IBM Reply at 5–6)

20. In its reply, IDCMA dismisses the likelihood of early changes in local loop technology, and urges that the foreseeable future offers no justification for restricting competition in the provision of CSU-like devices. (IDCMA Reply at 25–26)

21. In response to both IBM and IDCMA regarding future CSU-like functions, AT&T states that it "will continue to cooperate with the Commission and the industry in the development and adoption of standard network interfaces for digital services." (AT&T Responsive Comments at 26–27)

Questions 4 and 5: CSU Power and Location

22. Questions 4 and 5 were intended to reveal any effects CSU-like devices might have on the network, the user's data stream, or the Commission's other proceedings, notably the development of the "demarcation point" in this docket. *See Second Notice of Proposed Rulemaking and Order, supra* at n. 1.

23. AT&T indicates that the 550A CSU used for DDS is commercially powered, and the 551A CSU is line powered. With regard to data transparency, AT&T seems to suggest that the CSU may be required to convert the electrical structure of the data bits transmitted through it, *e.g.*, bipolar to unipolar where transmission is by a lightwave facility, and in that sense is not transparent. (AT&T Comments at 74) With respect to logic structure, while the CSU does not convert the code or protocol of data signals, it may be required to convert network-to-user control signals. AT&T states that inherent protection is not necessary characteristic of NCTE generally, though in the case of DDS (*i.e.*, the CSU) it is. Thus, where protection is inherent, it is not separable from the other functions of the device. (AT&T Comments at 75) AT&T concludes that the NCTE must be electrically close to the demarcation point.

24. IDCMA asserts that CSU-like devices should not be required to be line powered. On the matter of transparency, IDCMA argues that the CSU is not transparent, since it contains filters and performs equalizing functions. (IDCMA Comments at 36–37)

III. DISCUSSION

25. Over the course of the last eight years, the Commission has developed, through Part 68 of its rules, a telephone equipment registration program that permits the direct electrical connection of telephone terminal equipment to the nationwide telephone network, including certain private line services, without causing harm to the

network. Underlying Part 68 was the objective of eliminating the discrimination fostered by telephone companies that had required the interposition of their protective arrangements where customer-provided terminal equipment was directly connected yet did not require such protective arrangements where comparable telephone company-provided terminal equipment was connected. Consistent with this objective, IDCMA filed its petition for rulemaking, RM-3530, urging the adoption of rules that would extend the registration program to include equipment connected to DDS. IDCMA's petition raised a threshold concern regarding identification of the interface point between telephone company service and terminal equipment, *i.e.*, whether the CSU is properly part and parcel of the common carrier service offering or whether it is separable and more properly classified as CPE. The questions we offered for public comment, at para 6, *supra*, were directed at developing a better understanding of this issue.

26. As indicated, in this proceeding we are asked to make a generic determination as to whether a CSU device is properly considered part of the common carrier offering or otherwise is within the exclusive control of the carrier. In making such a determination, however, it is clear that we are not merely addressing a specific piece of equipment having the designation of a "channel service unit." AT&T, for example, views the CSU and CSU-like devices as members of the broader family of devices termed "network channel terminating equipment" (NCTE). Thus, while we discuss specific arguments made with regard to CSUs, on the basis of the record herein we see no reason to limit the decision solely to such devices.[15] Our

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[15] AT&T has filed a petition for rulemaking to amend Part 68 to permit the direct connection of PBXs or similar systems to DS-1 channels (1.544 Mbps digital channels that use digital NCTE.). In its reply comments in that proceeding, AT&T characterizes the digital NCTE in a manner that leads us to conclude that it is functionally, if not electrically, identical to the CSU. Both the CSU and the digital NCTE contain circuitry that performs signal shaping, amplification and remote loopback testing and, incidentally, network protection. *See* AT&T Reply Comments in RM-4087 at 4; *see also* AT&T Comments on RM-3530 at 73. Also, we note from AT&T's Reply Comments to petitions directed to Transmittal No. 14186 (Revisions to Tariff F.C.C. Nos. 260, 262, 267, 268, 270, 271 and 273 Terrestrial Digital Circuits, or DS-1 Channels) at Attachment A, that the digital NCTE and customer-provided equipment will be required to handle a D4 format for the framing bit position or an Fe format for the framing bit. (*See*AT&T Compatibility Bulletin 142, The Extended Framing Format Interface Specification, dated September 29, 1981.) We note that AT&T plans to provide the Fe format as an optional offering beginning January 1, 1985. (Fe provides certain network efficiency information through the use of compatible terminal equipment and/or network equipment.) There is no indication, however, that the network interface, *i.e.*, levels and wiring configurations, will differ from those currently specified for the CSU; or, if they do, whether such parameters would preclude production of digital network-compatible NCTE by independent manufacturers. The D4 and Fe formats may require changes in the design of digital NCTE devices currently offered. Nevertheless, we do not believe that such changes are affected by, or in

determination in this proceeding encompasses those CSU-like devices that serve the function equivalent of a CSU and which a carrier might seek to provide in conjunction with its offering of digital transmission capacity. Consistent with this, in this order we shall use the terms "CSU", "CSU-like", and "digital NCTE" interchangeably.

27. It is plain from the responses to question 1 that there exists no lack of manufacturing expertise among independent producers to duplicate the CSU. AT&T itself recognizes this, arguing, in essence, that it is system integrity that requires that the CSU remain part of the DDS offering. The majority of the parties commenting agree that a CSU-like device is needed in conjunction with digital services to perform loopback testing and bit regeneration capability. Both of these functions appear to be necessary if rapid, remotely controlled fault location is to be incorporated into the DDS maintenance function. The parties do not agree, however, that system integrity mandates sole telephone company provision of these functions. The focus of our attention, then, is not on whether manufacturers are capable of producing CSU-like devices or whether such devices are desireable, but whether there exist any technical or legal justification for their being provided exclusively by the telephone company, *i.e.*, by the DDS carrier.

28. The legal principle fundamental to telephone network equipment interconnection was enunciated by the Commission in *Hush-A-Phone* [16] and *Carterfone*.[17] It is that the burden of proof rests squarely on the carriers - not the users or this Commission - to demonstrate that a particular unit or class of customer-provided equipment would cause harm to the telephone network. The essential test for this well-established principle, as applied to the case before us, is whether connection of customer-provided CSU-like devices to DDS constitutes use of the network in a way that is privately beneficial without being publicly detrimental. *See Carterfone, supra* at 424. The manufacturers assert that they can produce such CSUs, and AT&T does not controvert the assertion. The benefits of competition in this area, in addition to opening market opportunities to the manufacturer, may lead to the innovation of new terminal equipment features, such as error detection and correction circuitry or the provision of network status or performance data, which could be of considerable benefit to users. The

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themselves affect, the decision we make herein; nothing the parties' responses to our questions 2 and 3 leads us to any other conclusion.

[16] Hush-A-Phone Corp. v. U.S., 99 U.S. App. D.C. 190, 238 F.2d 266 (D.C. Cir. 1956).

[17] Carterfone, 13 FCC 2d 420 (1968), *recon. denied*, 14 FCC 2d 571 (1968).

competitive provision of CSU-like devices will serve to benefit private use of the network - without causing public detriment.[18] In a competitive environment, it is likely that innovation will occur in CSU design. As we noted in *Computer II*, the benefits of a competitive equipment policy have been found in such areas as improved maintenance and reliability, improved installation features including ease of making changes, competitive sources of supply, the option of owning or leasing equipment, and competitive pricing and payment options. *Final Decision*, 77 FCC 2d 384, 439 (1980).

29. Over the years, this Commission has consistently fostered the competitive provision of terminal equipment. The apex of this evolutionary process was our *Computer II* determination that CPE should not be offered as part and parcel of a common carrier offering. Having divorced CPE from the common carrier offering while allowing carriers to provide such equipment on a competitive basis with other equipment vendors, we placed a high threshold burden on a carrier to demonstrate that a particular type of equipment located on the customer's premises should be considered part of a common carrier offering. As discussed below, we conclude that AT&T has not met its burden in this regard and that CSU-like devices should be accorded the same regulatory treatment as any other customer premises equipment, as set forth in our *Computer II* decisions.

30. We now turn to AT&T's argument that customer provision of CSUs will affect performance guarantees associated with DDS, to the detriment of the service offering. Since the CSU is an isolation device, it prevents harmful signals or voltages from subscriber equipment from affecting the DDS line or network. The signal at the input to the CSU from the network should then be the same as that at the telephone company central office, except for occasional errors due to line noise. Present DDS tariffs guarantee a maximum error rate at the CSU output. If the error rate were guaranteed instead at the CSU input, requirements for a maximum error rate could be met regardless of faulty operation of a customer-provided, CSU-like unit; performance standards could be specified at an interface point on the network side of the CSU. Customers providing their own CSUs, which most likely would contain loopback circuitry compatible with network-initiated testing requirements (as discussed below in more detail), would be responsible for telephone company maintenance expenses incurred as a result of faults in those CSUs. For example, if the carrier were testing a DS-1 facility from the central office and could not engage the loopback function of the CSU due to a failure in

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[18] Over the last seven years we have seen clear evidence of private benefit without public detriment in the analog network registration program. Some 12,000 devices have been registered by over 1,000 persons.

the customer-provided CSU, the customer would be liable for all maintenance costs associated with isolating that trouble, including the expense for dispatch of a repairperson to the customer's premises to make the final diagnosis. This burden has existed since the Commission's Part 68 program was first instituted. *See Carterfone, supra*, and *First Report and Order* in Docket No. 19528, 56 FCC 2d 593, 596 (1975). The disincentives associated with faulty CSU function likely will assure that devices of lesser quality than models currently in use will not reach the data equipment user. Although we believe that performance guarantees can be a meaningful adjunct to tariffed services, they are no less meaningful when measured at the point of demarcation, *i.e.*, on the network side of the (customer-provided) CSU. Further, if IDCMA's claim that the weak link in digital service is the terminal equipment is correct, the carrier would benefit by being responsible only to that point. It would no longer be responsible for the more common problems of terminal equipment malfunction. AT&T's argument that the functions of the CSU are essential to meeting its DDS tariff performance guarantees[19] seems to support IDCMA's view. It also suggests a design threshold for manufacturers as they develop CSU-like devices for direct connection to DDS facilities. In short, we believe that competition will (1) assure the availability of suitable CSUs, and (2) not affect current tariffed DDS performance guarantees, since such guarantees will be referenced at the demarcation point. Accordingly, we do not believe that performance guarantees warrant control of the loop facilities, OCU (office channel unit), *and* CSU by the telephone company.

31. AT&T suggests that future developments in local loop technology may require changes in terminal equipment design. Such developments are generally instituted with considerable notice in the trade press, and telephone companies are under a continuing obligation to disclose anticipated network changes that affect terminal equipment interconnection. *See* Sections 64.702(d)(2) and 68.110(b) of the rules, which reflect the requirement for notice of network changes that occur either on the network side of CPE or that affect the operation of equipment on the customer's premises. *See* Section 2 of *Modification of Final Judgment Governing the BOCs*, 552 F.Supp. 131, 227 (D.D.C. 1982). Consequently, we do not agree with AT&T's position that CSU changes, in response to network changes, cannot be implemented. We do not intend by our decisions herein to forestall network development or innovation by the carriers. CSU manufacturers and users will bear the risk of all necessary equipment modifications required in response to network changes announced pursuant to Sections 64.702(d) and 68.110(b).

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[19] AT&T's Tariff F.C.C. No. 267 guarantees 99.5% error-free seconds of operation at up to 56 kbps and provides for credit allowances for the periods the telephone company requires to complete repairs.

Widespread CSU modifications necessitated by network changes would be no less costly were AT&T to provide the CSU; the costs in equipment changes would be borne directly by the user in this case rather than indirectly through expanded revenue requirements and increased tariff charges. As a practical matter, we would expect that network changes initiated by the telephone company, once implemented, will prove beneficial to users, and the costs to users of revisions to their terminal equipment necessitated by those changes will be minimal in relation to the technical advantages offered thereby. Should future local loop technology require adjustment in our conclusions herein, appropriate regulatory remedies remain available.

32. In addition, AT&T raises what amounts to four basic technical-operational arguments suggested by AT&T that bear on its argument in favor of retention of the CSU as part of the DDS offering: (1) there is an array of tariffed offerings that requires the interposition of a telephone company-provided interface to provide the specified service; (2) there exist facility characteristics so variable from local loop to local loop as to warrant a telephone company-provided device at the termination of the offering in order to standardize the interface parameters; (3) the use of a customer-provided CSU would in some way cause operational harm to the network, or harm to other persons; and (4) remote loopback testing is a feature that must be available for network integrity. In the paragraphs that follow, we will examine each of these arguments.

33. *Signalling and standardization*. While AT&T asserts that a function of the CSU is to provide network termination standardization, there is no showing that DDS (or DS-1, for that matter) is offered at other than one set of predetermined amplitude levels, or that there are signalling options available. There are various data speeds offered which may necessitate equipment adjustment or network conditioning, but the digital offering is provided in a uniform format, with no signalling option or choice of amplitude level.[20] (As we discuss below, such equipment adjustment is generally handled automatically by the terminal equipment, or may be "set" by an installer with the proper test equipment at the time of CSU installation.)

34. DDS signals normally consist of bipolar rectangular pulses. Because of the finite bandwidth of the DDS channel, distortion (primarily phase distortion) is introduced into the signal. Further, because the channel is not perfect, there is external noise pickup and self-generated thermal noise. To compensate, DDS trunks contain circuitry, including regenerators, that amplify, clip and resynchron-

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[20] Network conditioning refers to the technical characteristics and capabilities of the network facilities. Conditioning determines, in part, how efficiently terminal equipment will function when used with such facilities.

ize, or reconstruct the signals. These regenerators are spaced at regular intervals on a DDS line. The maximum span between the CSU and the previous regenerator is limited, so that the amount of noise and distortion at the CSU is generally not severe. The CSU alone does not perform all the requirements for coupling of the DDS line to the customer. In the receive (line to customer) direction, the CSU depends upon the fact that in traversing the local loop from the OCU at the central office to the CSU, line distortion and noise are within certain limits. This assures that the signal may be regenerated properly. In the transmit direction, the CSU depends on the customer to derive timing signals from the incoming signals and to provide signals in the proper format and synchronization to the line. If these conditions are not met, the CSU cannot accomplish its intended function. AT&T uses two types of CSU devices. At the lower DDS bit rates (2.4, 4.8, 9.6, and 56 kbps), a model 550A CSU is used. At the higher bit rate of 1.544 Mbps, a model 551A CSU is used. While both perform similar functions, the 551A is a more sophisticated device which performs certain signal monitoring and correction functions in addition to its 550A-like functions. These functions include monitoring of the customer line and inserting pulses when necessary to achieve a specified minimum pulse density. In addition, an active clock recovery circuit allows pulses to be transmitted when no data signal is present. (This prevents oscillation along the span when customer data output ceases.) In addition, the telephone company must assure that the signal delivered to the interface contains no more than a specified level of distortion and noise. In this sense, DDS and other digital offerings do not require a "standardizing" interface, such as the CDQ used in private line tie-line services. *See First Report and Order* in Docket No. CC 79-143, 76 FCC 2d 246 (1980). So long as the arriving bits conform both to the terminator threshold voltage (Vin) specifications (0.35 V and 1.05 V for logic states 1 and 0, respectively) and to the waveform (distortion) limits of the CSU, no "standardization" is needed. *See* AT&T PUB 41021, *supra*.

35. *Loop variations*. As to the matter of variation in loop characteristics, it is apparent that at the lower DDS speeds, *i.e.*, below 1.544 Mbps, the CSU does not utilize regeneration circuitry, nor is there generally a requirement for regeneration equipment in the span between the central office and the customer premises. This certainly tends to show, at least in the lower speed DDS case, that local loops are conditioned adequately to deliver data to the CSU in a form that assures reliable, relatively error-free performance. At the higher DDS speed of 1.544 Mbps, final delivery of reasonably well-shaped waveforms is assured by the inclusion of regenerators in the loop, including a final regenerator within some 2000 feet of the customer's premises. *See* AT&T BSP 314-645-100; and AT&T Technical Reference PUB 41021, *supra*, Attachment E, Items 29-34.

This final regenerator is located relatively close to the customer's equipment in order to prevent significant waveform distortion by extraneous noise sources in riser cables and "noisy" customer environments. While the CSU may require initial adjustment to optimize its compatibility with the local loop to which it is connected, there is no showing that noise or facility anomalies result in regular CSU readjustment or replacement. Indeed, the design of the CSU apparently permits its successful operation in most cases where properly conditioned facilities have been provided. The greater variable seems to be noise (and jitter) within a given loop rather than variation in characteristics from loop to loop, and these faults are generally easily handled by the CSU, whether provided by the telephone company or by an independent manufacturer. In conclusion, it is not evident that there generally exist facility variations justifying interposition of an exclusively telephone company-provided interface.

36. *Harm*. While the CSU is a signal reshaper which restores pulse quality, it has no way of determining if customer signals are properly synchronized or if the proper bipolar format is being generated. (The CSU for 1.544 Mbps service does recognize and correct certain faults, but it cannot compensate for all signal problems. Most faults in customer signals cannot be corrected and do not present the potential for harm to the network.) One possible source of harm might come from high amplitude pulses or voltages emanating from data equipment, creating levels that exceed the specifications of the network interface. But CSUs registered under Part 68 would include means of preventing such pulses or voltages from entering the network. In current designs, components in the reshaping or regeneration circuitry, *viz*., transformers and varistors, provide that function. Other faults in customer generated signals would most likely cause harm only to the successful transfer of information. There is, then, negligible likelihood of "harm", as defined in Section 68.3(g) of the rules, to telephone service by direct connection of FCC-registered CSUs.

37. There is no suggestion by any party that the power drawn from the line for operation of CSU circuitry is likely to cause harm. We would expect that the standards we develop in this proceeding will include specifications that are analogous to the ringer equivalence number in our existing rules. Parties are invited to offer amendments to the proposals contained in the attached Appendix in this regard.

38. *Loopback testing*. A further argument offered by AT&T concerns its claim of its need to include remote loopback testing within the CSU as a feature of DDS. As discussed earlier, remote loopback testing provides the telephone company with the capability of locating or isolating faults in facilities (including span regenerators). Such capability, AT&T notes, is particularly useful in identi-

fying the source of trouble on a line, which may be in the CSU. Were customer-provided CSUs that do not contain loopback testing capability interconnected, telephone companies could only test: (1) remotely to the regenerator closest to the network-customer demarcation point, or (2) by manual means to the demarcation point.[21] However, as indicated earlier herein, we believe it likely that independent CSU manufacturers will be eager to offer prospective purchasers of CSUs features that enhance system reliability and performance - such as remote loopback testing capability.

39. *Waiver*. As noted previously, we have carefully considered the specific arguments advanced with respect to the CSU and like digital devices and have concluded that, notwithstanding the carriers' arguments in favor of continued supply of such equipment on a regulated basis, there are advantages in favor of unregulated supply of such devices, *i.e.*, treating them no differently than other terminal equipment. Technical and operational concerns have been raised; but, in our view, they are not insurmountable, and, in fact, represent relatively minor problems which can be addressed and solved. Nevertheless, in an abundance of caution we shall seek to create a mechanism by which carriers might, upon an appropriate showing, supply NCTE in conjunction with loop facilities if exigencies exist which have not been demonstrated to be applicable to the CSU devices. We address below the circumstances which, from our present perspective, might justify special treatment of NCTE, and we address the overriding principles which should apply if any such special treatment is sought.

40. While the CSU appears to interface with loop facilities using relatively stable interface parameters, to which other suppliers' CSU devices might similarly be designed on a stable basis, this may not be the case with all other NCTE equipment. We are aware that there may be variability among loops, and that in such circumstances supply of NCTE by the carrier in conjunction with the loop would create a stable interface to which competitive terminal equipment might be designed. This could occur where there is wide variability among loop characteristics, where the characteristics of each loop are unstable, or where facilities are changed frequently or are subject to extraordinary interference. In such cases, provision of NCTE by the carrier could promote competition among vendors of terminal equipment in that such equipment could be designed to interface with a standard interface specification, and the NCTE would provide the "customization" required to alter the loop characteristics to a form which would be compatible with that interface specification.[22] An additional function of such NCTE might

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[21] If the source of trouble cannot be isolated and the difficulty proves on a premises visit to stem from a defective CSU or other unit of station equipment, a "maintenance of service" charge as specified in the tariffs would apply.

be to maintain unchanged an interface characteristic when loop facilities are modified to embrace a new technology (*e.g.*, to digital facilities when analog facilities were used previously, or to optical fiber or broadband facilities when analog voice-grade pairs were used previously). This use of NCTE might minimize dislocations to subscribers who already have purchased and deployed terminal equipment and who might otherwise be faced with the prospect of modification to, or obsolescence of, their equipment if they wish to maintain uninterrupted service.[23]

41. We emphasize that our identification of these possibilities should not be construed as endorsement of the potential arguments by carriers that, where such circumstances are present, they should have the right to supply NCTE in conjunction with loop facilities. We shall address any such circumstances on an *ad hoc* basis, and carriers will have the burden of persuading us that our general policy in favor of unregulated supply of NCTE should be altered in specific circumstances. The result of this proceeding is to reject the notion that NCTE be supplied exclusively by carriers on a regulated basis - we foresee no possibility under which this principle might be varied.

42. *LADC*. IDCMA argues that AT&T's rulemaking petition to accommodate LADC service under Part 68[24] similarly requires that we accommodate DDS under Part 68. The argument seems to be that since both services utilize metallic loops to provide digital services they must be teated identically. While LADC and DDS facilities utilize metallic loops and may carry digital data, they are designed as different service offerings under the tariffs on file with this Commission and may not be treated identically. In any case, in view of our decision herein to view CSUs as CPE, the matter is moot.

43. *Other proceedings*. In *Second Notice, supra*, at Appendix A, the Commission proposed a general definition for the demarcation point between customer premises equipment and wiring, and the

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[22] Of course, there is a correlative possibility that provisions of such NCTE by carriers in conjunction with loop facilities would have anti-competitive effects with respect to supply of the NCTE itself. We would consider this issue careully in response to any waiver request.

[23] One of the arguments made by the carriers in favor of supply of the CSU in conjunction with DDS is that it implements automatic remote testing. As discussed, we conclude that others' equipment similarly can be used to implement a remote testing function. As a practical matter, this approach raises no problem with respect to DDS service, or other digital services similar to it which are used by sophisticated users of relatively complex data processing equipment. By our decision herein, we do not necessarily foreclose the possibility of at some point authorizing the supply by carriers of limited function, NCTE-like equipment, perhaps combined with a protector block, which inexpensively implements a remote testing function in conjunction with broadly available services, *e.g.*, MTS. Upon an appropriate showing, we are prepared to address the possibility that remote testing (and no more) might be implemented as part of the loop offering.

[24] RM-3526. *See* NPRM-NOI, supra at 885–87.

telephone network. The effective redefinition of the demarcation point for DDS, *i.e.*, to include the CSU as customer-provided equipment and require measurement of performance standards at that point, would have no impact upon our proposed general definition.

IV. CONCLUSION

44. Having reviewed and considered the arguments offered by AT&T in opposition to IDCMA's rulemaking petition and the comments of IBM, CCIA, and those filing informal comments, we find no technical, legal or policy justification for restricting independent manufacturers from providing CSUs or digital NCTE to digital service subscribers. We fail to be convinced that AT&T has met its burden of showing that independent provision of CSUs or digital NCTE would be publicly detrimental. Our experience with competition in terminal equipment under the current Part 68 program leads us to believe that reliance on the marketplace to produce CSU-like devices that function compatibly with DDS, including remote maintenance operations,[25] is not publicly detrimental and will be privately beneficial. We find that there exist no reasons to further delay development of appropriate standards under Part 68 to permit registration and direct connection of terminal equipment to DDS (and other digital services, circuits and facilities utilizing digital NCTE or digital NCTE-like devices). Accordingly, we will offer for public comment IDCMA's technical proposals. *See* Appendix. We also ask that interested parties offer amendments to IDCMA's proposals to accommodate the higher speed digital service offerings, *e.g.*, DS-1, in the final rules.

45. In order to expedite the availability of alternatives to users and to implement our decision herein, we will require AT&T to file, within 30 days of publication of this notice in the Federal Register, appropriate tariff revisions to institute an interim plan. The tariff revisions should include an unbundling of all CSUs, CSU-like devices, and digital NCTE[26] so that any rates and charges associated with these devices, when provided by AT&T, are stated as separate rate elements. In addition, reasonable technical standards for direct interconnection of customer-provided CSUs, CSU-like devices and

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[25] One alternative to requiring compatible loopback testing would be to require a switch or other loopback test mechanism on the network side of the demarcation point that could be activated independently of the operation of the customer-provided CSU. This would enable the telephone company to test its facilities up to the demarcation point. However, such an approach effectively would interpose a new network CSU-like device, unnecessarily duplicating the features more rationally required of the terminal CSU.

[26] As a practical matter, we anticipate that CSUs and digital NCTE will be incorporated as components in other digital equipment. When referring to CSUs or digital NCTE, we are referring to the CSU-like (or NCTE-like) component of such equipment.

digital NCTE to digital services and associated circuits and facilities[27] should be published in the tariffs or established by reference to specifications set forth in AT&T's PUB 41021, and other PUBs, supplemented as necessary. Such standards should include operational criteria for loop-back testing, and all necessary CSU, CSU-like, and digital NCTE technical specifications. We will require AT&T to submit these tariff revisions with a scheduled effective date of 30 days from their date of filing.

46. The use of a tariffed interim program is not without precedent. On March 17, 1983, the Commission allowed AT&T Tariff No. 270 (Transmittal No. 14186) to become effective. This tariff established a new service called High Capacity Circuits, which are dedicated private lines used for the transmission of digital signals at 1.544 Mbps, *i.e.*, DS-1. Initially, these circuits are to be provided via Terrestrial Digital Circuits (TDC), which are two-point, dedicated High Capacity Circuits used for simultaneous two-way transmission of serial, bipolar, return-to-zero isochronous digital signals at 1.544 Mbps, and are comprised entirely of terrestrial channels. In order to allow connections of customer-provided terminal equipment and systems to TDC, an interim program was established in Tariff No. 270. Under that program, which was also published in the Commission's Public Notices (No. 3260) on March 30, 1983, equipment and systems that were directly connected to a telephone company-provided 1.544 Mbps service, circuit or facility as of March 17, 1983, or meet the specifications of AT&T Technical Reference (PUB) 41451 and the report of the FCC/Industry Ad Hoc Task Group on Digital Interfaces,[28] may be included on the Commission's grandfather list of devices lawfully connectible to TDC. In the affidavit that must be filed with the Commission attesting to compliance with these specifications, a manufacturer must state that any equipment connected under the interim plan will be modified by the manufacturer (or his authorized agent) in response to revisions to Part 68 adopted in Docket No. CC 81-216 or RM-4087. Similarly, any

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[27] Such tariff revisions should include provision for interconnection of NTCE with TDC (DS-1 rate signals) [*see*para. 46] and other digital services, circuits and facilities. Any future digital service, circuit or facility is equally subject to this requirement; where digital NCTE devices for such future service, circuit or facility requires special regulatory treatment, the waiver process discussed at para. 41, *supra*, remains available.

[28] In 1980, the Commission established an industry group to determine if revisions to Part 68 of the rules were necessary to allow connections of terminal equipment and systems to 1.544 Mbps digital channels. On December 1, 1981, the group reported that revisions were required and filed a report which identified those areas of Part 68 which should be revised. Subsequent to that report, AT&T filed a petition for rulemaking (RM-4087) requesting that Part 68 be amended to allow connections of digital terminal equipment to 1.544 Mbps digital channels. That petition is pending. Copies of PUB 41451 and the group report, as well as AT&T's proposals in RM-4087, are available through the Commission's copy contractor.

manufacturer that provides digital CSU/NCTE devices pursuant to the standards that will be specified by AT&T in its digital CSU/NCTE interim program must be prepared to modify those devices in response to the standards ultimately adopted in RM-4087.

47. The effect of our decision herein is to apply the provisions of Section 64.702 of the rules to CSUs and digital NCTE. By so doing, CSUs and digital NCTE may be offered only on an unregulated basis.[29] This means that CSUs and digital NCTE offered subsequent to the effective date of AT&T's interim equipment program (described at para. 45, *supra*) will be treated as CPE and fully subject to market competition.

48. *The IDCMA rule proposals, RM-3530.* IDCMA offers a set of technical proposals that it believes are necessary to establish standards for the registration and interconnection of CSU-like devices to DDS. These proposals appear essentially as offered by IDCMA in the Appendix hereto, modified in part to reflect the broader application discussed at paras. 26 and 44 herein. We will briefly describe each of the proposals.

49. Revisions to Section 68.2(a) are proposed to allow appropriate terminal equipment to connect to digital services, circuits and facilities. A new grandfathering provision is also offered that would permit equipment of a type lawfully connected to such services, circuits or facilities prior to notice in the Federal Register of adoption of final rules in this proceeding to be connected for up to six months thereafter and to remain connected without registration. In view of the current absence of non-telephone company-provided CSUs and digital NCTE, we also will utilize the interim program described in para. 45, *supra*, (interim program #2) to establish grandfathering eligibility. Further, in order to prevent possible harm to the network from devices that digitize analog signals, we will require CSUs and digital NCTE connected under interim program #2 to also comply with the requirements of the interim program of March 30, 1983 described in para. 46 (interim program #1). Thus, the requirement for modification of devices connected pursuant to interim program #1 to comply with any rules adopted in response to RM-4087 remains applicable to all registered and grandfathered CSUs and digital NCTE. *See* proposed Section 68.2(f) in the Appendix hereto.

50. IDCMA proposes to modify Section 68.100 to allow appropriate terminal equipment to be connected to the digital access lines used to provide DDS. Our proposed amendments to Section 68.2, which encompass all digital services, circuits and facilities, would seem to make this modification unnecessary. IDCMA also proposes revising Sections 68.200 and 68.206 to make those sections consistent with Section 68.218(a) and to make it clear that compliance with

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[29] 84 FCC 2d 50, 61, n.10 (1980); 77 FCC 2d 384, 410–13 (1980).

certain inappropriate specifications not applicable to DDS is not required. Also, since ringer equivalence is a term that is not used in connection with regard to digital services, IDCMA proposes to amend the labeling requirement of Section 68.300. Finally, IDCMA offers revisions to Sections 68.308 and 68.310 to reflect the interference and longitudinal balance limitations necessary for DDS interconnection. We note that IDCMA's proposals do not reflect the high speed DDS offering, *i.e.*, 1.544 Mbps. In addition to offering comment on the rules in the Appendix, we ask interested parties to propose amended or additional rules necessary to implement registration and connection of CSUs and digital NCTE to DDS and other digital services, circuits and facilities.

51. *RM-4054*. AT&T proposes to add an alternative termination circuit to the current Part 68 loop and off-premises simulator circuits in order to permit a broader representation of actual network impedances during registration testing. AT&T suggests that hybrid balance circuitry tested in conjunction with this alternative test termination circuit will be reasonably assured of remaining within the bounds of the signal power limitations specified in Section 68.308 of the rules when connected to actual network loops. Comments were filed by GTE Service Corp. in support of AT&T's proposal. Interested parties are invited to comment on the proposed amendments to the definition of Loop Simulator Circuit and Off-Premises Line Simulator Circuit of Section 68.3, the proposed simulator circuit of Section 68.3(i), and the proposed note 3 to Figures 68.3(a) and (f). *See* Appendix.

52. *Part 68 or tariff procedures*. Upon receipt of comments on these proposed rule changes, and upon evaluation of the tariff filings implementing an interim program, we will be in a position to evaluate whether, and to what extent, rule changes are necessary. Registration has proven efficacious over the last eight years as a means of protecting the nationwide network from technical harm caused by the interconnection of customer-provided terminal equipment, but it has not been the exclusive procedure utilized. *See, e.g., Offer of Facilities to Other Common Carriers (Group/Supergroup)* in Docket No. 21499, FCC 83–39, (released February 15, 1983), and *Memorandum Opinion and Order (Plugs and Jacks)* in Docket Nos. 19528, 20774 and 21182, 70 FCC 2d 1800 (1979), for discussion of the use of the tariff mechanism in cases of relatively nonubiquitous, specialized interconnection offerings. With regard to our rulemaking proposals herein, we request comment on whether a tariff alternative should be employed here, rather than rules, and upon criteria which might be established to determine whether and under what conditions we should use rule or tariff procedures in future interconnection programs.

53. *Regulatory Flexibility Act Initial Analysis*

I. *Reason for Action.* The Commission is responding to a petition for rulemaking filed by IDCMA that seeks to expand the range of services currently encompassed under Part 68 of the Commission's rules. IDCMA proposes standards that would permit the direct connection of certain terminal devices to AT&T's DDS lines.

II. *The objective.* The Commission proposes to amend the scope of Part 68 of its rules to permit non-telephone company-provided CSU-like devices to be directly connected to DDS loops. The Commission also proposes to establish standards under Part 68 by which such devices may be registered.

III. *Legal basis.* Legal action as proposed is in furtherance of Sections 201–205 of the Communications Act of 1934, as amended, which require the provision of communications service offerings on a reasonable and not unreasonably discriminatory basis. *See* para. 55, *infra.*

IV. *Description, potential impact and number of small entities affected.* Development of rules to permit the registration and direct connection of CSU-like devices to DDS will follow the Commission's policy over the last seven years to open the provision of telephone network terminal equipment to competition. Such devices will be manufactured by an unspecified number of manufacturers who will benefit from the creation of a new market. No longer will Western Electric constitute the sole source of supply for the CSU. Price and feature innovation that has characterized the competitive marketplace for telephones, PBXs, and the like, will extend as well to CSUs. We see positive impact on small entities by our proposal to modify Part 68 of the rules.

V. *Recording, record keeping and other compliance requirements.* No significant additional paperwork will be required by the proposals set forth in this proceeding. New devices submitted for registration will constitute a negligible increase in the total number of devices currently being processed by the Commission.

VI. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* The Commission's alternative is to restrict the competition in provision of CSU-like devices. For the reasons discussed herein, we believe such an alternative is inconsistent with the public interest and would unnecessarily restrict the development of healthy competition in the CSU marketplace.

V. EX PARTE PRESENTATIONS

54. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arugments) between a person outside the Commission and a Commissioner or a decision-making member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation which must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official(s) receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

VI. ORDERING CLAUSES

55. Accordingly, and in view of the foregoing, IT IS HEREBY ORDERED, pursuant to Sections 1, 4, 201–05 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–05 and 403, and 5 U.S.C. § 553, that this docketed rulemaking proceeding IS HEREBY EXPANDED to consider further amendments to Part 68 of the Commission's Rules and Regulations, 47 C.F.R. Part 68.

56. IT IS FURTHER ORDERED, pursuant to Sections 1, 4, 201–05, 215, 218, 220, 313, 309(e)-(h) and 412 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–05, 215, 218, 220, 313, 309(e)-(h) and 412, and 5 U.S.C. § 553, that NOTICE IS HEREBY GIVEN of proposed rule changes in Part 68 of the Commission's Rules and Regulations, 47 C.F.R. Part 68, in accordance with the discussion and delineation of issues herein.

57. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4,

201–05 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–05 and 403, AT&T SHALL REVISE ITS INTERSTATE TARIFFS to provide an interim interconnection program for CSUs and digital NCTE devices, as described at paragraphs 45 and 46 herein.

58. IT IS FURTHER ORDERED that on the effective date of AT&T'S interim program for the interconnection of CSUs, CSU-like devices, and NCTE to its digital services, circuits and facilities, such devices shall be considered CPE for purposes of Section 64.702 of the Commission's rules, 47 C.F.R. § 64.702.

59. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register.

60. Interested parties may file comments to the matters contained in the Appendix hereto on or before July 29, 1983, and reply comments on or before August 17, 1983. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. All submissions filed in this proceeding will be available for public inspection during regular business hours in the Commission's Docket Reference Room.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

It is proposed that Part 68 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 68) be amended as follows:

1. It is proposed to revise Sections 68.2(a) and (f) to read as follows:

§ 68.2 Scope.

* * * * *

(a) General. Except as provided for in paragraphs (b), (c), (d), (e), and (f), the rules and regulations in this part apply to the direct connection:

(1) Of all terminal equipment to the public switched telephone network, for use in conjunction with all services other than party line service and coin service;

(2) Of all terminal equipment to channels furnished in connection with foreign exchange lines (customer-premises end), the station end of off-premises stations associated with PBX and Centrex services, trunk-to-station tie lines (trunk end only), switched service network lines (CCSA and EPSCS), and digital services, circuits or facilities; and

(3) Of all PBX (or similar) systems to private line services for tie trunk type interfaces, off-premises station lines, automatic identified outward dialing, message registration, and digital services, circuits or facilities. Additional types of services may be added to this section only through rulemaking proceedings, and equipment connected to such added services will be afforded a reasonable transition period.

* * * * *

(f) Channel service units (and other network channel termination equipment) directly connected to digital services, circuits or facilities on [date of appearance of final rules in this proceeding in the Federal Register] will be grandfathered, and new equipment which is of the same type as grandfathered equipment may be directly connected to such digital services, circuits or facilities without registration for six months thereafter. Other such equipment must be registered prior to connection. All grandfathered and registered equipment so connected remains subject to modification by the manufacturer or an authorized agent thereof as necessary to comply with any analog conversion limitations specified in FCC tariffs or this Part.

* * * * *

2. It is proposed that in Section 68.3 a note (3) be added to Figures 68.3(a) and 68.3(f); a new drawing entitled "Alternative Termination" (Figure 68.3(i)) be added; and Sections 68.3(j) and 68.3(q) be revised as follows:

§ 68.3 Definitions.

* * * * *

(3) Tests for compliance may be made with either R1 = 600 Ohms or R1 replaced by the alternative termination shown in Figure 68.3(i).

* * * * *

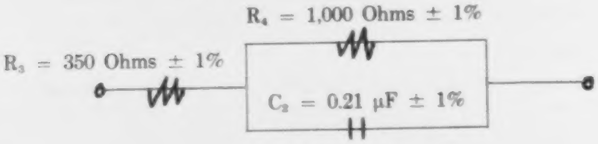

Figure 68.3(i)

Note: When this alternative termination is used during signal power compliance testing, it replaces R1 (600 Ohms) in the loop simulator circuit.

* * * * *

(j) *Loop Simulator Circuit:* A circuit that simulates the network side of a 2-wire or 4-wire telephone connection during testing. A schematic of the type of circuit that will be required is shown in Figure 68.3(a) for 2-wire loop or ground start circuits, Figure 68.3(b) for 2-wire reverse battery circuits, Figure 68.3(c) for 4-wire loop or ground start circuits, and 68.3(d) for 4-wire reverse battery circuits. Figure 68.3(i) is an alternative termination for use in the 2-wire loop simulator circuits. Alternative implementations may be used provided that the same dc voltage and current characteristics and ac impedance characteristics will be presented to the equipment under test as are presented in the illustrative schematic diagrams. When used, the simulator circuit shall be operated over the entire range of loop resistance as specified in the Figures, and with the indicated polarities and voltage limits. Whenever loop current is changed, sufficient time shall be allocated for the current to reach a steady-state condition before continuing testing.

* * * * *

(q) *Off-Premises Line Simulator Circuit:* A load impedance for connection, in lieu of an off-premises station line, to PBX (or similar) telephone system loop start circuits (Figure 68.3(f)) during testing. The schematic diagram of Figure 68.3(f) is illustrative of the type of circuit which will be required. Figure 68.3(i) is an alternative termination for use in the 2-wire loop simulator circuits. Other implementations may be used provided that the same dc voltage and current characteristics and ac impedance characteristics will be presented to the equipment under test as are presented in the illustrative schematic diagrams. When used, the simulator shall be operated over the entire range of loop resistances as indicated in Figure 68.3(f), and with the indicated polarities. Whenever loop current is changed, sufficient time shall be allocated for the current to reach a steady-state condition before continuing testing.

* * * * *

3. It is proposed to revise Section 68.200(d) to read as follows:

§ 68.200 Application for equipment registration.

* * * * *

(d) A statement that the terminal equipment or protective circuitry complies with and will continue to comply with the appropriate rules and regulations in Subpart D of this part accompanied by such test results, description of test procedures, analyses, evaluations, quality control standards and quality assurance standards as are necessary to demonstrate that such terminal equipment or protective circuitry complies with all the applicable rules and regulations in Subpart D of this part. The Office of Science and Technology may issue an OST Bulletin describing acceptable test methods; other test methods may be employed provided they are fully described in the application and are found acceptable by the Commission.

* * * * *

4. It is proposed that Section 68.206(a) be revised to read as follows:

§ 68.206 Grant of application.

(a) The Commission will grant an application for equipment registration if it finds from an examination of such application and other matter which it may officially notice, that the equipment will comply with the applicable rules and regulations in Subpart D of this part, or that such grant will otherwise service the public interest.

* * * * *

5. It is proposed that a new subsection (c) be added to existing Section 68.300 as follows:

§ 68.300 Labelling requirements.

* * * * *

(c) Registered terminal equipment for connection to the digital services, circuits or facilities will not include a ringer equivalence number on the label. Instead, such equipment must state: "For use solely on digital interfaces."

6. It is proposed that a new subsection (g) be added to Section 68.308 as follows:

§ 68.308 Signal power limitations.

* * * * *

(g) *Interference Limitations for transmission of bipolar (non-return to 0) signals over digital services, circuits and facilities*

Prior to any frequency shaping filters, the system excitation is defined by an ideal 50 percent duty-cycle rectangular pulse. The relation of bit rate, R, in kbps and pulse amplitude, A, in Volts, is given in Table I.

The power shall not exceed 0 dBm for 9.6 kbps or +6 dBm for 2.4 kbps, 4.87 kbps and 56.0 kbps. These are average power transfers with matched 135 Ohm driving and terminating resistances.

Table I

Driving Pulse Amplitude

Pulse Rate (R) *kbps*	*Amplitude (A)* *Volts*
2.4	3.32
4.8	3.32
9.6	1.66
56.0	3.32

1. The average power transfer is measured across a 135 Ohm terminating resistance with a matched 135 Ohm driving resistance.

2. The average power transfer will be measured using a random signal sequence (O or +1 equiprobable in each pulse interval).

3. For all rates the driving pulse will be shaped by a single real pole low pass filter having a cutoff frequency in Hertz equal to 1.3 × bit rate.

4. Specific band rejection filters are provided to protect certain other services. These requirements apply at 2.4, 4.8 and 9.6 kbps, and the amounts of additional rejection are specified in Table II.

Table II

Minimum Additional Rejection

Rate (R) *kbps*	*Rejection Band* *24-32 kHz*	 *72-80 kHz*
2.4	5 dB	1 dB
4.8	13 dB	9 dB
9.6	17 dB	8 dB

7. It is proposed that a new subsection (1) be added to Section 68.310 as follows:

§ 68.310 Longitudinal balance limitations.

* * * * *

(1) *Terminal equipment connected to digital services, circuits or facilities*

The metallic termination used for the performance of the test shall be 135 Ohms, the longitudinal termination may be kept at 500 Ohms, and all tests shall be made with the device in an active mode. For equipment operating in the frequency range of 200–1000 Hertz, the minimum balance requirement shall be 60 dB. For equipment operating in the frequency range of 1–15 kHz, the miminum balance requirement shall be 40 dB.

Microwave, Dom. Public Point-to-Point, Technical Requirements Proceeding Termination of

> *Report and Order* adopted terminating proceeding. Commission concluded that technical standards, licensing, and frequency coordination requirements applied to this service will remain unchanged. Low power point-to-point microwave service will not be extended to 24 GHz band.
> *–Amendment of Part 94 & 15*
> Gen. Docket No. 79–337

FCC 83–166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 94 of the Commission's Rules and Regulations to facilitate operation of low power, limited coverage systems in the 22.0–23.6 GHz band,	Gen Docket No. 79–337 RM-3241
and	
Amendment of Part 15 of the Commission's Rules to create a new class of low power unlicensed microwave device in the 24 GHz band.	RM-3678

SECOND REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: April 27, 1983 Released: May 5, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

Summary of Action

1. In the *First Report and Order* in this docket,[1] the Commission created a low power microwave communications service in the 23 GHz band. Here we have concluded that the technical standards, licensing and frequency coordination requirements applied to this new service should be retained. In addition, we conclude that low power point-to-point microwave service should not be extended to the 24 GHz band.

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[1] *First Report and Order*, FCC 80–485, released August 19, 1980, 47FR55731 August 21, 1980, 81 FCC 2nd 140 (1980).

Background

2. The *First Report and Order* amended Part 94 of the Commission's Rules to provide for the operation of short haul, low cost, low power microwave communications systems in four channel pairs within the band segments 21.8–22.0 GHz and 23.0–23.2 GHz with somewhat relaxed technical standards.[23] During the course of the proceeding, two commenters, General Electric Company (GE) and M/A-COM, Incorporated (M/A-COM), questioned the necessity for frequency coordination for these low power devices. M/A-COM stated that the cost of frequency coordination might be greater than any savings realized in relaxing the technical standards and GE agreed that uncoordinated operations would meet the needs of some users. Further, both GE and M/A-COM suggested that Part 15 of the Rules could be amended to allow operation of these devices without a license. GE also suggested that the Commission adopt a temporary licensing program for these systems. Additionally, on 15 May 1980, M/A-COM petitioned the Commission (RM-3678) to amend Rule Part 15 to accommodate the operation of low power fixed service microwave radio systems in the 24.05–24.25 GHz band. The issues raised by GE and M/A-COM were not resolved in the *First Report and Order*. Instead, the Commission issued a *Further Notice of Proposed Rule Making* (*FNPRM*) to seek comment on these matters.[4]

Further Notice of Proposed Rule Making

3. The applications for the low power systems foreseen by GE and M/A-COM, and the issues raised by the companies, were sufficiently similar to warrant consolidation of the M/A-COM petition into this proceeding. The Commission did not want to delay introduction of the low power devices while the issues of frequency coordination and unlicensed operations were being solved. In the *FNPRM*, the Commission asked for public comment on questions concerning the need for frequency coordination and licensing of the low service and on the appropriate technical standards. We stated that we saw merit in providing spectrum for non-frequency coordinated operations in the 22 to 24 GHz band because these low power devices were envisioned to be highly directional and to have limited (short range) interference potential. Thus, we proposed to eliminate

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[3] The term 'low power' is derived from the fact that operations in the 23 GHz band pursuant to § 94.73 are limited to transmitter output power of 10.0 watts or less, whereas operations on the four subject channel pairs using reduced technical standards pursuant to § 94.91 are limited to transmitter output power of 0.1 watts or less.

[4] *FNPRM*, FCC 80–486, released August 19, 1980, 45FR55775, August 21, 1980.

the coordination requirement for the channel pair 21.825/23.025 GHz,[5] except within 25 kilometers of the Canadian and Mexican borders. We also proposed to apply the same technical standards set forth for the other low power devices to this channel pair. Furthermore, we stated that some form of licensing seems appropriate because these low power microwave operations do not fall within Part 15 of the Rules. However, we posed questions on these points. We specifically asked commenters to address the following questions:

(a) Is one 50 MHz channel pair sufficient for non-frequency coordinated operations?

(b) Should unlicensed operations of these devices be permitted? If so, under what conditions?

(c) Is there a need for temporary or point of sales licensing?

(d) Should these devices be subject to different technical standards than proposed?

(e) Is there a need to permit mobile operation and if so, what would be the implication for fixed operations?

Discussion

4. Comments were filed by M/A-COM, GE, Datapoint Corporation (Datapoint) and the Central Committee on Telecommunications of the American Petroleum Institute (API). Reply comments were filed by M/A-COM, GE and API.

5. All agreed that there is merit in providing spectrum for non-frequency coordinated operations for those users who are willing to forego guarantees of protection from interference in order to implement operations more quickly. There was disagreement, however, over how many channels should be designated for non-frequency coordination and whether they should be taken from the four channel pairs or from other spectrum. API felt that spectrum for non-frequency coordinated operations should be limited to one channel pair, while M/A-COM and Datapoint felt that several, or all, of the channels in these band segments should be so designated. GE felt that several pairs should be allocated for non-frequency coordinated operations but that they should be taken from other band segments in this region of spectrum.

6. Since the time of the *Report and Order* and *FNPRM*, these low power channels have experienced significant development and several manufacturers now provide equipment for voice, data and video transmissions. There are now a substantial number of licensees and applicants, which could be affected by non-frequency coordinated operations. At present, usage of the low power channels is evenly distributed over the four channel pairs available at 21.8–22.0 GHz and 23.0–23.2 GHz. Additionally, the receivers currently

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[5] The four available channels are: 21.825/23.025, 21.875/23.075, 21.925/23.125 and 21.975/23.175 GHz.

available are highly susceptible to interference from adjacent channel signals.[6] Thus, the introduction of uncoordinated operations on the 21.825/23.025 GHz channel pair would also have an adverse impact on adjacent channel operations which would remain subject to prior frequency coordination. In the absence of prior frequency coordination, the Commission and its licensees would have to rely on after-the-fact investigation to detect and eliminate adjacent channel interference. Such investigations could be more expensive and time consuming than prior frequency coordination. While it might be possible to require frequency coordination for adjacent channel operations without requiring coordination for co-channel operations, we doubt that this approach would speed up the licensing process.

7. As M/A-COM noted in its comments, it is difficult to allow uncoordinated operations if there are already users who have done frequency coordination and expect to operate with guaranteed freedom from interference. For this reason we are not changing the rules of Part 94 to provide for uncoordinated operations in the band segments 21.8–22.0 GHz and 23.0–23.2 GHz.

8. We do not find that it is appropriate to introduce a non-frequency coordinated, unlicensed communications service into the 24 GHz band. The band is allocated on a primary basis for Federal Government radiolocation use and on a secondary basis for non-Government radiolocation and amateur use, as well as for Industrial, Scientific and Medical Service (ISM) equipment. The frequencies are already being used by radar devices, and NTIA has recommended that the operations proposed by M/A-COM not be permitted in the 24 GHz band because they would be inconsistent with the current allocated use of the band.[7] We are, therefore, not adopting rules authorizing low power microwave operations in the 24 GHz band.

9. The possibilities for providing spectrum for non-frequency coordinated operations in other band segments are being considered in Docket 82–334, which is dealing with the development of utilization policy for fixed and mobile services' use of certain bands between 947 MHz and 40 GHz. The *Notice of Inquiry* [8] in that Docket solicited comments on the need for coordination in bands between 17.7 and 40.0 GHz, and the *Notice of Proposed Rule Making* [9] in that

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[6] Most receivers at 23 GHz employ simple Schottky diode detectors which have front-end responses of nearly 200 MHz. Even superheterodyne receivers have IF's of a full 50 MHz and a frequency stability of ±11.5 MHz.

[7] Letter dated February 1981 from Mr. Leo A. Buss, Director, Spectrum Plans & Policies, NTIA to Mr. Robert L. Cutts, Chief, International and Operations Division, FCC. A copy of this letter has been placed in the docket file of this proceeding.

[8] Paragraphs 52 and 53 of the *NOI*, (FCC 82–286, released July 9, 1982, 47FR31959, July 23, 1982).

[9] Paragraphs 29–30 of the *NPRM*, (FCC 83–2, released January 13, 1983, 48FR6730, February 25, 1983).

Docket proposed to allocate all of the spectrum at 31.0–31.2 GHz for low power, non-frequency coordinated operations. That band is already allocated to the fixed and mobile services.

10. The commenters agreed that some form of licensing is necessary to provide records to locate sources of interference in bands where protection is afforded. M/A-COM noted that temporary licensing is not compatible with frequency coordination since the value of temporary licensing is to provide more immediate access to the spectrum while the purpose of frequency coordination is to make the review necessary to insure that operations will be interference free. GE, on the other hand, suggested a temporary licensing approach wherein applicants who had completed frequency coordination could immediately implement their systems, subject to final review by the Commission.

11. The issue of applying temporary licensing procedures to channels where frequency coordination is required has been treated in the *First Report and Order* in this proceeding and in a *Memorandum Opinion and Order* responding to a Petition for Limited Reconsideration filed by GE. We found that to preserve an interference protected environment, we should continue the review of all applications prior to grant of license. The need to provide operational safeguards against the possibility of temporarily licensed users causing interference to other licensees is now even more important given the growth and use discussed above. Therefore, we will continue the existing licensing procedure for these channels.

12. The commenters generally agreed with the technical standards in § 94.91 and felt that there should not be different standards for non-coordinated equipments if channels were set aside for these operations. M/A-COM, however, said that the beamwidth standard should be relaxed to permit 6° beamwidth antennas; this would allow 8 inch rather than 12 inch antennas. On the other hand, GE argued that narrow beams resulting from the 4° beamwidth antenna standard provide more efficient spectrum utilization and lessen chances for interference. The commenters also agreed that certain operating standards, specifically those dealing with user transmitter measurements (§ 94.85), notification to the local Engineer-In-Charge (§ 94.55) and maintenance of station records (§ 94.113) are excessive regulation and unneeded for the low power operations. The suggestion to delete these regulations is beyond the scope of this proceeding and are more appropriately addressed in the context of Docket 82-334 where more general regulatory issues are being considered, and they will be taken into account in that proceeding.

13. With regard to mobile operations, commenters indicated that the need for mobile operations at this frequency range is unknown but likely to be small. Further, the possibilities of interference arising from mobile operations are likely to be small at this frequency range and short-lived due to movement of the mobiles.

Until further experience is gained, we will not make particular provisions for mobile operations. We will handle applications on a case-by-case basis.

Other Matters

14. The Commission still has before it for consideration the matters raised in GE's Petition for Limited Further Reconsideration of the *First Report and Order*, filed October 29, 1981, in this docket. GE objected to the channel assignment policy set out in the *First Report and Order* and the *Memorandum Opinion and Order* adopted on September 22, 1981 and released on September 29, 1981. GE contended that the Commission's Rules, by mandating the use of designated channel pairs in the 21.8–22.0 GHz and 23.0–23.2 GHz band segments, would result in highly inefficient spectrum utilization. GE was concerned that the technical limitations of state-of-the-art receiver design would preclude users from establishing parallel 23 GHz systems on adjacent channels. Thus, GE sought a channel assignment scheme which would provide licensees with the flexibility to establish 50 MHz guardbands between the transmit frequencies used by parallel systems. GE argued, therefore, that the Commission should not designate any particular channels for use in simplex or duplex systems.

15. GE stated, further, that if the Commission felt it necessary to maintain a formal channel assignment plan, it would be necessary to rearrange the channelization plan set forth in the *First Report and Order*. To provide for a 50 MHz guardband between parallel systems, GE urged the Commission to designate the 21.825/23.025 GHz channel pair, which was allocated in the *First Report and Order* for simplex operations, for duplex operations. Similarly, GE urged that the 21.975/23.175 GHz pair, previously designated for duplex operation, be made available for simplex systems.

16. Racon, Inc. (Racon) and M/A-COM filed comments in response to GE's Petition for Limited Further Reconsideration and, in turn, GE submitted a Reply and Request for Expedited Action. Racon pointed out that its products utilized receiver technology similar to that employed by GE. Racon therefore supported GE's arguments in favor of a more flexible channel assignment scheme. M/A-COM expressed the belief that it would be unwise for the Commission to adopt any policies "intended to protect nonselective receivers from interference." M/A-COM noted that the guardbands needed to protect GE's receivers from adjacent channel interference were spectrally inefficient and would be contrary to the public interest. M/A-COM concluded that the Commission should not adopt a channelization plan merely for the purpose of protecting adjacent channel receivers from interference when the same purpose could be accomplished with higher-stability oscillators and more selective receivers.

17. On October 15, 1982, the Commission issued a *Public Notice* which summarized and further clarified the licensing policies adopted for low power microwave systems in the 23 GHz band. The *Public Notice* reaffirmed that, in accordance with existing Commission rules, the channels designated for single or adjacent channel operations could be assigned for duplex operations and vice versa in certain situations when necessary to avoid intra-system or inter-system interference. The *Public Notice* also made it clear that adjacent channel operations could be authorized on frequencies other than those so designated upon a technical showing justifying the need for a exception to the established channel assignment plan. In response to the *Public Notice*, GE, on November 12, 1982, filed a Motion to Dismiss its Petition for Limited Further Reconsideration. In view of the fact that the matters raised in GE's Petition and in the corresponding comments filed by Racon and M/A-COM now appear to be moot, we think it appropriate to dismiss GE's Petition for Limited Further Reconsideration.

Conclusion

18. Accordingly, IT IS ORDERED, that pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, the General Electric Company's Petition for Limited Further Reconsideration, filed October 29, 1981, is DISMISSED as moot.

19. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

20. For futher information contact Donald Draper Campbell, Spectrum Management Division, 202-653-8177.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted to satellite private line carrier. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–*American Satellite Company*

FCC 83–189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of AMERICAN SATELLITE COMPANY For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 521-DSS-P/LA-82 522-DSS-P/LA-82 523-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT; COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT

1. The Commission is considering the above-captioned applications filed by American Satellite Company (ASC) to construct and operate a new domestic satellite system. ASC proposes to construct three satellites, of which two are to be launched and operated in orbit and the third retained as an on-ground spare. Public notice of the applications was given on December 23, 1981. A petition to deny was filed by United States Satellite Systems, Inc. (USSSI). Additionally, comments were filed by COMSAT General Corporation, RCA American Communications, Southern Pacific Communications Company, and Western Union Telegraph Company. For the reasons discussed below, we deny the petition and grant ASC's applications.

2. ASC is owned on an equal basis by wholly owned subsidiaries of Fairchild Industries and Continental Telephone Corporation.[1] ASC is currently providing domestic satellite services on a common carrier basis using an undivided 20% ownership interest in the Westar domestic satellite system.[2]

3. Each of the new ASC satellites will be "hybrids," carrying 12 narrowband (36 MHz) 4;6 GHz transponders, six wideband (72 MHz) 4;6 GHz transponders and six wideband (72 MHz) 12;14 GHz transponders. The satellite mission lifetime in orbit is estimated at 8.5 years. Coverage of all 50 states can be provided at 4;6 GHz, but only the 48 contiguous states are covered at 12;14 GHz. Launches are scheduled in September 1985 and March 1986. ASC anticipates that its satellite system will provide voice, data and video transmissions on a common carrier basis. It estimates the cost of a two in-orbit and one on-ground spare system to be $227 million, with first year operating costs of $1.7 million for the space segment. The company has obtained a $350 million line of credit to finance the satellite system.[3] ASC requests one orbital position capable of providing 50 state coverage so that it may continue to serve its Puerto Rican and Hawaiian customers, as well as Alaska, at 4;6 GHz. In order to maintain service quality to population centers on the East Coast at 12;14 GHz, it requests that its second satellite be provided with an orbital location in the eastern portion of the arc. Specifically, ASC requests to be assigned the locations of 122° and 88° West Longitude.

4. USSSI's principal objection to the ASC satellites is that they are inefficient because of their failure to make full frequency re-use of the 12;14 GHz transponders. USSSI contends that ASC does not reveal any detail as to use or operations of the 12;14 GHz transponders. ASC responds that weight limitations make it impossible to utilize frequency reuse techniques for the 12;14 GHz capacity on its satellites. Moreover, it argues that any inefficiencies that may exist are negated by the cost savings inherent in the building, launching and operating of one satellite which includes both 4;6 GHz and 12;14 GHz as opposed to separate satellites for each frequency band. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit*

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[1] *See* American Satellite Corporation, 80 FCC 2d 254 (1980).

[2] *See* Western Union Telegraph Company, 86 FCC 2d 196 (1981). Fairchild and Continental were each authorized to acquire 25% interests in the TDRSS/Advanced Westar system, and ASC had been authorized to use 50% of the commercial capacity of the Advanced Westar satellites. Subsequently, Western Union relinquished its interest in the TDRSS/Advanced Westar system and Advanced Westar is no longer authorized for domestic satellite operations. *See* Western Union Telegraph Company, FCC 83–196, adopted today.

[3] *See* letter from ASC to the Commission dated October 19, 1982. Moreover, the financial qualifications of the parents of ASC are a matter of record before the Commission, and ASC's qualifications are not at issue in this proceeding.

Assignment Order, FCC 83–186, both adopted today, and we will not repeat that discussion here.[4]

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4;6 GHz and 12;14 GHz bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domestic satellite services. *See Report and Order, supra*. We are taking these actions to continue the opportunities for initial entry by new companies into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all of the applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant them without the need to resort to a comparative hearing. Moreover, ASC's entry as a new space segment operator will further our goal of maximizing competitive supply of satellite services.

6. We recognize that hybrid satellites of the design proposed by ASC require various tradeoffs between orbit use efficiency and the cost of satellite construction. While the ASC satellite design does not achieve full spectrum re-use, we believe that ASC has made a sufficient showing for us to find that their applications will serve the public interest under current circumstances. We will therefore assign two hybrid locations to ASC. However, as discussed in the *Report and Order, supra*, we can not conclude that grant of authority for additional satellites of the same design will be similarly received in the future.

7. Accordingly, IT IS ORDERED that Application File Nos. 521-DSS-P/LA-82, 522-DSS-P/LA-82 and 523-DSS-P-82 ARE GRANTED and American Satellite Company IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

8. IT IS FURTHER ORDERED that American Satellite Company IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

9. IT IS FURTHER ORDERED that American Satellite Company shall comply with all the requirements of the *Report and Order*,

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[4] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

FCC 83–184 in CC Docket No. 81-704, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch (No later than)*
ASC I	* * *	May 31, 1985	September 30, 1985
ASC II	May 31, 1983	September 30, 1985	March 31, 1986
ASC III	December 31, 1983	April 30, 1986	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Satellite Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the Petition to Deny filed by United States Satellite Systems, Inc. IS DENIED.

13. American Satellite Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Applications of American Satellite Co. for Authority to Construct and Launch Space Stations in the Domestic Fixed Satellite Service.

The majority's decision to authorize construction of these hybrid satellites, which are incapable of full frequency re-use, perpetuates an undesirable spectrum management policy[1] without a significant countervailing justification. Hybrid satellites are economically attractive as a generic proposition, but we can no longer afford to authorize their construction unless they incorporate state-of-the-art technology comparable to that possible for single band satellites.

The majority's approval of Amsat's construction permit applications is apparently premised on the equitable consideration that if Amsat is held to the newly adopted policy on hybrids, it will lose some of the money spent developing its construction plan. Although this would be unfortunate, an applicant obviously has no legal right to have its proposals judged against discredited standards and policies. Furthermore, the majority's calculus assigns no weight to the loss of transponders (and consequent loss of spectrum efficiency and satellite service) that will result from the instant Amsat authorizations. The majority's disinterest in the impact of these grants on transponder supply is especially disturbing in view of the growing congestion in these spectrum bands and the Commission's adoption of more demanding technical requirements in recognition of that condition. While I am not insensitive to the equities on Amsat's side, if the holding of this case is that mere economic inconvenience is a basis for granting equitable relief, the Commission's ability to induce technological advances will be seriously undermined.

I respectfully dissent.

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[1] *See Report and Order*, CC Docket No. 81-704, paras. 71 and 79–81 (adopted April 27, 1983).

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> Application to construct and launch an additional space station in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
> *–AT&T Co.*

FCC 83–188

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of AMERICAN TELEPHONE AND TELEGRAPH COMPANY For Authority to Launch and Operate a Space Station in the Domestic Fixed-Satellite Service	File Nos. 234-DSS-LA-82 235-DSS-MP-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The American Telephone and Telegraph Company (AT&T) is requesting authority to launch and operate an additional in-orbit domestic communications satellite. Public notice of these applications was given on November 10, 1981. Petitions to deny were filed by Western Union Telegraph Company (Western Union) and Southern Pacific Communications Company (Southern Pacific). American Satellite Company (ASC) also filed comments.[1] For the reasons discussed below, we deny these petitions and grant AT&T's applications.

2. AT&T is currently using 4;6 GHz COMSTAR domestic satellites leased from COMSAT General Corporation.[2] Four such satel-

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[1] The unopposed motions of Southern Pacific for acceptance of its late filed comments and of AT&T for a consolidated date for the filing of its opposition are granted. In a brief letter, COMSAT General Corporation reserved its right to file comments in this proceeding, but did not do so.

[2] COMSAT General Corporation, 44 FCC 2d 444 (1974) and 84 FCC 2d 547 (1981).

lites are currently operated at 3 orbital locations to provide common carrier services through earth stations operated by AT&T, GTE Satellite Corporation, Alascom, Inc. and All America Cable and Radio.[3] Each of these satellites contains 24 transponders with a bandwidth of 36 MHz. The TELSTAR satellite design is capable of 50 state coverage and the satellite mission lifetime is 10 years. In 1980 AT&T was granted authority to replace the COMSTAR D1/D2 and D3 satellites at 95° and 87° West Longitude with its TELSTAR satellites.[4] Action on AT&T's request to launch a third TELSTAR satellite was deferred at that time because COMSTAR D4 would not reach the end of its operational lifetime until 1987. Authority was granted, however, for the third TELSTAR satellite to be maintained as a ground spare. Construction commenced on this satellite in December 1980 and is scheduled to be completed in June 1983.[5]

3. AT&T is now requesting authority to operate the first TELSTAR satellite in a fourth orbital location in order to expand its available system capacity. The company's current traffic projections indicate an immediate need for a fourth orbital location. AT&T plans to offer any common carrier tariffed service on its fourth satellite which it deems appropriate. An orbital location east of 99° West Longitude is requested in order to serve the primary uplinks of the television industry which are located on the east coast of the United States.[6]

4. Western Union and Southern Pacific in their petitions contend that AT&T should be required to make a far more detailed showing of need for a fourth orbital location. ASC requests the Commission to withhold any grant if there is a significant possibility that there will be a shortage of orbit positions. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–

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[3] *See e.g.* American Telephone and Telegraph Company, 42 FCC 2d 654 (1973); GTE Satellite Corporation, 57 FCC 2d 147 (1975); Alascom, Inc., W-P-C-3490, released October 6, 1980; and All America Cable and Radio, 74 FCC 2d 14 (1979).

[4] *See* COMSAT General Corporation, 85 FCC 2d 547 (1981). The first TELSTAR satellite was scheduled to replace COMSTAR D1/D2 at 95° West Longitude in mid-1983, and the second TELSTAR satellite to replace COMSTAR D3 at 87° West Longitude in 1984. AT&T now proposes to delay these replacement launches until July 1984 and May 1985, respectively.

[5] The costs of the project proposed in these applications is estimated to be $95 million for construction and launch. AT&T's financial qualifications to undertake this project is a matter of record before the Commission and are not questioned by any party.

[6] Since the third TELSTAR satellite was originally intended to be used to replace COMSTAR D4, AT&T now plans to file an application at a later date to construct, launch and operate an additional TELSTAR satellite to replace COMSTAR D4. Such an application should, of course, be filed in accordance with today's companion processing order. *See* Memorandum Opinion and Order, FCC 83-185, adopted today.

704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–185, both adopted today, and we will not repeat that discussion here.[7]

5. In separate actions taken today, we have reduced orbital spacings between domestic satellites in the 4;6 GHz bands so that additional satellites might be accomodated in orbit to satisfy growing user demands for domestic satellite service. *See Report and Order, supra*. Consequently, there are now enough orbital positions available to grant the current group of pending applications without comparative hearings under our open entry domestic satellite licensing policies. The only substantive issue presented by this application is whether the demand for AT&T satellite services warrants the award of an additional orbital position for its services. We believe that AT&T has made a sufficiently firm *prima facie* showing that this threshold requirement is satisfied. It projects in its October 25, 1982 supplemental filing a need for 96 transponders by the end of 1983. Moreover, its most recent semi-annual report indicates that in excess of 90% of its operational transponder capacity is being utilized.[8] In light of these representations, we believe that AT&T has made a sufficient showing that the public interest would be served by a grant of its application in accordance with the criteria set forth in our *Report and Order, supra*. Moreover, we reserve the authority to require colocation of COMSTAR and TELSTAR satellites to reduce or eliminate excess spare capacity if these traffic forecasts do not materialize.

6. Accordingly, IT IS ORDERED that Applications File Nos. 234-DSS-LA-82 and 235-DSS-MP-82 ARE GRANTED, and American Telephone and Telegraph Company is authorized to launch and operate its previously authorized TELSTAR satellite in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

7. IT IS FURTHER ORDERED that American Telephone and Telegraph shall comply with all the requirements of the *Report and*

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[7] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon.denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

[8] *See* AT&T Satellite Utilization Report, January 28, 1983. This estimate includes only the COMSTAR D3 and D4 satellites. COMSTAR D1/D2 is used for occasional service and as a spare for the other two satellites. AT&T also claims to be in receipt of orders for over 60 channels for its satellite television service. It has also received requests for satellite audio distribution services and digital satellite services. We recognize, however, that orders do not always translate into paying customers when little, if any deposit, is required in order to be placed on a waiting list.

Order in Docket 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

8. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization to launch and operate an in-orbit satellite shall become null and void in the event the space station is not launched by July 31, 1983, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization.

9. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to American Telephone and Telegraph Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

10. IT IS FURTHER ORDERED, that the Petitions to Deny filed by Western Union Telegraph Company and Southern Pacific Communications Company ARE DENIED.

11. American Telephone and Telegraph Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Interconnection
Tariff, Rejection of

> AT&T's application for Section 214 authority to offer Basic Packet Switching Service (BPSS) granted, with conditions attached to authorization.
> *–Basic Packet Switching Service*

FCC 83–221

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

For Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States.

File No. W-P-C-4841

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted: May 12, 1983; Released May 26, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

I. *Introduction*

1. Before the Commission is an application for authorization pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, filed by the American Telephone and Telegraph Company (AT&T) to install and operate "packet facilities" at specified telephone company locations in the United States.[1] The facilities would be employed

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[1] A petition seeking denial of AT&T's § 214 application has been filed by the Computer and Business Equipment Manufacturers Association (CBEMA). Tymnet, Inc. (Tymnet) has submitted a petition to deny or, alternatively, to condition the authorization. A late filed petition to deny also was filed by GTE Telenet Communications Corporation (Telenet). The Independent Data Communications Manufacturing Association, Inc. (IDCMA) filed comments regarding AT&T's request which relate to the Commission's Registration Program (47 C.F.R. Part 68). Satellite Business Systems (SBS) filed limited comments concerning Tariff FCC Nos. 267 and 268. Finally, the International Business Machine Corporation (IBM) filed comments. Also before the Commission are reply comments filed by AT&T and the Association of Data Processing Service Organizations, Inc. (ADAPSO), and a letter from IDCMA commenting on information exchange procedures between American Bell Inc. (ABI) and AT&T. In addition, on January

in a new service offering of packet switch facility capacity for use by customers in the construction of private packet networks. AT&T identifies the offering as the Basic Packet Switching Service (BPSS). Also filed with AT&T's Section 214 authorization request were three illustrative tariffs. The first of the tariff filings would revise Tariff FCC No. 270 by setting out initial rates and regulations for BPSS. A second would revise Tariff FCC No. 267 to provide for the connection of AT&T's 56 kbps and 9.6 kbps Dataphone Digital Service (DSS) to BPSS. Finally, revisions to Tariff FCC No. 268 and the 19 Bell Operating Companies (BOC) tariffs would provide for a new offering of a 56 kbps. Digital Central Office Connecting Facility. This facility would be provided between an other common carrier (OCC) terminal location and a telephone company central office for connection to BPSS. Also before the Commission is a petition, filed by the Computer and Business Equipment Manufacturers Association (CBEMA), for limited reconsideration and clarification of the Commission's decision to reject AT&T's March, 1982 offering of BPSS (BPSS decision).[2] On balance, we believe that the public interest would be served by BPSS, and, accordingly, we approve AT&T's request for authorization for this service as discussed below.

II. *Background*

2. The nature of the proposed service and its development are summarized in the BPSS decision. Briefly, in 1978, AT&T sought authority from this Commission to offer the Advanced Communications Service (ACS), an integrated end-to-end service that included packet transport for the carriage of digitized information.[3] The application was later withdrawn so that the service could be redeveloped into separated basic and enhanced offerings according to the guidelines established in our *Second Computer Inquiry* (*Computer II*).[4] The *Computer II* decisions held, *inter alia*, that AT&T could provide basic services but could only offer enhanced services

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27, 1983, CBEMA filed further reply comments in response to AT&T's reply. These late filed pleadings will be considered as informal comments. *Cf.* 47 C.F.R. § 21.30(b). On March 18, 1983 CBEMA also filed a petition to institute a proceeding to establish that packet switching services should be offered in the competitive marketplace as enhanced services under *Computer II*. CBEMA states that such a proceeding will allow the Commission to develop additional factual or policy bases that may be necessary to confirm this decision. Because instituting a proceeding inviting additional public comment on packet switching in general will unreasonably delay Commission action on AT&T's BPSS application, we will not institute the requested proceeding. Accordingly, CBEMA's petition is denied. However, we have considered the points raised in that petition as informal comments.

[2] American Telephone and Telegraph Company, Bell Packet Switching Service, 91 FCC 2d 1 (1982).

[3] See Advanced Communications Service, Docket CC79-117.

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v.

through a separate subsidiary. On June 10, 1982, the Commission approved the establishment of AT&T's separate subsidiary, American Bell, Inc. (ABI). ABI has since announced that it will provide the enhanced portion of the earlier proposed ACS, now termed Advanced Information Systems (AIS), and that it will interconnect its nodes with the packet transmission services offered by common carriers. On March 1, 1982, AT&T filed proposed revisions to Tariffs FCC Nos. 267 and 268, and a new Tariff FCC No. 270. [5] In its cost support data for Tariff 270, AT&T described the Bell Packet Switching Service (BPSS) as an offering of a dedicated facility, located on AT&T premises, that, when interconnected with other equivalent packet facilities using 56 kbps transmission channels, could provide a private packet transmission network. Access connections to the packet facility ports from users' premises and interconnection between the packet trunk ports could be provided, according to AT&T's filing, by any common carrier through a Digital Central Office Connecting Facility provided by AT&T. Additionally, the revisions to Tariffs 267 and 268 provided for interconnecting DDS transmission facilities suitable for that purpose. In its filing, AT&T noted that ABI was its only customer for BPSS.

3. In the BPSS decision, we rejected AT&T's proposed tariff revisions on the grounds that BPSS, as offered, could create channels of communications and therefore required certification pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214.[6] We also expressed our concern that the BPSS offering appeared to be primarily tailored for the separate subsidiary, as it appeared that BPSS allowed ABI the exclusive use of computer facilities located on AT&T's premises. The decision made it clear, however, that the Commission "continue(s) to support the addition of new and innovative improvements in the basic network" and that "we are not . . . preventing AT&T from providing a basic packet switching service under tariff." BPSS decision at 4. Rather, the decision requested AT&T to readjust its offering in response to the Commission's

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FCC, 693 F.2d 198 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3676 (U.S. Feb. 9,10, 1983) (Nos. 82–1331, 82–1352).

[5] Tariff FCC No. 270, which contains rates and regulations for services other than BPSS, became effective on March 17, 1983, when the Common Carrier Bureau, acting under delegated authority allowed AT&T's Terrestrial Digital Circuits, filing to take effect. In the Matter of American Telephone and Telegraph Company, Terrestrial Digital Circuits, Memorandum Opinion and Order, FCC 83-___ Mimeo No. +3s , released May ___ , 1983.

[6] Section 214 provides, in pertinent part, that:

> No carrier shall undertake the construction of a new line or of an extension of any line, . . . or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation . . . .

concerns when it sought the appropriate certification pursuant to Section 214 of the Communications Act.[7]

4. On November 16, 1982, AT&T filed a "Request for Special Temporary Authority to Test the Bell Packet Switching Service" (STA).[8] AT&T requested that it be allowed to temporarily interconnect, for the purpose of limited joint testing, the ABI premises located in New York, New York and Somerset, New Jersey with packet facilities owned by AT&T. Interconnection of the network would also require eight DDS 56 kbps circuits. Telenet filed comments in opposition to the request. On December 1, 1982, the Commission rejected Telenet's arguments and granted the requested STA, finding that testing at AT&T's own risk would permit the detection and solution of technical problems.[9]

5. In the current filing, AT&T states it has made several changes to BPSS including (1) renaming the service "Basic" Packet Switching Service (BPSS); (2) allowing shared use of BPSS facilities by unrelated users although all ports (access or trunk) are dedicated to a single user; and (3) making available 9.6 kbps ports in addition to the previously offered 56 kbps ports. AT&T also revised its tariffs to revise the rates for AT&T and OCC interconnection to BPSS using DDS facilities and to correct other defects noted by the Commission in its BPSS decision.[10]

III. *Summary of Pleadings*

6. By and large, Telenet, Tymnet and CBEMA's arguments restate positions similar to those filed in response to AT&T's March 1982 application. Generally, the parties argue that BPSS does not comply with principles set forth in the Commission's *Computer II* decisions, in that, as proposed, it is either an enhanced service or an offering of Customer Premises Equipment (CPE). In either case, they urge, AT&T must offer BPSS through its separate subsidiary, ABI. They also argue that BPSS is not a basic common carrier service because it does not contain basic transmission facilities, nor is it offered in a manner that would make it attractive to other than large and heavy users of communications. Telenet, Tymnet and CBEMA also argue that BPSS continues to favor ABI in its tariff construction and general network design. AT&T, in response, claims that the Commission in its BPSS decision has already made an

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[7] 91 FCC 2d at 15.

[8] Letter to William J. Tricarico, Secretary, FCC from R.K. Jacobsen, VP, Network Engineering, AT&T (November 16, 1982).

[9] Letter to R.K. Jacobsen from Chief, Common Carrier Bureau (December 1, 1982).

[10] With its application AT&T also included a "Memorandum of Law" in which it argues that BPSS does not create new channels of communication within the meaning of Section 214 of the Act. Because we have already decided that issue in the BPSS decision, we will not further consider AT&T's "Memorandum" here.

explicit and well-founded determination that BPSS is a permissible network service.[11] It argues that petitioners are confusing terms, and notes that under *Computer II*, AT&T, as a regulated entity, is restricted to providing basic services, but that basic services are not so restricted as to involve only those with transmission facilities. AT&T characterizes BPSS facilities not as CPE, but as equipment that could be owned by itself or its fully separated subsidiary. Further, AT&T argues that the fact that ABI will be a major BPSS customer is simply not a reason to prevent AT&T from offering the service.

7. With regard to petitioners' arguments that BPSS is an enhanced service, both Telenet and Tymnet allege that dissimilar terminals will be able to communicate when interconnected by a BPSS network. Both argue that the communications protocol incorporated in BPSS will allow computers supplied by different manufacturers, installed at different points in time, utilizing different electrical levels, transmission speeds and error control procedures to communicate with each other. Telenet offers examples showing that terminals initially built to communicate only with other terminals using special communication protocols, such as Binary Syncronous Communications (BSC) protocol or High Data Level Communications (HDLC)[12] protocol, could now communicate with each other through a BPSS network. Telenet further claims that BPSS is an enhanced service because it allows user options associated with the delivery and control of messages through the network, and because BPSS ports can be either 9.6 kbps or 56 kbps, thereby allowing communication between terminals of dissimilar speed. AT&T responds that differing port speeds at either end of the network does not constitute, of itself, an enhanced service, since speed conversion is fundamental to basic service in the performance of network multiplexing functions. AT&T notes that Telenet compares BPSS to its own packet service and argues that there are material differences between Telenet's service and BPSS. AT&T further states that BPSS complies only with the 1980 CCITT X.25 Recommendation as published in Vol. VIII of the CCITT yellow books[13] and as explicated in AT&T's Technical Reference PUB54010, whereas Telenet's service goes beyond that recommendation. Unlike

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[11] AT&T's Reply, at paragraph 9.

[12] BSC and HDLC are two industry accepted protocols that enable digital terminals to communicate with each other. Each protocol defines different elements and procedures necessary for communication. Both protocols achieve the same purpose but are normally incompatible with each other.

[13] CCITT is part of the International Telecommunications Union (ITU) based in Geneva, Switzerland, and is generally recognized as the premier international organization for establishing telecommunications network and operating standards. The standards applicable for the period 1980–84 were published in 1980 and bound in yellow covers. Other periods are bound in different colors, i.e., orange for 1976–80.

BPSS, Telenet's service is said to support device dependent interfaces, carry out protocol conversions and allow for communications between incompatible terminals.

8. A number of petitioners, anticipating that the Commission might approve AT&T's request, propose specific language and conditions that should be included in our authorization. Tymnet proposes that the authorization be conditioned to prevent ABI from using BPSS for a period of 18 months. Tyment argues that this would equalize ABI's advantage gained in obtaining early information from AT&T about the service. Similarly, Telenet proposes that any subsequent Section 214 authorization contain conditions to prevent packet switches from being shared by the BOCs and AT&T. Telenet also proposes that the authorization be conditioned to require that a publically accepted interface standard be adopted to facilitate non-AT&T packet networks connecting to a BPSS network. AT&T responds that Tymnet's concerns about ABI gaining any information advantage are unfounded because AT&T, when it released Technical Reference PUB54010 in September 1981, provided information that allowed enhanced service providers sufficient lead time to accommodate network developments into their service plans. AT&T also contends that Telenet's proposed interconnection condition is premature and should be resolved in the context of network-to-network service arrangements at the time such services are offered. Similarly, AT&T states that because AT&T will not share packet switches with the BOCs, there is no need for Telenet's proposed condition.

9. IBM proposes that our authorization permit the use of BPSS facilities to provide only those services described in AT&T's request. IBM argues that an imprecise grant of the application might cause AT&T to assert that it has "carte blanche" authority to provide any service using the BPSS facilities that it later chooses to offer. Both IBM and CBEMA propose that the language in the authorization should not foreclose Commission jurisdiction over similar future services. The petitioners suggest that this would allow the Commission to review, on an ongoing basis, policy issues where other uses of this type of service may occur. AT&T disagrees and alternatively argues that future policy issues arising in this regard could be adequately handled by the Commission's normal regulatory procedures.

10. Finally, IDCMA in its comments notes that BPSS will increase the use of DDS, which in turn will exacerbate the anticompetitive offering of the Channel Service Unit (CSU), presently part of AT&T's DDS service offering. IDCMA notes that in a separate proceeding (Docket No. 81-216), it takes the position that these units should be provided by the general trade.[14] AT&T

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[14] General trade refers to manufactures of telephone facilities unaffiliated with telephone companies.

responds that the outcome of Docket No. 81–216 will not impact the BPSS offering.

IV. *Discussion*

A. *Public Interest Considerations*

11. In our *Computer II* decisions, we have sought to establish a rational and enduring demarcation between basic and enhanced services. We also have sought, as an important public interest objective, to ensure that innovation and improvements will continue to occur in the regulated basic network, and that broadly available basic services will continue to evolve as technology evolves. *See Final Decision*, 77 FCC 2d at 423 ("[the definition of enhanced service] allows the provider of these basic services to integrate technological advances conducive to the more efficient transmission of information through the network . . ."); *Reconsideration*, 84 FCC 2d at 77 ("the benefits of any improvements introduced into AT&T's transmission facilities to accommodate the needs of the subsidiary would become available to all users of the underlying facility.")

12. BPSS as now proposed appears to satisfy this objective. It offers, on a broadly available tariffed basis, a service for the transmission of digital signals utilizing packet switching technology. Much of our concern that as originally proposed BPSS appeared excessively tailored to the needs of AT&T's separate affiliate, 91 FCC 2d at 16–17, has been resolved by the substantial changes made. In our view, the end result is a BPSS offering which appears to comport with our *Computer II* policies, and with our overriding statutory mandates to promote the availability "to all the people of the United States a rapid, efficient, Nation-wide, and world-wide . . . service with adequate facilities at reasonable charges," 47 U.S.C. § 151, and that "the benefits of new inventions and developments may be made available to the people of the United States," 47 U.S.C. § 218.[15] The packet switching technology in certain circumstances may be a more efficient means of transmitting digital signals than has previously been utilized by AT&T, and in our view should be permitted to be introduced in AT&T's facilities.

13. Furthermore, while a number of entities have offered digital transmission services in the past using packet switching technology (*e.g.*, Telenet and Tymnet), their offerings have often been enhanced offerings, in that they support communications among incompatible terminals (and perform code, format and protocol conversion to support this service within their facilities). BPSS as proposed does not do so. If the current pattern continues for the future, the marketplace will require such conversions to support communications among disparate terminals. BPSS can serve as a "building

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[15] *See also* 47 U.S.C. § 303(g).

block" for desirable enhanced service offerings by a variety of service providers, including but not limited to AT&T's affiliate, and on a fair basis subject to the regulatory constraints of the Act. We conclude that this is a desirable result.

14. In sum, we conclude that the public interest is served by the offering by AT&T of BPSS as proposed. As is detailed below, we have carefully considered arguments to the contrary made in comments filed in this proceeding, and we have concluded that the comments raise no substantial and material questions.[16]

B. *Basic vs. Enhanced Issues*

15. In our BPSS decision, we described the operation of AT&T's BPSS system. 91 FCC 2d at 5–6 and 13–14. Briefly, subscriber messages are segmented into packets of predetermined bit lengths, and the packets are transmitted over packet switched networks in "bursts" of bits. The transmission of each packet is controlled by capabilities residing in the terminals and in each BPSS network node. In the decision, we considered a number of comments which claimed that the control procedures associated with transmission of the packets, and options which were to be made available to subscribers of BPSS, constituted an offering of enhanced service within the meaning of Section 64.702(a) of our rules. We concluded that "there is no question that *Computer II* permits AT&T to offer a packet switching service such as BPSS in the network as basic service." *Id.* at 15. This conclusion is challenged on three grounds in this proceeding.

16. First, it is claimed that AT&T's BPSS will support communications between terminals utilizing disparate communications protocols, and that in so doing the service will be enhanced within the meaning of Section 64.702(a) of the rules. The definition of enhanced service includes, *inter alia*, "computer processing applications that act on the . . . protocol . . . of the subscriber's transmitted information." As indicated above, Telenet alleges that certain link control protocols, HDLC and BSC, are required to be supported simultaneously in a packet-switched network which conforms to CCITT Recommendation X.25, even if the two protocols are used at different ends of the same communication, which would imply that the network would be performing protocol conversion. While it is

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[16] AT&T contemplates that BPSS would be available only if the customer also obtains either a DDS line or a Digital Central Office Connecting Facility, another type of line, from AT&T. Because BPSS would be available only in conjunction with such a line, it is apparent that the service constitutes more than a simple offering of CPE. Thus, although the Commission does not regulate as common carriers the lessors of switching equipment (*e.g.* PBXs) or stand-alone multiplexing equipment, it does regulate communications, i.e., transmission services, such as MTS, that incorporate switching and multiplexing functions. *See* Sections 2(a), 3(a) of the Communications Act.

true that predecessor versions of the CCITT X.25 specification supported two sets of control protocols (and Telenet's own packet-switched network supports both), the current version of X.25, to which BPSS conforms, clearly supports only the HDLC protocol. *See* Section 2.1.2. No reference is made to the alternative BSC protocol, thus it is clear that AT&T has not proposed to support both, or to perform a protocol conversion between the two protocols as part of BPSS.

17. Similarly, Telenet argues that BPSS will support two sets of link access procedures (i.e., sets of protocols) LAP and LAPB, simultaneously, which also in Telenet's view would allow unsimilar terminals to communicate if the two procedures were used at different ends of the same communication. We do not reach this argument here because it is factually incorrect. LAP and LAPB both continue to be specified in the current version of X.25, Section 2.1.1, however, AT&T has not proposed to support both in BPSS. Rather, it has proposed to support only the LAPB protocol. PUB54010, Section 4.2.[17]

18. Second, it is argued that subscribers to BPSS will have certain service subscription options available to them, i.e., the ability to select service to a closed user group, incoming virtual calls only, outgoing virtual calls only, flow control parameters and fast select capability, and that the availability of these options renders BPSS an enhanced service. There is no basis for this claim. Subscribers of basic common carrier services often have service options available to them (pricing options, restricted service options, private line versus switched services, etc.), and the options involved in BPSS are no different from these. Significantly, Telenet does not relate any of these options specifically to the definition of enhanced services in Section 64.702(a) of our rules, and in our view, they cannot do so. None of these represents the type of processing of, or changes to, subscriber information which is reached by the definition.

19. Third, it is argued that although BPSS as currently proposed to be offered may not invoke the definition of enhanced service, the actual processors to be used in BPSS are capable of supporting

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[17] A related argument is made by Telenet and Tymnet that in supporting communications at both 9.6 kbps and 56 kbps, which could involve a speed conversion in the BPSS facilities if terminals operating at the two speeds were at different ends of the same communication, BPSS is an enhanced service. In *Computer II*, we acknowledged that intermediate network storage of information during the course of its transmission, to facilitate the transmission, is permissible in a basic service, *see* 77 FCC 2d at 420 and 84 FCC 2d at 55–59. *Computer II* did not preclude a basic network from converting to different transmission speeds. Speed conversion alone, unaccompanied by changes in the format, content, code and protocol, is implemented in principle by the use of such intermediate network storage, and does not involve subscriber "interaction" with stored information. In sum, the speed conversion which may be implicit in the offering of 9.6 and 56 kbps ports in BPSS does not alter the classification of BPSS as basic.

broader capabilities. Because of the possibility that these facilities *might* support enhanced services in the future, it is argued that we should determine that the currently proposed offering is enhanced. We are not persuaded by this argument. Indeed, many electronic central offices today are capable of supporting enhanced services, and on this theory they should not be permitted to provide basic MTS.[18] As is discussed below, we are persuaded by the related argument that evolution of BPSS should be carefully scrutinized to ensure that is is not transmuted in the future into an offering of enhanced service, and for this reason we are specifically conditioning our authorizations herein accordingly.[19]

20. In sum, in our earlier BPSS decision, we examined carefully the contentions of various parties that BPSS, as proposed to be offered, was an enhanced service, and we concluded on the basis of information before us that the proposed offering would be basic. Several parties have filed comments which, in essence, seek reconsideration of that determination. We have carefully analyzed each of their specific arguments and found that they are incorrect, in large measure because they are based on the view that while BPSS as currently proposed to be offered may be basic, it might evolve in the future toward an enhanced service. As noted, this possibility is present in virtually all current basic service offerings inasmuch as they are increasingly implemented through the use of relatively agile stored-program controlled facilities which are capable of being reprogrammed to support the offering of enhanced services. Indeed, it is clear that even the electronic central office facilities which support the offering of conventional telephone service are capable of doing so. We have already acknowledged this potential, and have demonstrated that we will carefully examine new offerings proposed to be made over existing stored-program controlled facilities to ensure that they are not impermissible enhanced service offerings.[20]

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[18] *See* American Telephone and Telegraph Co. (Custom Calling Services II), 88 FCC 2d 1 (1981).

[19] *See* para. 38, *infra*.

[20] In September 1982, CBEMA filed a petition for limited reconsideration and clarification of our BPSS decision. CBEMA asks that we reconsider our finding that BPSS packet switches are basic service transmission facilities subject to Section 214 of the Act, or, in the alternative, that we interpret and reaffirm our decision in light of Computer II. To that end, CBEMA urges that our grant make it clear that the Commission is in no way modifying any of the Computer II criteria for defining basic services. CBEMA argues that (1) the BPSS offering does not involve any code or protocol conversion of subscriber data, but rather, the subscriber's information must be packetized prior to delivery to the carrier according to prescribed X.25 protocol standards; (2) in designing BPSS, AT&T has chosen a specific subset of those protocols in attempting to make its service basic; (3) any user negotiated options are chosen by the subscriber and do not involve the carrier in any conversions between originating and terminating subscriber facilities; and (4) the BPSS facility is fully transparent to the subscriber except as

C. *Computer II Separation Rules Concerns*

21. In the BPSS decision, we said that AT&T's Section 214 filing should focus upon and clear up several concerns raised in the pleadings with respect to *Computer II*.[21] Specifically, we asked AT&T to buttress its claims that BPSS would have general utility, and is not an offering primarily tailored for its separate subsidiary. While we noted that *Computer II* permits AT&T to employ packet transmission technology in the provision of a basic service, we cautioned that because a packet switch is a sophisticated computer facility, when AT&T provides such facilities to its enhanced services subsidiary, it must be careful to comply with the "separation" rules established in *Computer II*. Most of our concern about the BPSS filing centered around the *Computer II* prohibitions against allowing the subsidiary to use in common with AT&T any physical space or property on which transmission equipment or facilities used to provide basic service is located, and allowing the subsidiary to share computer facilities with its parent.[22] We raised these concerns because BPSS, as then structured, appeared to allow ABI exclusive access to computer facilities located in AT&T's central offices to provide ABI's enhanced services. Indications of this included that (1) BPSS was developed for used with AIS; (2) the vague nature of certain tariff provisions suggesting that BPSS was not a service offering directed at customers other than ABI; and (3) multiple parties could not use a single BPSS switch, and thus it would be located in AT&T's central offices and dedicated for the sole use of the separate subsidiary.[23] We asked AT&T to provide in its Section 214 filing additional support for the claim that BPSS was an open service with value and utility to users other than ABI. We noted that if it was not, BPSS could bring about the very problems the Commission sought to avoid when it adopted its separation requirements.[24] For example, AT&T could impose rates for BPSS use of DDS lines that favor ABI over its competitors who secure their own packet switches and also use DDS lines to connect those switches. In addition, cross-subsidization could occur if AT&T were to underprice BPSS, thereby lowering the cost to ABI of providing AIS, and then make up this deficit through other regulated services.

22. In order to address the concerns raised in the Commission's BPSS decision, AT&T has made a number of significant changes to Tariff 270 and to the service itself. The revisions to Tariff 270 alleviate the problems we pointed out that potential customers, who

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necessary to establish the interface to the service. In light of the foregoing discussion, this petition is moot.

[21] 91 FCC 2d at 15.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 16.

would likely be ABI's competitors, would be faced with in ordering service from AT&T.[25] In addition to removing or revising tariff provisions which could discourage potential customers other than ABI, AT&T has made certain changes to the service itself which should make it more attractive to other customers, and thus a more general offering. One such change is that AT&T would now allow unrelated users to share a BPSS facility rather than requiring, as before, a single user to subscribe to an entire device. Tariff 270 now permits a BPSS subscriber to lease as few or as many ports on a BPSS facility as it requires.[26] A second change in BPSS is that 9.6 kbps ports will now be available to subscribers, in addition to previously proposed 56 kbps ports. Through these changes in the BPSS offering, AT&T has lowered the entry threshold for users and broadened the base of appeal for this service. We find these changes to be significant improvements responsive to the concerns raised in the BPSS decision.

23. Another problem raised in our BPSS decision was that AT&T's use of DDS transmission facilities could favor ABI over its competitors who secure their own packet switches and also use DDS lines to connect those switches.[27] Under that scheme, when a DDS customer terminated a DDS line at the premises of a customer, user or OCC, the DDS customer was to be charged $908.00 per month. On the other hand, the charge to terminate a DDS line at an AT&T central office for the purpose of connecting to BPSS would be only $180.00 per month. We determined in the BPSS decision that this rate structure could result in significantly lower overall charges to ABI for DDS connections in its packet network than its competitors

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[25] For example, AT&T deleted the provision which allowed it discretion to establish an installation date on a service by service basis, and by which it disclaimed responsibility to the customer if such date was not met. AT&T also removed the provision which afforded it discretion to accommodate customers' requests for special service features and arrangements. The final provision which gave us concern was Section 2.5.6 of the proposed tariff, which gave AT&T the right to require very large deposits as a guarantee that charges would be paid by the customer. While deposit provisions are standard in AT&T tariffs, we noted in the BPSS decision that the deposit could be required where the customer intended to take service only for a "limited period," and that in such cases the deposit could be applied as an advance payment of the customer's bill. These latter provisions did not comport with standard tariff practice. For one, no definition was given for the term "limited time," so the customer would not know the exact meaning of this provision. For another, deposits are not synonymous with advance payments, and making them so could deprive a customer of its rightful interest on the deposit. AT&T has corrected these problems in Tariff 270. In Section 2.6.6, AT&T has deleted the phrase "limited time," and now specifies the advance payment. In addition, AT&T has treated advance payments and deposits as two separate charges in two separate provisions.

[26] Although AT&T does propose a minimum usage charge, the charge does not appear to be of sufficient magnitude to discourage entry on the part of medium-sized customers.

[27] 91 FCC 2d at 16.

would pay for DDS connections to their own packet switches. In so doing, we referred to a letter from the Chief, Tariff Division, Common Carrier Bureau, dated March 10, 1982 on this same subject.[28] AT&T in this filing has eliminated any rate differences for DDS access lines by charging $908.00 per month for all 56 kbps DDS lines.[29] Thus, it has sought to ensure that charges to ABI for DDS connections will be in line with charges ABI's competitors must pay for DDS connections to their own packet switches.

24. In view of the changes to BPSS discussed above, AT&T has moved the BPSS service toward the Commission goal of having a packet service with general utility for the network, rather than an offering with utility only for ABI. As the service matures we are hopeful that it will evolve even further as a general offering.

25. AT&T has not publicly announced plans to develop BPSS into a switched common user offering and we are not requiring it to do so at this time. However, we believe that no technological reasons exist to prevent AT&T from providing a more common user oriented packet switching service without the leasing of dedicated transmission lines. Some carriers already offer similar services and the communications industry is continuing to develop ways to reduce the user's entry threshold for X.25 networks. For example, there are presently proposals under consideration to allow "dial up" access from the MTS network. In addition, manufacturers have recently announced end user terminal component attachments that will interface directly into X.25 networks. We recognize, though, that the economic justification for a common user service might arise from first fulfilling the more specialized needs of large users. However, we believe it not unlikely that in the future, as the service matures, smaller users will find it increasingly attractive. We expect that AT&T will respond to such market demands by adopting tariff changes which would accommodate such smaller users. For example, as already suggested, one way to make BPSS a more generally useful service offering would be to develop it into a fully implemented common user service that could be tariffed on a message use basis. To monitor developments, we order AT&T to report on any expected or proposed changes in BPSS forecast for the coming year. This report must be submitted no less than 60 days in advance of any

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[28] In this letter, it was noted that the Commission's decision in Docket No. 20288, relating to DDS, required that the rate structures which applied to Tariff 260 services also apply to DDS.

[29] This $908.00 per month charge is the rate for a DDS access line currently in effect in Tariff 267. AT&T, in this filing, has proposed to apply this rate, rather than the $180.00 rate initially proposed, to DDS terminations in its central offices for purposes of connecting to BPSS.

proposed change. AT&T may either file this report separately or include it in its yearly Section 214 blanket authorization filing.[30] However, any proposed change included in AT&T's blanket authorization filing may not take effect less than 60 days from the date of that filing. The staff shall instruct AT&T as to the format and content requirements of this report.

26. In response to the petitioners' claims that BPSS is not a common carrier service, but instead is an offering of customer premises equipment (CPE), AT&T argues that such finding would preclude AT&T's provision of commonly accepted basic services such as Common Control Switching Arrangement (CCSA), Enhanced Private Switched Communications Service (EPSCS), Switched Circuit Automatic Network (SCAN) and Central Office Centrex. We agree with AT&T that BPSS is not CPE, but rather, as in the case of the other services mentioned above, part of the network.[31] (See note 16, *supra*, for additional discussion).

D. *Tariff Concerns*

27. While AT&T has corrected the tariff problems we identified in our BPSS decision, AT&T's revised and modified filing contains certain new tariff provisions which raise a number of additional concerns. Because we have in this order resolved our fundamental difficulties with BPSS, we hope to allow the related tariff to go into effect on short notice and thus allow service to the public to begin. We therefore take this opportunity to point out here our remaining specific tariff concerns so that AT&T may take action to solve our problems without lengthy and time-consuming tariff investigation and suspension procedures.

28. Our first problem relates to proposed Section 6.2.3.C, where AT&T would now require a minimum of twelve months notice, in writing, prior to discontinuance of BPSS. This twelve month notice of discontinuance requirement would apply even if a customer has had the service for a number of years. If notice is not given, the recurring charge for service would continue to apply for a period of twelve months from the date AT&T received notice, whether or not

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[30] The blanket filing technique permits AT&T to receive Section 214 authorization for the major part of its annual construction in a single filing. *See* 47 C.F.R. § 63.06.

[31] Notwithstanding the above, however, we intend to scrutinize BPSS once it is actually offered to the public under tariff to ensure that it is indeed a generally useful and available service. We wish to ensure that BPSS does not become a means by which AT&T could favor unreasonably its unregulated subsidiary, ABI. Should BPSS be used almost exclusively by ABI, serious questions would arise as to whether the service was communications common carriage at all. *See* NASA, 61 FCC 2d 56 (1976). Should BPSS be used almost exclusively by ABI, the Commission will consider taking further steps to ensure that there are no unreasonable barriers, tariff or otherwise, blocking the ability of the general public to use this service.

the customer continued to take service. Such a notice period would appear to severely limit a BPSS customer's ability to make rational economic decisions based upon the availability of alternative offerings, technologies and prices, and would, furthermore, discourage new customers from taking the service. By holding a customer to the service for a twelve month period, regardless of use, AT&T would in effect restrict the ability of its customers to take advantage of other carriers' similar offerings that might be available at lower prices, or that might provide more efficient and economical service because of new technology.

29. Furthermore, AT&T in this filing has not explained how this notice requirement is related to costs. Nor has it given any justification for the need for twelve months notice from an operational standpoint. Another difficulty we have with this requirement is that AT&T is silent as to whether, if replacement customers for BPSS facilities are available, a subscriber would still be bound to pay for service for the full twelve months following notice. Finally, AT&T says that its facilities plans are updated monthly. Thus, it would seem that AT&T's plans for reuse of facilities should be subject to demand considerations, and that AT&T has the ability, when demand warrants, to make facilities available in less than twelve months time.

30. We are aware that the marketing problem which AT&T seeks to overcome with this twelve-month notice provision is a common one, though varying in degree, to all private line or dedicated services. With the exception of the recently filed Terrestrial Digital Circuits (TDC) tariff,[32] which became effective March 17, 1983, however, AT&T has imposed no similar tariff conditions on other private line services such as Series 2000 and 3000 voice-grade channels, CCSA or other services contained in Tariff 260. Even in the case of TDC, moreover, the required notification period prior to termination is three months. In view of the fact, therefore, that there are other ways for AT&T to recover costs associated with time lapses caused by service discontinuance, we are very concerned that the ratemaking techniques proposed here will pose a significant obstacle to market entry, arbitrage,[33] and particularly, achievement of our stated goal of making BPSS a more generally useful service. For all

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[32] *See* note 5, *supra*.

[33] We believe the twelve-month notice requirement would discourage resale, sharing and arbitrage. Arbitrage, in the Commission's regulatory scheme, is seen not as a means of developing vested interests, but as a way of bringing rates into line with competitive pricing patterns. Once the forces of arbitrage and/or sharing make the maintenance of monopoly-type rates infeasible, we expect that the initiator of these rates will eliminate the discrimination and the opportunity for arbitrage. In such circumstances, the reseller would suddenly have nothing to offer and its customers would migrate, as rapidly as possible, back to the underlying carrier's service. Under AT&T's proposal, at such point in time the

of the above reasons, we have significant problems with the proposed twelve-month notice requirement. We believe that AT&T can propose a substantially shorter notice period that would partially accomplish its marketing goals without unduly interfering with Commission policy.

31. A second new tariff provision which we believe has not been justified and could discourage potential users is proposed Section 6.2.4.A. That section states that if a customer's requirement for ports at one BPSS location exceeds the available capacity of that switching arrangement, an additional switching arrangement may be required in order to provide the requested number of ports. When this occurs, trunks are required to connect the newly installed switching arrangement to the existing switching arrangement. Under AT&T's tariff scheme, the last customer to gain access to a BPSS switch must pay for the trunk which AT&T claims is required to connect the two BPSS switches. It would appear, on the basis of information before us, that these intermachine trunks would be useful for other functions in addition to satisfying the dedicated communications requirements of a single customer. Even if this were not the case, we would question whether it is reasonable to charge one customer more than another even though the two would effectively receive the same service, i.e., the same number of switching ports with the same functional capabilities. In view of the fact that BPSS is represented as a general tariff offering this practice raises questions of equity and discrimination. We expect therefore that AT&T will explain why it believes the above practice to be reasonable, or, failing to do so, will eliminate it and distribute the attendant costs over all customers.[34]

32. Review of the support material AT&T provided with its illustrative tariffs raises two methodological concerns. Our first concern relates to AT&T's support for the BPSS minimum monthly usage charge.[35] As proposed, this monthly charge is $1,150 per access port, or 852 kilopackets of usage. AT&T developed this charge by determining the average monthly revenue per switch over a three-year planning period, from 1983–1985, and then dividing that amount ($128,800) by the average number of available access ports (112) per switch over the 18 month period from 1983 to mid-1984. According to AT&T's own projections, however, the number of access ports per BPSS switch is to be increased through the end of 1985, and this increased number of ports would raise the average number of

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reseller would be left without customers and yet would face the necessity to pay for a full year of unused service.

[34] AT&T should also revise Section 6.2.6.B to indicate whether the minimum monthly usage charge required by Section 6.2.4.B.4 applies when a customer tests its equipment before beginning service.

[35] See Volume 2, Section 5 of Basic Packet Switching Service, Description and Justification, November 1982.

ports per switch to 115, consequently lowering the average monthly charge. Thus, AT&T's use of different time periods to derive average monthly use per access port is clearly erroneous. In filing its BPSS tariff offering, AT&T should correct this methodology and use the same time period to determine the average number of access ports and the average monthly revenue.[36]

33. The second methodological problem relates to the development of the minimum usage charge, one purpose of which is to ensure that the revenue requirement necessary to cover AT&T's switch investment and expenses will be recovered even if no usage occurs. In deriving this charge, AT&T has simply divided the average monthly switch revenue requirement by the number of access ports. We believe that this methodology sets the minimum usage charge at a significantly higher level than is needed to guarantee AT&T's revenue requirement. This is so because many access ports can be expected to substantially exceed the minimum usage level, thereby contributing more than an average amount of revenues. If customers were assessed the minimum usage charge for all remaining ports, even if they did not have the average amount of usage, AT&T would have realized more than its total BPSS switch revenue requirement. Therefore, AT&T could safely reduce the minimum usage requirement, a measure which would also have the salutory effect of lowering the entry threshold to potential BPSS customers. A preferable way to compute the minimum charge would be to construct a distribution of usage and develop rates based on that distribution, such that the aggregate revenues equal the total BPSS switch revenue requirement. In filing its revisions to Tariff 270, we expect AT&T to conduct such an analysis or demonstrate why its current method is appropriate.

34. Finally, with respect to tariff issues, we note that AT&T has proposed revisions in recognition of the Commission's concerns regarding potential imbalances in rates between DDS connections to BPSS, and DDS connections to packet switches located on customer premises. These revisions would provide for identical charges whether a DDS channel is terminated at the premises of a customer or within a telephone company office for connection to BPSS. This rate structure is said to ensure equal treatment of ABI and its competitors in the provision of DDS by AT&T. We consider this to be an extremely important change and we would be quite concerned if AT&T, at a later date, attempted to reinstitute different pricing techniques for BPSS terminations in the central office and customer premises terminations. To understand our concern here, some background is necessary. Private line service, as defined by the

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[36] A rough calculation indicates that by considering the addition of these ports, the proposed minimum monthly usage charge would be reduced by about $30 per access port.

telephone company for many years, is the offering of a dedicated channel extending between and among service points designated by the customer. In certain cases, one of the points or locations designated by the customer is an AT&T central office. For example, a CCSA switch located in the telephone company central office is considered a customer designated channel termination point. Historically, rates and rate structures for interstate private line services have generally not differentiated between customer and telephone company channel termination points. In other words, the rate has been the same to terminate a channel at a telephone company office as for any other customer designated location. As noted above, in its March 1982 BPSS proposal, AT&T departed from this historical ratemaking practice by devising a pricing structure which singled out telephone company points for special rate treatment.

35. We questioned this pricing approach in the BPSS decision for two reasons. First, we believe that there are significant public interest concerns if AT&T merely singles out BPSS central office terminations for independent rate treatment, while charging a single averaged rate for all other terminations.[37] The second reason which prompted us to criticize AT&T's rate structure was our recognition that ABI was likely to be at least the principal user of BPSS for the immediate future. Since any rate advantages accorded BPSS would immediately inure to the benefit of AT&T's subsidiary, AT&T had a clear incentive to discriminate in favor of BPSS when pricing the associated private line channels to the detriment of other enhanced services providers who also rely on AT&T transmission services. We were therefore concerned that AT&T's rate structure could undermine the separation policy objectives of *Computer II*.

36. In addition to finding that AT&T's modifications to the BPSS tariff should make the service more attractive to potential customers other than ABI, our conclusion that the public convenience and necessity requires us to grant AT&T's application also rests upon the elimination of special rate treatment for the BPSS channel termination. Thus, as indicated above, we would have considerable problems if AT&T were later able to implement a DDS rate structure which gave special treatment to BPSS terminations.[38]

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[37] It appeared, furthermore, from AT&T's initial filing that the $180 charge would have applied even in cases where the BPSS machine and the DDS channels terminate at different central offices.

[38] Our concern here should not viewed as disallowing separate charges for service functions—*e.g.*, special testing, intra-office or cross-office connections—performed at the central office pursuant to a customer's request. Also, as competition in the marketplace evolves, our overall policies on ratemaking and interconnection will be continuously monitored to insure that a fair equilibrium exists which does not unreasonably disadvantage any competitor, including AT&T.

E. *Other Issues*

37. We consider now the various proposals made by petitioners to condition AT&T's Section 214 authorization. Telenet proposes that our grant restrict the sharing of BPSS facilities between AT&T and the BOCs. Telenet argues that AT&T-BOC sharing would preclude AT&T's competitors from having equal access to the BOC portion of the BPSS facilities. Because AT&T has indicated in its Reply that it does not intend to share BPSS facilities with the BOCs, it is not clear that such a condition is needed. Any future BPSS sharing decisions would be subject to full regulatory scrutiny. Telenet also proposes that we include language in our grant to require that interconnection of BPSS with other packet networks be accomplished by a publicly accepted interface standard such as CCITT's X.75 recommendation.[39] Because no equal access or interconnection policy for digital and packet networks has been implemented, it would be inappropriate to adopt the proposal offered by Telenet. Moreover, this issue is now the subject of General Docket No. 80–756, and is thus more appropriately considered in that proceeding.[40] Accordingly, we reject Telenet's proposed condition.[41]

38. In its comments, IBM proposes that we limit our grant of AT&T's authority to those specific services described in the application. IBM argues that an imprecise grant at this time may cause AT&T to assume that it has "carte blanche" authority to provide any service using BPSS facilities it chooses. We are aware that the 3B20 processor used in BPSS is a versatile, programmable instrument that might be configured through software changes to provide services that as yet have not been contemplated. Considering the competitive environment, the limited regulatory control of current standards organizations in the United States, and the evolutionary response of standards to new technology, we would expect that the nature of BPSS services could change. The impact of such services could require Commission attention. At the very least, the public interest requires that the Commission be afforded an opportunity to examine new BPSS service offering in light of the competitive environment at the time such services are contemplated.[42] We anticipate that the means for review of such proposals is through Section 214. Therefore, we will restrict AT&T's BPSS offering to those services

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[39] Terminal and Transit Control Procedures and Data Transfer System on International Circuits Between Packet Switched Data Networks. FASCICLE VIII.3 - 1980 CCITT Yellow Books.

[40] Digital Communications Protocols, Docket No. 80–756, Notice of Inquiry, 83 FCC 2d 218 (1980).

[41] We need not consider in this proceeding IDCMA's comment concerning the Customer Service Unit as part of AT&T's DDS service offering. This matter is currently under consideration in Docket No. 81–216.

[42] *See* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Execunet I).

described in its August 1981, PUB54010 Technical Publication. We also believe this condition satisfies CBEMA's concern regarding Commission jurisdiction to consider further service offerings.[43]

39. In our BPSS decision, we found that BPSS could create channels of communications within the meanings of Section 214(a) of the Act, and we therefore required that AT&T apply for certification pursuant to Section 214 of the Act. In this proceeding, which is in response to AT&T's Section 214 application, we make the requisite public interest finding with regard to BPSS. Implicit in our acceptance of the application for filing, and by our discussion herein, we find that BPSS is a basic service under Section 64.702 of our rules.

V. *Conclusion*

40. Our finding that grant of this application will serve the public interest, convenience and necessity is the result of a balancing of several considerations. See paras. 11–14 supra.

41. Having reviewed and considered AT&T's request for authority to provide BPSS, as well as the arguments offered by the several petitioners, we find no technical or legal reasons that can be construed as violations of our *Computer II* policies.

42. Accordingly, in view of the considerations expressed above, IT IS ORDERED that the petitions to deny filed by CBEMA, TYMNET and TELENET ARE DENIED.

43. Further, IT IS CERTIFIED, subject to the conditions in paragraphs 25 and 38 above, that the public convenience and necessity would be served if the Basic Packet Switching Service is offered as part of the basic network service as proposed in application W-P-C-4841 and as described in PUB54010, August 1981. Therefore, IT IS ORDERED, pursuant to Section 214 of the Communications Act, that the American Telephone and Telegraph Company IS HEREBY AUTHORIZED to provide the services as specified in the captioned application.

44. IT IS FURTHER ORDERED, that the September 1982 petition for limited reconsideration and clarification filed by CBEMA is DISMISSED AS MOOT (*See* Note 20, *supra*), and that the March 1983 petition for rulemaking filed by CBEMA IS DENIED (See note 1, *supra*).

45. The applicant is afforded 31 days from the date of release of this order to decline this authorization as conditioned. Failure to

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[43] Tymnet also proposes that, to minimize the effects of AT&T's disclosure of information to ABI, the separate subsidiary be barred from using BPSS for a period of eighteen months, or until a competitor of ABI uses BPSS, whichever is less. The Commission has recently resolved this argument in a separate proceeding that clarifies the Computer II disclosure rule. Computer and Business Equipment Manufacturers Association, Report and Order, FCC 83-182, Mimeo No. 33209, at paragraphs 66–68, released May 9, 1983.

respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Filing
Consolidation of Case for Hearing
Cut-off rules

> Where an application filed late because air carrier could not provide next day delivery due to grounding at an intermediate stop, "unusual and compelling circumstances" are demonstrated to warrant waiver of Sections 73.3572(c) and 1.227(b) of the Rules.
> –*Caldwell TV Associates, Ltd.*

FCC 83–257

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
CALDWELL TELEVISION ASSOCIATES, LTD.
Caldwell, Idaho
For a Television Construction Permit

ARN-820217KE

MEMORANDUM OPINION AND ORDER

(Adopted: May 26, 1983 Released: June 2, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONERS JONES AND DAWSON DISSENTING; COMMISSIONER SHARP ABSENT.

1. On December 10, 1981, Benjamin B. Moore (BPCT-811210KE) filed an application for a new commercial television station to operate on Channel 9 in Caldwell, Idaho, and was assigned a cut-off date of February 16, 1982. Canyon Communications (BPCT-820216KF) and Cascade Broadcasting Group, Ltd. (BPCT-820216KH) filed timely competing applications by that date. On February 15, 1982, Caldwell Television Associates, Ltd. (CTA) delivered the above-captioned application to Purolator Courier Corporation, an air express courier service in Chattanooga, Tennessee; however, dense fog forced the closing of the Columbus, Ohio, airport, an intermediate stop for Purolator, and next day delivery to the Commission was not possible.[1] The application was ultimately delivered at 8:50 AM the following day (February 17); however, the staff returned it as untimely filed on February 25. On March 29, 1982, CTA sought reconsideration of that action, arguing: (a) that it had done every-

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[1] All this information is supported by affidavits from persons with actual knowledge of the facts.

thing required in order to assure that the application would be timely filed; (b) that acceptance of the application would not have disrupted the Commission's processing of the Caldwell applications, since they had not yet been designated for hearing; and (c) that acceptance of its application would be consistent with Commission precedent.

2. On September 23, 1982, the Broadcast Bureau, in denying CTA's petition, noted that Section 73.3572(c) of the Commission's Rules provides for the periodic release of public notices listing television applications which have been accepted for filing and providing cut-off dates by which all mutually exclusive applications must be filed. The Bureau found that Section 73.3572(c) has been strictly enforced, with waivers granted only in "unusual and compelling circumstances," and CTA had not shown the existence of such circumstances here. *Prairie Broadcasting Co.*, 47 F.C.C. 2d 373, 377 (1974). Consequently, the Bureau denied reconsideration.

3. CTA has filed an application for review of the Bureau's September 23 action and, pending its resolution, requested stay of further processing of the other applications, including their designation for hearing.[2] Our cut-off rules are to be strictly enforced with waivers granted only in unusual and compelling circumstances. A prerequisite to such a waiver is that an applicant demonstrate that it has exercised reasonable diligence. Any tardiness must be attributable to circumstances beyond the applicant's control. *Wright County Broadcasting Co.*, 13 R.R. 2d 1251 (1968); *Pictronics, Inc.*, 32 F.C.C. 2d 325 (1971).

4. In this case, we find that CTA did exercise reasonable diligence to assure timely delivery of its application. On the day before the cut-off date, CTA delivered its application to Purolator in sufficient time for that company to deliver it to the Commission the next day under normal circumstances. While it may have been more prudent for CTA to have allowed extra time for unforeseeable delays in delivery, certainly severe weather conditions in another part of the country could not have been reasonably anticipated and constitute circumstances beyond the applicant's control. Consequently, we believe that "unusual and compelling circumstances" have been demonstrated to warrant waiver of Sections 73.3572(c) and 1.227(b)[3] of the Commission's Rules and grant of CTA's application for review.

5. We wish to take this opportunity to reaffirm our intent to

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[2] CTA's application for review and request for stay were filed on October 28, 1982, a Thursday. The following Tuesday, November 2, 1982, the other applications were designated for hearing without the knowledge that the application for review and request for stay had been filed. The hearings are not scheduled to begin until April, 1983.

[3] Section 1.227(b) provides that no application will be consolidated for hearing with previously filed applications unless the application is tendered for filing by the cut-off date.

continue to enforce strictly the cut-off provisions of our rules and expect all applicants and their counsel to adhere thereto. The rules afford all parties, be they located in Washington, D.C. or elsewhere, adequate time to submit their applications, amendments, and pleadings in a timely manner. We caution parties who wait until the last possible day to effect delivery of their submissions from out-of-town, based on the "guarantees" of all courier services that they run a considerable risk that delays in delivery will render their filings untimely. Absent unusual and compelling circumstances, a party's sole reliance upon the "guarantee" of these organizations would be misplaced and would not excuse the consequences of its untimely filings.[4]

6. Since our action here resolves the necessity of ruling on the petition for stay, it will be dismissed as moot; however, the presiding Administrative Law Judge in the proceeding involving the other Caldwell applications may take this Order into consideration in the setting of hearing dates.

7. Accordingly, IT IS ORDERED, That CTA's application for review IS GRANTED.

8. IT IS FURTHER ORDERED, That the petition for stay filed by CTA IS DISMISSED as moot.

9. IT IS FURTHER ORDERED, That Sections 73.3572(c) and 1.227(b) of the Commission's Rules ARE WAIVED.

10. IT IS FURTHER ORDERED, That in due course, pursuant to Section 73.3522 of the Rules, CTA's application shall be accepted for filing and placed on an appropriate "B" cut-off list and, thereafter, designated by the Chief, Mass Media Bureau for a consolidated hearing.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[4] We note that we have in preparation a Notice of Proposed Rulemaking designed to explore alternatives to the present rule that could remove the uncertainty in situations similar to the instant case, including a "mail box rule."

Reconsideration, Petition for, Denial of

Petition for reconsideration of Review Board decision, 93 FCC 2d 643, denied. Petitioner essentially reargues the points it previously made.
–Cannon's Point B/cing Co.
BC Docket No. 81–306

FCC 83R–38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	BC Docket No. 81–306 File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	BC Docket No. 81–307 File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	BC Docket No. 81–309 File No. BPH-801003AF
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983; Released: May 13, 1983.)

BY THE REVIEW BOARD:

1. On April 28, 1983, Cannon's Point Broadcasting Company filed a petition for reconsideration of our Decision, FCC 83R-22, released March 29, 1983, which affirmed the ALJ's selection of Dale Bell as the best comparative applicant in this proceeding, *see* Initial Decision, FCC 82D-58, released August 17, 1982. Our Decision placed Cannon's Point last in the overall comparison because of the clear quantitative integration superiority of the other applicants. Cannon's Point now requests a moderate comparative preference because of its previous efforts as the successful petitioner in the rule-making proceeding which culminated in the assignment of Channel 224 to St. Simons Island, and by virtue of the fact that its application

was filed first. Such a preference would be unprecedented and is not supported here by reference to any pertinent Commission policy objective. Furthermore, petitioner's reliance on *Kentucky Broadcasting Corp., Inc.*v. FCC, 174 F.2d 38 (D.C. Cir 1949), is misplaced. That case held that the filing priority of applications may *not* be the controlling factor in determining which mutually exclusive application would best serve the public interest. Petitioner's other arguments, which pertain largely to the integration factor, have been thoroughly considered and resolved by the Board in its Decision. See paragraphs 9–13 thereof. Because it is well-established that reconsideration is not available "merely for the purpose of again debating matters on which the [deciding body] has once deliberated and spoken," *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co.*v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), we decline to rehash these issues again.

2. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed April 28, 1983 by Cannon's Point Broadcasting Company IS DENIED; and

3. IT IS FURTHER ORDERED, That the petition for extension of time in which to file opposition pleadings, filed May 10, 1983 by James U. Steele, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Cellular Communications Systems
Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular Applications

> Applications for Review of staff actions returning amendments to cellular applications as major granted. Application granted in part concerning amendments remanded to the Common Carrier Bureau and denied in all other respects.
> –*Cellular Communications Systems*

FCC 83-286

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

MID-AMERICA CELLULAR SYSTEMS, INC.

For construction permits to establish cellular systems operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Kansas City, Missouri and Kansas; New Orleans, Louisiana; and Dallas-Fort Worth, Texas modified Standard Metropolitan Statistical Areas

File No. 26137-CL-P-(8)-82

File No. 26133-CL-P-(4)-82
File No. 26158-CL-P-(5)-82

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1983 Released June 24, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. Presently before the Commission are two Applications for Review filed by Mid-America Cellular Systems, Inc. in three markets; Kansas City, New Orleans and Dallas-Fort Worth. The Applications For Review challenge actions taken by the Chief, Mobile Services Division, Common Carrier Bureau (Bureau)[1] in which amendments to MACS' applications in all three markets were returned as major and unacceptable for filing. Responsive pleadings have also been filed. All of the Applications for Review will be disposed of in one order since identical issues were raised in all three markets.

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[1] As explained below, the Commission has delegated to the Chief, Common Carrier Bureau, authority to act on the matters involved here in Part 0 of the rules. The Bureau Chief has subdelegated such authority to the Division Chiefs by Order released April 28, 1981, 46 Fed. Reg. 26,173 (1981).

2. Having reviewed the pleadings, prior decisions, and applicable Commission precedent, we conclude that the Bureau has the authority to return cellular amendments which are major or unacceptable for filing. The Commission in its *Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58 (1982), at para. 69, and in Section 22.23(c)(1) of the rules, established the classifications and guidelines for cellular amendments.[2] The Common Carrier Bureau has delegated authority to apply the classifications and guidelines to all amendments tendered for filing as well as authority to reconsider and reaccept previously returned amendments. Based on the cellular rules applicable at the time that MACS' amendments were filed, the Bureau properly returned the amendments as major and unacceptable for filing. Nothing in the pleadings before us persuades us that the Bureau exceeded its delegated authority or acted on matters presenting novel questions of fact, law or policy.

3. However, subsequent to the Bureau's return of the MACS amendments, we stated in *Advanced Mobile Phone Service, Inc.* (Chicago Order), 91 FCC 2d 512 (1982) that inflexible application of the rules in the 30 largest markets would not be in the public interest. Thus, we ordered several applicants to file major amendments to nonconforming cellular applications. In addition, we recently modified the rule regarding changes in the Cellular Geographic Service Area (CGSA) to classify only increases in the CGSA as major changes.[3] In light of our change in policy as well as the recent amendment of Rule Section 22.23(c)(1), we will remand the amendments at issue to the Common Carrier Bureau, Mobile Services Division for further consideration and appropriate action and grant the Applications For Review in all three markets to this extent. The Applications For Review will be denied in all other respects.

4. Accordingly, IT IS ORDERED that the Applications for Review filed by Mid-America Cellular Systems, Inc. ARE GRANTED to the extent set forth above, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[2] Section 22.23(c) states that amendments will be classified on an *ad hoc* basis and then goes on to list certain types of amendments that are "major", including any change in a Cellular Geographic Service Area. This particular provision, Section 22.23(c)(d), was recently amended to classify only increases in the Cellular Geographic Service Area as "major" changes. Order FCC 83-161, released April 22, 1983.

[3] *See* n. 2, *supra*.

Common Carrier, Interconnection, Customer-Provided Equipment
Competition, Common Carriers
Deregulation

> Commission adopted Notice of Proposed Rulemaking proposing procedures for the detariffing of embedded customer premises equipment owned by the Bell System, independent telephone companies, and record carriers.
> –*Computer II Implementation*
> CC Docket No. 81–893

FCC 83–181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81–893

NOTICE OF PROPOSED RULEMAKING

(Adopted: April 27, 1983 Released: June 21, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING;
COMMISSIONER JONES ABSENT;
COMMISSIONER SHARP CONCURRING IN THE RESULT.

I. INTRODUCTION

A. *Background*

1. In *Second Computer Inquiry*,[1] this Commission decided in principle to detariff embedded customer premises equipment (CPE) and reserved resolution of the details of such detariffing to other proceedings.[2] Underlying our decision to detariff CPE was our recognition that competitive market forces would promote the

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 834 (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980) (Reconsideration Order), *further reconsideration*, 88 FCC 2d 512 (1981) (Further Reconsideration Order), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3826 (U.S. May 16, 1983) (Nos. 82–1331 & 82–1352).

[2] Customer premises equipment includes all equipment provided by common carriers and located on customer premises except overvoltage protection equip-

widespread availability of affordable CPE more effectively than the traditional practice under which common carriers provided CPE pursuant to rate-of-return regulation. In order to achieve a competitive marketplace, we required carriers to offer detariffed CPE separate and apart from regulated operations. For the Bell System to participate in CPE markets, we imposed the additional requirement that the American Telephone and Telegraph Company (AT&T) provide CPE through a separate subsidiary.[3]

2. We recognized that the issues relating to the removal of costs associated with existing in-place CPE were substantially more difficult to resolve than those relating to new CPE offerings. Thus, we created a "bifurcated" transition plan separating CPE into two categories, new and embedded. New CPE, which includes all CPE acquired by a carrier or manufactured by an affiliated entity after January 1, 1983, may not be offered under tariff. Carriers could continue to offer embedded CPE, which is defined as "equipment or inventory which is tariffed or otherwise subject to the jurisdictional separations process as of [January 1, 1983]", under tariff during a transition period until the manner of detariffing the embedded equipment is determined in this proceeding. *Further Reconsideration Order*, 88 FCC 2d at 526. The length of any transition period during which embedded CPE would continue to be offered under tariff was one of the issues also to be addressed in this proceeding. *Reconsideration Order*, 84 FCC 2d at 67. This *Notice of Proposed Rulemaking* (hereinafter *Notice*) will address these issues as they relate to AT&T, the independent telephone companies, the international record carriers (IRCs), and the Western Union Telegraph Company (Western Union).[4]

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ment, inside wiring, coin-operated or pay telephones, and multiplexing equipment used to deliver multiple channels to the customer. Reconsideration Order, 84 FCC 2d at 61 n.10.

[3] Under the terms of the Modification of Final Judgment (MFJ) entered in United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*Maryland v. United States, 51 U.S.L.W. 3628 (U.S. Feb. 28, 1983) (No. 82-952) (hereinafter United States v. AT&T), AT&T must divest itself of all the Bell Operating Companies (BOCs) except Cincinnati Bell, Inc. (CBI) and Southern New England Telephone Company (SNET). Because of the changed circumstances created by the MFJ we recently concluded that there is no longer a need to require CBI and SNET to establish separate subsidiaries for providing CPE. Motion of Cincinnati Bell Inc. for Declaratory Ruling To Remove Uncertainty of Its Status Under the Commission Decisions in the Second Computer Inquiry, Docket No. 20828, Memorandum Opinion and Order, FCC 83-74 (released Feb. 25, 1983). The MFJ has also caused us to visit the question of whether, after divestiture, there will be a need to require the BOCs to provide CPE only through separate subsidiaries. Policy and Rules Concerning the Furnishing of Customer Communications Services by the Bell Operating Companies, CC Docket No. 83-115, Notice of Proposed Rulemaking, FCC 83-71 (released Mar. 4, 1983).

[4] It should be noted that this proceeding does not apply to embedded CPE which is subject to action taken by the Commission in American Telephone & Telegraph Co., Memorandum Opinion and Order, FCC 82-580 (released Jan. 25, 1983), which

3. The bifurcated approach to detariffing CPE was determined to be necessary because several issues of considerable difficulty had to be resolved with respect to the embedded base, whereas the same problems were either non-existent or of considerably less importance for new CPE. First, we sought to minimize possible dislocations to existing customers which could flow from our detariffing decision. *Further Reconsideration Order*, 88 FCC 2d at 514. Second, questions relating to the valuation of embedded CPE as well as the accounting mechanisms required to remove the embedded CPE investment from regulated books of account had to be resolved. *Id.*at 520–21. Third, questions relating to the effect upon competition in the CPE market caused by the transfer of AT&T's embedded CPE to a competitive venture needed to be resolved. *Id.*at 524. It is these questions which are addressed in this proceeding.

B. *Notice of Inquiry*

4. We began this proceeding through the release of a *Notice of Inquiry* on April 13, 1982. *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, CC Docket No. 81–893, 89 FCC 2d 694 (1982) (hereinafter *Notice of Inquiry*). The *Notice of Inquiry* requested interested parties to submit comments "address[ing] 'issues of capital recovery and asset valuation, alternative mechanisms by which transition to an unregulated CPE environment may be achieved, and the appropriate time period for removal of embedded CPE investment from separations and a carrier's rate base.'" *Id.*at 695 (quoting *Reconsideration Order*, 84 FCC 2d at 69). The *Notice of Inquiry* described four options which could be used separately or in combination to remove embedded CPE from a carrier's rate base:

(1) The sale of the CPE to the customer using it.

(2) The transfer of CPE to the carrier's untariffed service or, in the case of AT&T, its sale to a separate subsidiary.

(3) The sale of CPE to a third party.

(4) Retention of the equipment in tariffed service until it is fully retired.

*Id.*at 696–97. The *Notice of Inquiry* sought comments regarding how these options could most effectively be used.

5. We also addressed the issue of asset valuation. We tentatively concluded that any sale or transfer of this embedded CPE should be at a price equal to its "economic value," which we defined to be "the maximum amount the carrier would be willing to pay for that equipment if, instead of owning it, the carrier had the opportunity to buy it." *Id.*at 697. We also recognized the need to adopt either a

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granted waivers from Second Computer Inquiry requirements consistent with the provisions of the Telecommunications for the Disabled Act of 1982, Public Law 97–140.

practical means of measuring or a readily measurable surrogate for economic value, since no workable market exists for the sale of large quantities of embedded CPE. We sought comments addressing the relative merits of four different approaches to meeting this need:

> (1) Imitating the process a firm would pursue in its capital budgeting process to estimate the economic value.
>
> (2) Using net book value as a proxy for economic value.
>
> (3) Relying on asset appraisal by independent appraisers.
>
> (4) Conducting auctions.

*Id.*at 698–99. In addition, we solicited comments regarding the treatment under the Uniform System of Accounts of the transfer of embedded CPE out of regulated service. Related to that question is the problem of accounting for any gain or loss on the sale of embedded CPE in case later rate base adjustments become necessary due to the gain or loss. In addition, we requested comments with respect to methods by which carriers subject to our jurisdiction could account separately for revenues and costs associated with the provision of deregulated services and CPE.

C. *Comments by Interested Parties*

6. During the established pleading cycle which ended on July 9, 1982, parties filed comments and replies.[5] On August 24, 1982, however, the United States District Court for the District of

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[5] Those filing comments included: Ad Hoc Telecommunications Users Committee (Ad Hoc); American Petroleum Institute; AT&T; California Public Utility Commission (California); Centel Corporation (Centel); Charles River Associates, Inc. (CRA); Citizens of the State of Florida; Computer and Business Equipment Manufacturers Association (CBEMA); Continental Telecom, Inc. (Continental); District of Columbia Public Service Commission; Federal Executive Agencies (FEA); Florida Public Service Commission (Florida); General Dynamics; General Telephone and Electronics (GTE); Independent Data Communications Manufacturers Association (IDCMA); Kansas Corporation Commission (Kansas); Michigan Public Service Commission Staff (Michigan); National Association of Regulatory Utility Commissioners (NARUC); North American Telephone Association (NATA); New York State Department of Public Service (New York); North Dakota Public Service Commission (North Dakota); Rochester Telephone Company (Rochester); Satellite Business Systems (SBS); SNET; Southern Pacific Communications Company (SPC); United States Independent Telephone Association (USITA); United Telephone System Inc. (United); Virginia State Corporation Commission (Virginia); and Wisconsin Public Service Commission (Wisconsin). CBI and U.S. Telephone & Telegraph Corporation indicated that they had no comment at this stage of the proceeding. Organizations filing reply comments included: Ad Hoc; AT&T; California; Centel; CBEMA; Continental; FEA; General Dynamics; GTE; IDCMA; NATA; Rural Telephone Coalition (RTC); SNET; SPC; and United. Summaries of these comments and replies appear in Appendix A.* CRA submitted a motion to accept late-filed comments and SPC submitted a motion to accept late-filed reply comments. These motions are hereby granted and the late-filed comments of SPC are also hereby accepted.

Columbia (hereinafter District Court) entered the MFJ in *United States v. AT&T*. The MFJ requires that the divested BOCs transfer all their embedded CPE, as well as the assets and personnel relied upon to provide its installation and maintenance, to AT&T not later than February 24, 1984.[6] In addition, the MFJ would permit the divested BOCs to enter the CPE market as retailers competing directly against their former AT&T affiliate, American Bell, Inc. (ABI). Responding to these new developments, AT&T filed Supplementary Comments in this proceeding on October 28, 1982, seeking the detariffing of all embedded CPE not later than January 1, 1984, the anticipated date of divestiture, and presenting a plan which called for a customer sales option for some embedded CPE, with the remaining embedded plant passing to ABI at adjusted net book value.[7]

7. We invited comment on AT&T's supplementary filing through a Public Notice issued November 2, 1982. Eighteen organizations filed comments on the AT&T proposal, and eight filed replies.[8] On March 29, 1983, AT&T filed Further Supplementary Comments containing additional proposals for the detariffing and transfer of Bell System embedded CPE by the time divestiture occurs. The new proposals represent an attempt to address many of the concerns raised in the last round of comments.

II. SUMMARY OF AT&T PROPOSAL

8. Both the comments responding to the *Notice of Inquiry* and those responding to AT&T's Supplementary Comments have focused upon certain issues relating to the detariffing options and methods of asset valuation presented in the *Notice of Inquiry* and developed by AT&T. To provide a framework for shaping our discussion of these issues, we shall begin with a summary of the AT&T proposal which

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[6] AT&T has recommended to the District Court that divestiture take place effective January 1, 1984. AT&T Plan of Reorganization at 5, United States v. AT&T (filed Dec. 16, 1982).

[7] AT&T defines adjusted net book value as original cost less reserve for depreciation, less deferred taxes, less unamortized investment tax credits, plus the deferred income tax on restored Western Electric profits. For a discussion of our concerns regarding this definition, see paras. 51–59, *infra*.

[8] Comments were filed by: Centel; CBEMA; California; FEA; California Hotel and Motel Association; GTE; IDCMA; International Communications Association (ICA); Kansas; Michigan; New York; NATA; RTC; SPC; United Technologies Communications Company (UTCC); United; USITA; and Utilities Telecommunications Council (UTC). Replies were filed by: AT&T; CBEMA; ICA; NARUC; SPC; UTCC, UTC; and Consumers Union of the United States, Inc. (Consumers Union). Summaries of these comments and replies appear in Appendix B*. New York submitted a motion to accept late-filed comments. This motion is hereby granted, and the late-filed comments of Consumers Union are also hereby accepted. The Supplementary Comments and Further Supplementary Comments submitted by AT&T are hereby accepted pursuant to Section 1.415(d) of the Commission's Rules, 47 C.F.R. § 1.415(d).

reflects how the plan has evolved in response to the concerns raised by parties' comments.

9. The AT&T proposal contained in its Supplementary Comments featured three essential components. First, embedded CPE would be transferred to ABI, AT&T's affiliate for offering unregulated products and services,[9] at adjusted net book value. Second, ABI would offer this CPE for sale or lease on a detariffed basis. The third facet of the AT&T proposal was a "price predictability program" for embedded CPE sales and leases. Under this program ABI would limit residential CPE[10] price increases to the percentage increase in the Consumer Price Index (CPI). For those customers who continue to lease single-line CPE, AT&T would set a maximum charge to limit increases and it stated that any upward adjustments toward this level would be at least nine months apart. To allow customers time to make a reasoned decision, AT&T proposed to announce the details of these price predictability plans within three months of release of an order by the Commission adopting its proposal and to file a supplement to its capitalization plan to cover the transferred CPE, with detariffing to begin in July 1983 and end by January 1, 1984.

10. Under this original proposal, ABI would have adopted an 18-month price freeze for business CPE. It would have continued to honor outstanding contractual arrangements for business CPE, with gradual price adjustments only for those non-contractual customers paying amounts different from the national level which the plan would establish for business CPE. It also promised maintenance support for all business CPE and prior notice of the phase-out of any product. For any embedded business equipment of a type also to be sold new by ABI, AT&T proposed a purchase option after this 18-month period.

11. In its Reply Comments, AT&T modified its original plan in certain respects. AT&T stated that lease prices set for all PBX, key, and single-line CPE would not exceed the highest tariff price

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[9] The Commission already has approved the capitalization of ABI to provide enhanced services, American Telephone & Telegraph Co., 90 FCC 2d 404 (1982), and new CPE, American Telephone & Telegraph Co., 91 FCC 2d 578 (1982). Presently pending before the Commission is a capitalization plan filed by AT&T on January 21, 1983, for the provision of embedded CPE. Action on this plan will be held in abeyance pending final action in this proceeding.

[10] AT&T's proposal uses three different terms to refer to embedded CPE which is to be offered for sale through its national sales program. While these terms, "single-line CPE," "residence CPE," and "consumer CPE," appear to be synonymous they do not correlate with the investment items list for Account 231, "Station Apparatus." In order to clarify the definition and the magnitude of the investment being offered for sale, we expect AT&T in its comments to apprise the Commission of the definition and dollar investment by product line for each of these terms, and the percentage of each to the total investment in Account 231. We also must be informed regarding the applicable amounts of related deferred taxes and investment tax credits by these product lines.

previously approved by a state commission. AT&T Reply Comments at 23. AT&T also stated that every effort would be made to provide as much notice as possible concerning product line phase-out, and expressed its intent to provide one-year advance notice for business systems whenever possible.

12. On March 29, 1983, AT&T submitted Further Supplementary Comments which modified and expanded its proposal. Major features of AT&T's modified proposal include:

(1) A $12 million nationwide advertising campaign, beginning in July 1983, to encourage residence customers to make an informed choice between purchasing embedded single-line CPE and continuing on a monthly charge basis.

(2) Continuation by ABI of the single-line sale plan after detariffing, with prices guaranteed not to exceed specified maxima for at least two years.

(3) Continuation by ABI for at least two years after detariffing of a monthly charge option at specified prices for embedded residence CPE.

(4) Purchase options covering a significantly broader range of embedded multiline CPE than had already been proposed, including the offering for sale, at the time of detariffing, of all embedded multiline CPE of a type also offered for sale new by ABI.

(5) Independent professional appraisal of supporting assets (*e.g.*, land and buildings)[11] to be transferred from BOCs to ABI.

13. The purchase prices for the most common residential CPE would be based on net book value, tax effects, and transaction costs[12] and at detariffing would be no higher than:

	Rotary	*Touch-Tone*
Standard (Desk and Wall)	$19.95	$41.95
Princess (Desk)	39.95	49.95
Trimline (Desk and Wall)	44.95	54.95

AT&T proposed that these maximum prices would remain in effect for at least two years after detariffing. Prices for refurbished sets may be higher than the prices for in-place equipment. It is not clear whether party-line equipment would be included in the sales program although it is our understanding that party-line equipment has been included in some of the state-tariffed sales programs currently in effect. It is our tentative view that the sale plan should include party-line equipment.

14. For those residential customers choosing to continue their current lease option, AT&T proposed a period of at least two years

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[11] These supporting assets also will include all supporting assets transferred from a BOC rate base pursuant to ABI capitalization plan supplements submitted to the Commission on July 1, 1982, September 30, 1982, and January 21, 1983.

[12] The sales prices under AT&T's proposed sales program include transaction costs which vary significantly by product line. In its comments, AT&T should advise us of the method used to estimate these transaction costs by product line.

during which they may lease in-place residential phones at rates comparable to those they now pay. The proposed monthly charges to be imposed upon detariffing, under AT&T's proposal, are:

	Rotary	*Touch-Tone*
Standard (Desk and Wall)	$1.50	$2.85
Princess (Desk)	3.15	4.05
Trimline (Desk and Wall)	3.45	4.60

The national price for leasing a standard rotary phone would be fixed during the first two years of detariffing. Customers paying less than this rate for their rotary telephone would face rate increases during this period, but their monthly rate would not rise more than fifty cents above its current level in 1984. In jurisdictions in which the current lease rate for standard rotary phones exceeds $1.50, the plan would reduce the rate to $1.50. Increases in other lease charges would not be greater than the increase in the CPI during this period. In no case would ABI's charges during 1984 for in-place residential CPE be more than $1.00 higher than the rate currently in effect or filed in a given jurisdiction.

15. AT&T also expanded the details and scope of the multiline CPE sales program. AT&T identified embedded equipment which the Supplementary Comments already had committed ABI to offer for sale after the 18-month period following detariffing.[13] AT&T also represented that almost all types of equipment in ABI's current product line which also are in the embedded base (*e.g.*, Dimension PBXs and Horizon Communications Systems) would be made available for sale. Under the modified plan, the embedded CPE for all these types would be made available for purchase at detariffing. In its description of the expanded sales option for business CPE, AT&T indicated its intent to make most other embedded multiline CPE transferred to ABI available for sale, if feasible. This includes the sale of embedded cord boards (types 556 and 557) used by telephone answering services and alarm services as soon as detariffing occurs. AT&T also represented that, if feasible, almost all other embedded electromechanical CPE would be offered for purchase by January 1, 1986.[14] Criteria upon which AT&T would rely in determining whether to begin a sales program are:

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[13] This equipment is as follows: certain telephone sets (500 and 2500 sets, multibutton electronic telephone sets); certain voice terminals (Com Key, Touch-A-Matic 32 automatic dialer, Speakerphone, Comm-Stor, Voice Paging); certain data communications equipment (Series 100, 200, and 300 modems, Dataphone II); certain data terminal equipment (Dataspeed 40, printers, 43 Teleprinter, Dataspeed 4540, 1000 Teleprinter); and teleconferencing equipment.

[14] Among the exceptions to this availability for purchase is 1A Key equipment. AT&T has indicated that it does not expect that this equipment "will . . . meet the criteria for a viable purchase option." AT&T Further Supplementary Comments at 13 n.*. In its comments regarding this Notice, AT&T should advise us of the reasons for its conclusions regarding 1A Key equipment.

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(1) Evidence of sufficient customer interest to justify the cost of sales.[15]

(2) Assurance of a supply of parts.

(3) More timely depreciation to allow a price which recovers capital and is agreeable to customers.

(4) A means of informing customers about leased purchase option.

16. AT&T also proposed to hire independent professional appraisers to appraise supporting assets, such as land and buildings. See n.11, *supra*. This appraisal would be verified by a scientific sample by a second firm and meaningful differences would be subjected to a third appraisal with the average result being used. Assets never in the rate base and CPE in Account 231 or 234 would not be subject to this appraisal process. Costs of such appraisals would be included in Account 171, "Depreciation Reserve." AT&T, however, maintained that it would reserve the right to reconsider its proposal in light of such appraisal. AT&T Further Supplementary Comments at 18.

III. DISCUSSION

17. Our purpose in this proceeding is to devise a plan for the removal of embedded CPE from tariffed service. The accounting rules we promulgate will encompass the embedded base held by AT&T, the independent telephone companies,[16] the IRCs, and Western Union. In this part, we will discuss our tentative proposals and we will invite comments from interested parties regarding the adequacy of these proposals. We first present our views regarding the general options we intend to pursue in deregulating embedded CPE, based upon the options we outlined in the *Notice of Inquiry*. Next, we discuss the regulatory concerns and objectives guiding us in this proceeding, and the general criteria which we tentatively consider to be a necessary part of any detariffing and transfer plan sanctioned by this Commission. We then turn to a discussion of the issues with which parties have been most concerned with regard to AT&T's initial proposal, including consumer options before deregulation, detariffing, sale and lease pricing of the embedded plant after detariffing, mechanics of the ABI sale and lease procedures, antitrust issues, and asset valuation. Next, we address several account-

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[15] AT&T identifies the following as the factors which would determine the cost of sale for any specific category of embedded CPE: handling of customer inquiries; performing physical inventories; developing procedures for sale of equipment shared by two or more customers; separating and tagging equipment; establishing a parts storage and distribution system to support maintenance; producing documentation; developing maintenance plan contracts and prices; and making modifications to bring equipment into compliance with applicable regulatory codes. AT&T Further Supplementary Comments at 13–15.

[16] For purposes of this proceeding, we include CBI and SNET among the independent telephone companies.

ing problems which must be resolved in this proceeding, including the treatment of embedded CPE sold under regulation and accounting procedures for the independent telephone companies. We also present for comment the issue of whether intrasystem wiring should be treated as part of the embedded CPE plant. We then present our tentative proposals regarding detariffing the independents' embedded base. Finally, we discuss our tentative proposals for detariffing the embedded CPE of the IRCs and Western Union.

A. *Tentative Selection of Options*

18. As we noted at para. 4, *supra*, the *Notice of Inquiry* sought comment regarding four proposed options for the removal of embedded CPE from regulated service. Based upon the objectives we have established in *Second Computer Inquiry* and in this proceeding, and upon our review of the comments submitted by interested parties in this proceeding, it is our tentative view that the most effective detariffing plan would combine the sale of embedded CPE in place[17] with the transfer of embedded CPE to the carrier's unregulated service, or, in the case of AT&T, transfer to ABI. In tentatively selecting these options, we recognize that the detariffing and transfer plans we adopt for the independent companies and the record carriers should be sufficiently flexible to accommodate their special circumstances. For a discussion of these circumstances, see paras. 71–79, *infra*.

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[17] AT&T has maintained that this Commission does not have authority under the Communications Act of 1934 to require the sale of CPE to subscribers or third parties and that, even if the Commission could claim such statutory authority, such a requirement would be an unconstitutional taking of property. AT&T Comments at 21-22, Appendix A. Several parties, in their reply comments on the Notice of Inquiry, disagreed with these contentions. *See, e.g.*, Ad Hoc Reply Comments at 21-28; CBEMA Reply Comments at 11-13, Appendix A; General Dynamics Reply Comments at 31-43; IDCMA Reply Comments at 8-17; SPC Reply Comments at 12-15. Although the fact that we are not here formulating a final plan requiring the sale of embedded CPE makes it unnecessary for us to resolve this issue at this juncture, we do observe that it is our view that the promulgation of a plan requiring carriers to provide subscribers with an option to purchase embedded equipment is well within our authority under the Act and does not *per se* raise any constitutional concerns.

In a similar vein, AT&T has noted that the elements of its proposed plan are "part of a broad program" and that AT&T's willingness to appraise supporting assets and to carry out its proposed sale and pricing policies "is contingent on Commission approval of the broad program." AT&T Further Supplementary Comments at 4–5. We note, however, that if we decide in this proceeding to impose requirements upon carriers relating to the appraisal of assets, the sale and pricing of equipment, or other matters, we have ample authority under the Act to structure these requirements in a manner which denies carriers any discretion regarding whether they must comply with these requirements.

1. *Advantages of Sale and Transfer Options*

19. We previously have expressed the view that the sale of embedded CPE under the auspices of the state commissions is a useful means of easing the transition to an unregulated CPE marketplace.[18] The continuation of state sales programs, together with the establishment of a sale option in this proceeding as part of a transfer plan, offers several advantages. First, the option to purchase embedded CPE increases the choices available to consumers. Second, it is our tentative view that making embedded CPE available for purchase is a sufficient mechanism for meeting our obligation to balance equitably the interests of ratepayers and carriers' investors in accordance with the tests established in *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied sub nom.D. C. Transit System v. Democratic Central Committee*, 415 U.S. 935 (1974) (hereinafter *Demoncratic Central Committee*).[19]

20. Third, the sale of embedded CPE, combined with the detariffing of that portion of the embedded base which remains unsold, advances our efforts to achieve the deregulatory goals established in *Second Computer Inquiry*. A fundamental objective established in that proceeding is the promotion of a competitive CPE marketplace through the elimination of rate regulation. *See, e.g., Final Decision*, 77 FCC 2d at 441. In order to achieve this objective, it is our view that the detariffing of the unsold embedded base should not be unduly delayed. Finally, transferring all embedded CPE out of the rate base earlier rather than at a later time limits any potential increased risk that ratepayers would have to bear the burden of recouping carriers' investment in CPE which is removed from service (due to obsolescence or other reasons) before it is fully depreciated. This risk could continue to increase as competition grows in the CPE market because the alternatives generated by this competition could prompt a growing number of users to purchase or lease CPE from vendors other than the carriers presently providing them with their CPE. We also note that these options of sale and detariffing received considerable support in the comments which have been submitted in this proceeding.[20]

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[18] Further Reconsideration Order, 88 FCC 2d at 524 ("The sale of embedded CPE [under state tariffs] complements federal policy to the extent that such equipment is deregulated and the costs are removed from a carrier's rate base and jurisdictional separations process."); *see* Notice of Inquiry, 89 FCC 2d at 696.

[19] For a further discussion of our views regarding the application of Democratic Central Committee to the removal of embedded CPE from carriers' rate bases, see paras. 29–33, *infra*.

[20] Several parties, in their initial comments on the Notice of Inquiry, favored various permutations of the sale option. *See, e.g.*, Ad Hoc Comments at 19; California Comments at 4 (combined with detariffing embedded CPE which users do not desire to purchase or continue leasing); Continental Comments at 2 (in

2. *Disadvantages of Other Options*

21. The sale of embedded CPE to a third party poses several problems as a deregulatory vehicle. First, the sheer size of the embedded CPE base[21] makes it impractical to conclude that any buyer or combination of buyers could gather sufficient capital and support facilities and personnel to make such an option feasible. Second, opting for this approach would not obviate the need to address the difficult valuation issues which also come into play under Option 2.

22. Option 4, which involves retaining embedded CPE under tariff until it is fully retired, poses its own set of problems but, as we will discuss, certain considerations lend vitality to this option as a possible alternative which we do not intend to foreclose entirely at this stage of the proceeding. Turning to its disadvantages, however, we first must note that this option could force ratepayers to bear for a longer period of time the risk of costs associated with the loss of investment due to the retirement of CPE from service before it is fully depreciated. See para. 20, *supra*. Second, the continued tariffing of embedded CPE would impose other costs upon carriers, and these costs ultimately would be passed on to ratepayers. In this context, AT&T has argued that it would have to embark upon the costly undertaking of establishing a separate organization to provide tariffed, embedded CPE, and that it would have to prepare, file, and defend new embedded CPE tariffs in each state jurisdiction. AT&T Supplementary Comments at 9–10. Thus it might incur potentially avoidable costs as operations to support a dwindling stock of tariffed, embedded CPE are maintained.

23. Finally, continued tariffing until embedded CPE is retired, if

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combination with continued tariffing); General Dynamics Comments at 21 (in combination with state tariffs in effect for eight years); IDCMA Comments at 3 (coupled with continued tariffing and sale offers to third party); Kansas Comments at 2; Michigan Comments at 2 (combined with continued tariffing); NARUC Comments at 2 (under state auspices and combined with continued tariffing); North Dakota Comments at 2 (combined with continued tariffing).

Several parties, in their initial comments on the Notice of Inquiry, also supported various combinations of the sale and detariffing options. *See, e.g.*, API Comments at 3 (in combination with Options 3 and 4); Centel Comments at 4–5 (if valuation problems are resolved); CBEMA Comments at 12–15 (sale under state tariffs; transfer if valuation problems are solved); FEA Comments at 3 (if lessee elects not to continue leasing under tariff); Florida Comments at 2, 4 (sale and detariffing as state options); GTE Comments at 4–10 (for non-dominant carriers); New York Comments at 8–11; Rochester Comments at 7 (sale option up to divestiture of AT&T; transfer on date of divestiture); SPC Comments at 17, 20–21.

[21] The value of embedded CPE and related support assets in the rate bases of regulated carriers is estimated to exceed $20 billion. Notice of Inquiry, 89 FCC 2d at 695. We have noted that the value of assets held by AT&T in Account 231, "Station Apparatus," and Account 234, "Large PBXs," is approximately $14 billion. Further Reconsideration Order, 88 FCC 2d at 521.

considered as the exclusive option for effecting the transition to a deregulated CPE environment, cannot be viewed as a satisfactory, or even adequate, mechanism for achieving the objectives of *Second Computer Inquiry* and this proceeding. The promotion of competition in the CPE marketplace has long been a goal of this Commission. Although we do not intend to foreclose the use of this tariff option in certain circumstances which we will describe, we note that it is our tentative conclusion that the continuation of rate regulation, if treated as the only transitional device for disposing of the embedded CPE base, would deflect us from the path toward competition in the CPE marketplace. The restrictions and costs which this continued tariffing would impose upon carriers would seriously hamper their ability to become vigorous competitors in the CPE market.

24. It is important to note, however, that the continuation of tariff regulation may, in certain circumstances, have utility as a transitional mechanism if used in tandem with the sale option. This is true in the case of various deregulatory options we are considering for the independent companies and the record carriers, and it would be particularly true in the case of AT&T if only a small portion of the BOCs' embedded base is sold under state tariffs before our plan takes effect and a successful transfer plan is not developed under which a substantial majority of this embedded CPE is offered for sale under sufficient regulatory scrutiny so as to ensure that ratepayer interests are adequately protected. See para. 33, *infra*.

25. Our tentative preference is to permit the detariffing and transfer to ABI of that portion of the embedded base which is not actually sold, but we view this approach as contingent upon two factors. First, the portion of embedded CPE which is offered for sale under any transfer plan must be sufficient to meet our regulatory concerns and the requirements of *Democratic Central Committee*. Second, ultimate detariffing of the unsold embedded base depends in large measure upon our satisfactory resolution of a variety of problems which we will discuss subsequently in this *Notice*. These problems include valuation of the unsold base, accounting issues associated with detariffing, pricing under the sale option and the duration and terms of the sale option, leasing options available to current embedded CPE customers, and issues relating to customer proprietary information. This Commission can sanction a plan only if it meets these problems and concerns, and, in the case of AT&T, one purpose of this *Notice* is to solicit comments regarding the extent to which the plan proposed by AT&T already achieves this result. We recognize that, in the case of the independent telephone companies and the record carriers, our analysis of these problems may vary from the analysis applied in the case of AT&T, and it is our intention to include sufficient flexibility in fashioning plans for the independents and the record carriers. We also ask parties to comment regarding the appropriateness of our tentative view that

there may be circumstances under which continued tariffing would have to be invoked as the best means of promoting our objectives.

3. *Effect of Transfer of Embedded Base on Competition*

26. We discussed briefly at para. 3, *supra*, the issues set out in *Further Reconsideration Order* for resolution in this proceeding. The first two issues, regarding customer dislocations and valuation and accounting problems, are discussed subsequently in this *Notice*.[22] The third issue, regarding the effect upon competition of the transfer of AT&T's embedded CPE to ABI, warrants discussion here. In assessing this issue, two broad points should be made regarding the nature of competition in the CPE marketplace and the terms and conditions of the transfer to ABI which are proposed in AT&T's plan.

27. This Commission has strenuously sought to promote competition in the CPE marketplace,[23] and, in *Second Computer Inquiry*, we took notice of the fact that substantial progress had been made toward realizing the potential for competition in the various segments of the CPE market.[24] It is our continuing objective to encourage this development of competition, and we are cognizant of the fact that the transitional plan which we adopt in this proceeding may have a bearing upon the future course of this development.

28. The argument is made that an abrupt detariffing and transfer of AT&T's embedded base to ABI could have a stultifying

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[22] The need to protect ratepayers is discussed generally at paras. 29–32, *infra*. Issues relating to customer dislocations are also presented in connection with the discussion of pricing and consumer options under AT&T's proposed plan. See paras. 35–40, *infra*. Valuation issues are presented at paras. 30–32, 51–62, *infra*. Accounting problems are discussed at paras. 63–68, *infra*.

[23] *See, e.g.*, Second Computer Inquiry; Interstate and Foreign Message Telephone Service, Docket No. 19528, Second Report and Order, 58 FCC 2d 736 (1976), *aff'd sub nom.* North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); Interstate and Foreign Message Toll Telephone Service, Docket No. 19528, First Report and Order, 56 FCC 2d 593 (1975), *reconsideration*, 57 FCC 2d 1216, *further reconsideration*, 58 FCC 2d 716, *further reconsideration*, 59 FCC 2d 83 (1976); Telerent Leasing Corp., 45 FCC 2d 204 (1974), *aff'd sub nom.* North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); Carterfone, 13 FCC 2d 420, *reconsideration denied*, 14 FCC 2d 571 (1968).

[24] Final Decision, 77 FCC 2d at 439–40, 452. *See also* Majority Staff of Subcom. on Telecommunications, Consumer Protection, and Finance of House Comm. on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong., 1st Sess. 184 (1981) (hereinafter House Staff Report) ("There has been a marked increase in the competitors' share of terminal equipment markets since the [FCC] registration program facilitated competition.") As a further indicator of growing competition, AT&T has pointed out that "[i]n early 1982, AT&T actually experienced a reduction of more than two residence telephones for each access line added. Data for business telephones show a pattern of consistent decline from a high of nearly three telephones added per access line in 1966 to a small loss in early 1982." AT&T Comments at 14.

effect upon competition, primarily because of AT&T's substantial share of the embedded equipment base.[25] Because of this concern, various parties suggest[26] that the transfer of embedded CPE to ABI must be "cushioned" in order to prevent adverse effects upon competition. AT&T responded to these concerns through the sale and lease options, and the price predictability periods, included in its latest proposal. It would appear, therefore, that AT&T is not proposing an abrupt transition to a deregulated environment. The provisions of its latest plan should work to prevent ABI from engaging in anticompetitive conduct in CPE markets in the wake of the transfer of embedded equipment. We invite parties to comment regarding whether these aspects of AT&T's plan are sufficient, or necessary, to satisfy concerns regarding the protection of competition. Ultimately, any detariffing plan must take these competitive factors into account.

B. *Regulatory Concerns and Objectives*

29. We will outline in this section what we believe are our regulatory obligations relating to the transition to the fully detariffed CPE environment. It is our tentative view that the case law regarding the issue of the treatment of capital gains and losses upon the removal of assets from regulated service, especially *Democratic Central Committee*, requires that we ensure that the carriers' investors receive their net investment in transferred or sold equipment at the time of transfer or sale, and that any gains or losses resulting from this transfer or sale accrue to the ratepayers. *Democratic Central Committee* requires that gains or losses on transfer or sale of assets must go to that entity, carriers' investors or ratepayers, which bore the risk of loss of capital value over the regulated life of the asset.[27] In this case, we tentatively find that our regulatory scheme which allows the carriers to file tariffs designed

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[25] See House Staff Report at 186–87 for a description of this AT&T market share.

[26] See paras. 35–40, *infra*, for a discussion of various comments regarding requirements and safeguards which should be made to apply to the transfer of the BOCs' embedded CPE base to ABI.

[27] *See* Democratic Central Committee, 485 F.2d at 806–08. The Court of Appeals concluded that "an investor can hardly muster any equitable support for a claim to appreciation in asset value where he has been shielded against the risk of loss on this investment, or has already be rewarded for taking on that risk." *Id.* at 806. The Court of Appeals also noted a second principle which may be applied to balance investor and ratepayer interests in connection with the removal of assets from regulated service: "[H]e who bears the financial burden of particular utility activity should also reap the benefit resulting therefrom." *Id.* The Court applied this second test to dispose of the case before it because "there [had] never been any risk of financial loss, actual or foreseeable, on the parcels of land" at issue in the proceeding. *Id.* at 811. Our primary concern in this proceeding is with the first test set forth in Democratic Central Committee because the embedded CPE at issue here is subject to the types of capital loss risks (*e.g.*, casualty losses, retirement due to obsolescence) which the Court of Appeals elaborated. *Id.* at 807.

to earn the allowed rate of return and to recover reasonable depreciation expenses has placed the risk of loss on the ratepayers.[28] Therefore, the gains or losses resulting from any transfer should flow to the ratepayers rather than the investors. We invite interested parties to comment on our reading of the case law, our interpretation of the effects of our regulatory scheme, and the implications of these factors for our obligations.

30. Our initial view, expressed in the *Notice of Inquiry*, was that we would protect the ratepayers' interest by determining the value of the embedded CPE prior to its transfer or sale. This amount would be credited to regulated accounts at the time of transfer or sale, thereby satisfying the requirements of *Democratic Central Committee*. See *id.*, 85 F.2d at 811 & n.227. After reviewing the comments in response to the *Notice of Inquiry*, we now tentatively conclude that while our proposal to determine the amount the embedded CPE is actually worth to the carrier was conceptually sound, it would be extremely difficult as a practical matter to implement such an approach.[29] We pointed out in the *Notice of Inquiry* that for practical reasons we might rely on net book value as a proxy, and we tentatively conclude that this is the case. That is, it is our view that the only workable alternative for measuring the value of the embedded CPE is net book value.

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[28] The Commission, in fixing rates of return on carriers' interstate investment, has refused to add any additional premium to the rate of return as compensation for risks of loss associated with technological and market changes, finding that the carriers' investors are well protected against these risks. American Telephone & Telegraph Co, Docket No. 16258, Interim Decision and Order, FCC 67–776, 9 FCC 2d 30, 76 (1967). It has been the practice of the Commission to permit factors such as competition and obsolescence due to technological change to be taken into account in calculating depreciation expenses charged to ratepayers, and the Commission has noted that these depreciation calculations are designed so that "[t]here is very little danger that plant actually devoted to service will not be fully paid for." *Id.* at 77. For a description of the factors taken into account in determining depreciation expense, see American Telephone & Telegraph Co. (Charges for Interstate Service), Docket No. 19129, Phase II, Final Decision and Order, FCC 77–150, 64 FCC 2d 1, 63 n.84 (1977) (hereinafter Charges for Interstate Service). In that proceeding the Commission found that the calculation of depreciation expense ensures that "the ratepayers bear the risk of loss in value. Thus, when . . . a piece of property is retired and disposed of and a gain results, the equities of the situation would suggest that the ratepayer should receive the benefit of that gain." *Id.* at 67.

[29] We note that in United States v. AT&T the District Court considered establishing proceedings for determining the value of assets to be transferred as a result of the MFJ. The District Court noted the extreme complexity of such a proceeding and pointed to the protracted and contentious asset valuation proceedings in the Conrail case as exemplifying the problems which would be encountered in such a proceeding. The District Court settled on net book value as the appropriate standard after noting that Democratic Central Committee did not apply because the MFJ did not result in the removal of assets from regulated service. United States v. AT&T, 552 F.Supp. at 200–05.

31. Of course, such an approach to valuation does not definitely answer the basic question of what the equipment is actually worth to the entity acquiring it. Thus, a transfer at net book value would leave open the possibility that a gain might occur and accrue to the entity acquiring the embedded CPE rather than to the ratepayers. For example, if a telephone company were to transfer its embedded CPE to detariffed service after crediting regulated accounts with the net book value of the equipment, there would be no mechanism to guarantee that the carrier could not then sell the equipment for a great deal more than net book value, realizing a substantial capital gain. We feel that some mechanism to ensure against such an occurrence is required to meet our obligation under the *Democratic Central Committee* standard.

32. We believe that offering in-place CPE for sale at a price based on net book value plus reasonable transaction costs provides the needed mechanism to protect ratepayers. It is logical that the firm receiving the transferred equipment (*e.g.*, ABI, in the case of AT&T) cannot reap any capital gains which may be associated with the CPE after that CPE has been offered for sale at close to net book value. This is so because, if the CPE were worth a great deal more than net book value, presumably the subscribers would purchase it at the offered price.[30] On the other hand, if the CPE were not worth substantially more than net book value, then the equipment could not be sold by the transferee firm after the transfer at prices substantially in excess of net book value plus transaction costs. Thus, by combining the sale of in-place CPE to customers based on net book value plus transaction costs and the transfer of the unsold CPE to unregulated operations at net book value, ratepayers have the opportunity to receive the capital gains by purchasing the CPE and unregulated entities could not receive capital gains upon the transfer of unsold equipment. It is our view that the *Democratic Central Committee* standard can be met if all classes of CPE are offered for sale, in the aggregate, at net book value plus transaction costs. This approach ensures that ratepayers, as a class, would have an opportunity (through purchase of the embedded CPE) to realize any capital gain and thus prevent any gain from inuring to the benefit of investors. We conclude that *Democratic Central Committee* does not require that each and every piece of equipment be offered at net book value plus transaction costs. Further, it is our view that the complexities involved in such an approach would cause it to collapse of its own weight. It may be appropriate to apply the aggregated valuation approach suggested here on the basis of the different classes of CPE. The embedded CPE could be so divided and each class

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[30] This conclusion, however, may also be dependent upon other factors which could affect customer response to the CPE purchase option, including the duration of the offer period and, in particular, whether the period is long enough to enable the customer to evaluate the offer and arrange for maintenance services.

could be valued, in the aggregate, at net book. Such an approach might be particularly necessary if any significant portions of the embedded base were not offered for sale to subscribers because the undervaluation of any such portion could result in a gain to the transferee entity rather than to the ratepayers. The balancing of equities which is at the center of the *Democratic Central Committee* test can be satisfied, in our view, if net book value plus transaction costs is imposed as an aggregated pricing requirement. We invite parties to comment on our conclusions regarding the *Democratic Central Committee* requirements and on the approach suggested here.

33. The failure to offer a significant portion of embedded CPE for sale while it is under tariff, or shortly after it is detariffed, at a price which gives ratepayers an opportunity to realize any gain in the value of the CPE would pose significant problems under *Democratic Central Committee*. Yet, it is possible that we might approve a transitional plan which does not involve the offer for sale of substantially all of the embedded CPE. In such a case, we would have to provide some mechanism other than the offer for sale at prices closely related to net book value for meeting our obligations to protect ratepayers from a disadvantageous transfer of those classes of equipment not offered for sale. There seem to be only two alternatives. First, we could elect to continue under tariff the kinds of embedded CPE which are not offered for sale. In this way, no transfer of this equipment would occur and ratepayers would suffer no loss of value of equipment devoted to tariffed service. Second, since the sale plan substitutes for the more difficult valuation of the CPE to be transferred, we could revert to the valuation approach. That is, in order to ensure that any gains accrue to the ratepayer, we could determine the value of the CPE not offered for sale and require the carrier to charge that amount to the entity to which the CPE is transferred. We seek comment from interested parties on these means for meeting our obligations to ratepayers in the event that only certain kinds of embedded CPE are offered for sale. We also seek suggestions as to any other means which might be available to meet our obligations in the event that some significant portion of AT&T's embedded CPE is not offered for sale.

34. In its Supplementary Comments, Reply Comments, and Further Supplementary Comments, AT&T has proposed a detariffing plan which includes the transfer of unsold CPE to ABI. We seek comment from interested parties on whether AT&T's plan is consistent with our obligations, concerns, and objectives, as discussed in this section. To the extent that parties believe AT&T's plan is not fully consistent with our goals we seek suggestions as to how it might be changed to bring it into conformance with our requirements. In the following sections, we focus attention on more specific issues regarding AT&T's proposal, on which we seek comment.

C. *Consumer Options before Detariffing*

35. California[31] asserts that no portion of the embedded base should be detariffed until customers have had an opportunity to purchase the CPE under tariff. Others, including CBEMA, FEA, IDCMA, Kansas, Michigan, SPC, and UTC, urge that embedded business CPE should be available for purchase under tariff before detariffing. We note that AT&T has stated that most single-line CPE customers either already have or will shortly have an opportunity to purchase embedded CPE while it is still under state tariff. AT&T Further Supplementary Comments at 7. In the *Notice of Inquiry* we encouraged the sale of embedded business CPE under state tariff before detariffing takes effect. *Notice of Inquiry*, 89 FCC 2d at 696. Although AT&T's proposal that detariffing occur by January 1, 1984, may make infeasible the implementation of such compulsory sale programs for business CPE in some states,[32] we invite parties to comment regarding whether the modified plan's treatment of business CPE makes the need for such tariffed sales less important than it otherwise might have been, and how it affects our responsibility to protect ratepayers consistent with the *Democratic Central Committee* standard.

D. *Pricing; Other Transitional Issues after Detariffing*

36. California, CBEMA, FEA, Michigan, and UTCC express fear that if the Commission fails to impose adequate price protections, then AT&T could follow anticompetitive pricing policies after detariffing. It is our tentative view that the revised AT&T proposal makes substantial progress toward allaying these understandable concerns. The revised proposal will offer price predictability and stability to both residential and business embedded CPE customers, whether they choose to buy or to continue leasing their embedded CPE. *See* AT&T Supplementary Comments at 16–17, 20–21. AT&T also suggests that the pricing framework which it has proposed significantly reduces opportunities for price manipulation by AT&T. We invite parties to comment regarding (1) whether the most recent revisions of AT&T's proposed plan adequately protect the interests of ratepayers and CPE users; and (2) whether additional pricing requirements are necessary to effectuate the goals set out in the *Notice of Inquiry* and in *Second Computer Inquiry* and to meet the regulatory objectives we have discussed in this *Notice*. California and CBEMA note that the initial AT&T proposal failed to establish any relationship between its sale and lease prices and the transfer costs

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[31] References to comments in this section and sections D through F are to those comments and reply comments filed in response to AT&T's Supplementary Comments.

[32] *But see* California Comments at 6 (sales programs could be put in place expeditiously for multiline equipment).

of the embedded CPE from the BOCs to ABI. We invite parties to comment regarding whether the prices announced in the modified proposal are sufficient to alleviate fears that AT&T intends to establish sale and lease prices which deviate substantially from prices at which the embedded investment is transferred.

37. CBEMA complains that the initial plan did not require ABI to set a price for single-line CPE until after detariffing, while ICA makes the same observation concerning embedded business CPE. The modified plan announces specific prices for single-line CPE and caps lease rates for business CPE. The modified plan also would offer for sale at the time of detariffing all embedded business CPE of a type also offered for sale new by ABI at that time. It also responds to Kansas' assertion that all embedded business CPE should be offered for sale at the end of the price predictability period regardless of whether it is included among ABI's new equipment offerings. AT&T now indicates that it "intends to make most other embedded [Advanced Information Systems] CPE available for purchase . . . if feasible . . . ." AT&T Further Supplementary Comments at 12.

38. California finds a two-year price predictability period to be too brief,[33] and suggests a five-year period which would begin only after state approval of embedded CPE sales programs. California believes that states should also be authorized to review ABI's pricing after detariffing. Michigan would also prefer a price predictability period of four or five years. FEA would go even further and require AT&T to continue leasing embedded CPE under tariff until retirement. It is our tentative view that adopting any of these suggestions would perpetuate the restraints of a regulated environment. We invite parties to comment regarding whether the price predictability periods proposed by AT&T strike a fair balance between the legitimate business concerns of ABI and the need to extend suitable protection to customers and ratepayers, or whether additional requirements such as those proposed by California, Michigan, and FEA are necessary to ensure that the detariffing and transfer program is consistent with our goals in the *Notice of Inquiry* and in *Second Computer Inquiry* and with the objectives discussed in this *Notice*.

39. Three other transition issues raised in the comments warrant mention here. First, ICA asserts that the AT&T proposal is discriminatory because it provides a longer transition period for consumer CPE for business CPE. According to ICA, the 18-month transition period for business CPE is not long enough because "complex business CPE requires a substantially longer lead time for

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[33] It is our understanding that, under the modified AT&T proposal, the price predictability period for single-line CPE is two years while the period for business CPE is 18 months. AT&T would endeavor to make "[a]lmost all categories of embedded electromechanical [business] CPE [available] for purchase by January 1, 1986." AT&T Further Supplementary Comments at 13 (footnote omitted).

customer planning and changes." ICA Comments at 6. It is our preliminary conclusion that this difference in treatment between consumer and business CPE does not have any deleterious effect on business users, but we invite parties to comment regarding whether a longer transition period is necessary to achieve the goals established in the *Notice of Inquiry* and in *Second Computer Inquiry*, and to meet the objectives discussed in this *Notice*. Second, CBEMA, IDCMA, and New York assert that no embedded CPE should be transferred to ABI before the anticipated date on which AT&T divests the BOCs in accordance with the MFJ.[34] With one exception, AT&T's modified proposal adopts their preference.[35]

40. Finally, California challenges the use of the CPI as a measure for increasing embedded CPE prices during the price predictability period. Under the modified plan, the CPI will have no effect upon the sale price of in-place single-line CPE, the lease charge for standard rotary sets (which comprise approximately 42 percent of in-place single-line sets), or the national prices for the lease of embedded business CPE. For setting prices for the remaining categories of embedded plant, *e.g.*, the lease of single-line CPE other than standard rotary sets, it is our tentative view that the CPI would not be an unreasonable surrogate to compensate for increases in the cost of doing business during the price predictability period. We find it unlikely that the CPI adjustments will result in unreasonable price increases over this period. Moreover, single-line customers who do not wish to continue leasing may avoid the CPI lease increases by purchasing their CPE from ABI or by purchasing from other vendors. We seek further comment regarding whether the CPI adjustments proposed by AT&T are consistent with our regulatory concerns and objectives.

E. *ABI Sale and Lease Procedures, BOC Support*

41. Several parties raise issues regarding the procedures which ABI will follow in connection with the sale and lease of embedded CPE after detariffing. ICA and UTC urge that ABI be required to give prior notice to embedded CPE users of any intention to discontinue products. AT&T now proposes to give advance notice whenever possible at least one year before the discontinuance of any business CPE offering. AT&T Reply Comments at 24. We invite comments regarding the adequacy of this approach. Two objections have been raised concerning the warranty program proposed by

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[34] AT&T originally proposed that detariffing and transfer of embedded CPE begin by July 1983. AT&T Supplementary Comments at 22. For purposes of its proposal, AT&T has assumed a divestiture date of January 1, 1984. *Id.* at 3.

[35] The proposal does call for detariffing and transfer of embedded CPE "in at least one jurisdiction in 1983, so that American Bell operations and systems can be tested prior to January 1, 1984." AT&T Further Supplementary Comments at 19. See n.39, *infra*, for a further discussion of this proposal.

AT&T. California asserts that the warranty periods of 90 days for inventory purchases and 30 days for in-place purchases should be extended. We invite comments regarding whether it would be appropriate to impose warranty requirements which differ from those contained in the proposed plan, or whether the opportunity for customer choice and market forces are sufficient to protect the consumer. Kansas notes that the AT&T proposal limits the duration of implied warranties to the same length as express warranties,[36] and indicates that such a limitation on implied warranties would violate Kansas law. It would not be our intent to preempt either state statutes or Uniform Commercial Code provisions concerning implied warranties.

42. New York urges that ABI be prohibited from assessing an interest charge in connection with installment purchases of embedded CPE during the transition period. It is our preliminary view that AT&T's proposal[37] regarding interest assessments does not appear to constitute an extraordinary or objectionable business practice, but we invite the parties to comment regarding whether ABI should be authorized to assess interest charges and, if so, whether the rates should be specified in the rules we promulgate in this proceeding.

43. AT&T also proposes that the BOCs be permitted to furnish billing and other support services to ABI[38] after detariffing. California, Kansas, and IDCMA object, claiming that such BOC support operations may not be consistent with the MFJ and questioning "the appropriateness of having the regulated entity bill customers for detariffed equipment . . . ." Kansas Comments at 4. Although we do have concerns in this area regarding access to customer proprietary information, see paras. 45–49, *infra*, it should be noted that in conjunction with the detariffing and transfer of embedded CPE to ABI, approximately 64 million customer accounts must be converted. AT&T Reply Comments at 17. Substantial billing and other service disruptions could result if the BOCs were unable to provide billing and related support to ABI on a transitional basis in the absence of ABI's ability to provide these services for itself in a timely fashion. Even assuming that it is theoretically possible (which may be

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[36] See AT&T Supplementary Comments, Appendix * A, at A-8.

[37] AT&T has indicated that installment purchases would "include interest charges on outstanding balances." The rate of interest is not specified. AT&T Supplementary Comments, Appendix * A, at A-10.

[38] The nature of these other support services is not elaborated in any detail in the AT&T filings. Presumably the services would include access to customer records and other records needed to support ABI's embedded base operations. AT&T's comments should provide clarification as to the nature of the BOC support services which would be provided to ABI. It also should be noted that, if we ultimately were to adopt a detariffing option involving bulk sales of the BOCs' embedded CPE to a third party, then it is our tentative view that the BOCs should be permitted to provide billing and other support services to the third party on an interim basis in a manner similar to the AT&T proposal.

questionable in itself) for ABI to have in place and properly functioning the necessary support systems, ABI could incur significant costs merely because it would be forced to construct on an expedited basis the billing and customer service systems needed as of January 1, 1984. It would appear to make little sense to invite the occurrence of these substantial service disruptions and costs when the available BOC support would ease the problems of transition for current BOC embedded CPE customers. If other regulatory concerns can be satisfied, it appears questionable whether transfer to ABI should be precluded based on its inability to provide customer billing services.

44. California, New York, and NATA assert that the BOCs should be fully compensated for any costs incurred in connection with support services they provide to ABI during the transition period. California and New York assert that the MFJ does not provide for any BOC support regarding embedded CPE after divestiture and that, therefore, such arrangements must be approved by the District Court in conjunction with its review of AT&T's Plan of Reorganization.[39] We invite comments regarding whether any plan we adopt should establish requirements relating to compensation. For instance, we recently have concluded that rate-of-return methods would not be used to constrain the amounts exchange carriers may earn by providing billing and collection services to interexchange carriers. *MTS and WATS Market Structure*, CC Docket No. 78–72, Phase I, Third Report Order, FCC 82–579, at para. 251 (released Feb. 28, 1983), *appeal docketed sub. nom.* NARUC v. FCC, No. 83–1225 (D.C. Cir., Mar. 1, 1983) (hereinafter *MTS and WATS Market Structure*). With regard to MFJ requirements applicable to BOC support for the provision of embedded CPE, it is for the District Court to examine whether BOC support may, consistent with the MFJ, be made available to AT&T after divestiture.[40] This

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[39] IDCMA argues that AT&T must be granted a waiver from our Second Computer Inquiry requirements to enable the BOCs to furnish billing and other support services to ABI. At a minimum, these requirements would be applicable to the detariffing which may take place in 1983. See AT&T Further Supplementary Comments at 19. It is premature at this stage of this proceeding to reach any conclusions regarding whether we should deviate from our Second Computer Inquiry separation requirements prior to divestiture. We will address this issue as part of our disposition of this proceeding, but we note here that, as an alternative to the AT&T proposal, it might be possible for AT&T to simulate operations in a "detariffed and transferred mode" on a limited basis in 1983 as a means of easing the transitional problems it will face after divestiture. AT&T intends to follow a similar approach on a system-wide basis in the last quarter of 1983 in order to ensure uninterrupted service after divestiture. See AT&T, Plan of Reorganization at 468, United States v. AT&T (D.D.C., filed Dec. 16, 1982).

[40] A detailed AT&T proposal relating to the sharing of multifunction support facilities for embedded CPE is pending before the District Court. See AT&T, Plan of Reorganization at 89–109, United States v. AT&T (D.D.C., filed Dec. 16, 1982). AT&T argues that such sharing is necessary because "[t]he large volume and

need for judicial approval, however, does not forestall our review of the AT&T proposal regarding BOC support to ABI to determine whether it is consistent with the public interest standards which we are mandated to apply under the Communications Act of 1934. New York asserts that ABI should be required to reimburse the BOCs for the full cost of billing, including postage, handling, and paper costs, and that it may be necessary to include notice on customer bills that there is no connection between the BOC involved and ABI. AT&T has indicated that customer bills will include such a notice. AT&T, Response to Objections to Its Proposed Plan of Reorganization at 182, *United States v. AT&T* (D.D.C., filed Mar. 14, 1983). New York also would impose the costs of any such notice upon ABI. We invite the parties to comment regarding this proposal made by New York. We also ask parties to comment regarding whether the notice should include a statement that the customer may purchase CPE from other vendors.

45. An additional area of concern regarding AT&T's proposal for the provision of billing and other support services by the BOCs involves the question of access to BOC customer proprietary data. We recognized in *Second Computer Inquiry* that anticompetitive problems could result if the separated subsidiary had exclusive access to customer proprietary information maintained by an affiliated entity, and we required that such information "must be disclosed to other competitive vendors at the same time the subsidiary receives the information and under the same terms and conditions if it is shared with the subsidiary." *Final Decision*, 77 FCC 2d at 481.

46. AT&T, in its filings in *United States v. AT&T*, has argued that its access to BOC customer proprietary information will be severely restricted during the period AT&T is receiving support services from the BOCs in connection with embedded CPE. *See* AT&T, Response to Objections to Its Proposed Plan of Reorganization at 193–95, *United States v. AT&T* (D.D.C., filed Mar. 14, 1983). AT&T also has indicated that such proprietary information will be masked or rendered mechanically inaccessible to the extent that this is practical. "In situations where this is not practical, the contract [for support services] will require that such proprietary information .

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complexity of the BOC's records relating to embedded customer premises equipment render it operationally impossible for AT&T to attempt to duplicate all associated facilities and computer systems prior to divestiture." *Id.* at 90. AT&T has argued that the type of sharing it is proposing is permissible under the MFJ. AT&T, Response to Objections to Its Proposed Plan of Reorganization at 18, United States v. AT&T (D.D.C., filed Mar. 14, 1983). The Department of Justice has indicated to the District Court that it supports AT&T's proposal and does not find it to be inconsistent with the MFJ. Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization at 96–102, United States v. AT&T (D.D.C., filed Mar. 24, 1983).

. . be held in confidence . . ." AT&T, Plan of Reorganization at 108–09, *United States v. AT&T* (D.D.C., filed Dec. 16, 1982).

47. The Department of Justice, in its filings in *United States v. AT&T*, has indicated that it is satisfied that "the sharing arrangements will not permit AT&T access to BOC marketing data or information on plans of subscribers to expand their service." Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization at 98, *United States v. AT&T* (D.D.C., filed Mar. 24, 1983). The Department has concluded that there are sufficient safeguards in the proposed Plan to minimize the risk of anticompetitive conduct. *Id.* at 100. Several parties, however, in comments to the District Court regarding the proposed Plan, have argued that AT&T's access to BOC customer proprietary information will give it an unfair competitive advantage. *See, e.g.*, Initial Comments of the North American Telephone Association on the AT&T Plan of Reorganization at 48–49, *United States v. AT&T* (D.D.C., filed Feb. 14, 1983). The argument is made that the safeguards proposed in the Plan are insufficient, in part because "the fact that such [proprietary] data [which cannot be rendered inaccessible] would be held in confidence does not eliminate the substantial competitive advantage that the knowledge of such information brings with it to both the BOCs and to AT&T." *Id.* at 49 n.17.

48. Among the services AT&T proposes that the BOCs be permitted to provide to ABI is service order processing. BOC service order processing systems contain orders for changes or additions to access lines pending installation. Since customers with changing access line needs may also have changing equipment needs, this information could be of value to an equipment vendor. BOC billing information is contained in the BOCs' Customer Records Information Systems (CRIS). CRIS contains virtually all customer-specific information regarding CPE service provided by the BOCs to each of their customers. Access to customer service histories through a system such as CRIS could provide commercially useful information to an equipment vendor. If AT&T were to obtain such access, then ABI, unlike any other equipment vendor, would control information not only regarding the equipment it provides but also regarding the access line service to all BOC customers regardless of the identity of the particular equipment vendor involved.

49. Our concern in this area is to determine how any detariffing and transfer plan restrictions on ABI's access to BOC customer proprietary information which relies on BOC billing and other support services might affect our *Second Computer Inquiry* decisions. Under current procedures no customer-specific information may be disclosed by a BOC to ABI unless ABI obtains a written customer authorization for the release of such information after the customer has been informed that the customer may require the release of the

same information to any vendor of the customer's choosing. *See* Letter from Chief, Common Carrier Bureau, to Alfred A. Green, Attorney for AT&T (Nov. 24, 1982) (on file at Common Carrier Bureau). AT&T is required to maintain at central locations a list of customer-specific information which has been disclosed to ABI. If, under the transfer plan, ABI is able to access customer-specific information with respect to embedded CPE, the question arises as to whether other CPE vendors should have access to this information. We seek comment on this question and specifically whether any requirement for disclosure of customer-specific information to ABI should trigger automatic disclosure to competing vendors, or whether such disclosures should be at the customer's discretion. We also seek comment regarding whether we should view our concerns as being different from those which confront the District Court because we are faced with questions relating to the sharing of information between the BOCs and a deregulated entity (*i.e.*, ABI) which is not subject to price regulation, whereas the District Court is considering information sharing between the BOCs and a regulated entity (*i.e.*, AT&T) which would be offering the transferred embedded CPE under price regulation.

F. *Antitrust Issues*

50. NATA claims that the pricing mechanism proposed by AT&T could be a violation of the Federal antitrust laws, and IDCMA and NATA also assert that any rulemaking by the Commission which codifies the proposed pricing structure could amount to the extension of antitrust immunity for anticompetitive conduct. It is our view that it would not be productive for us to resolve these antitrust concerns at this stage of the proceeding, since we have not yet formulated the specific elements of the plan. We do, however, invite parties to submit further comments regarding this issue. These comments should address, in particular, whether the pricing elements of the AT&T proposal could lead to antitrust problems and, more generally, whether *any* requirement to sell embedded CPE to subscribers at net book value plus transaction costs, see para. 32, *supra*, raises antitrust concerns.

G. *Accounting Issues*

1. *Net Book Value*

51. We have already noted in this proceeding that net book value as a proxy for economic value "has the advantage of extreme simplicity, and it may be the most prudent approach in some cases given the practical difficulties of implementing other alternatives." *Notice of Inquiry*, 89 FCC 2d at 698. We still hold that view. See

paras. 30–32, *supra*. The definition of net book value is the cost of an asset less the related depreciation reserve. Under AT&T's proposal[41] embedded CPE would be transferred to ABI at adjusted net book value.[42] AT&T would adjust this net book value by deducting deferred income taxes and unamortized investment tax credits and adding amounts relating to Western Electric deferred taxes. We believe AT&T's adjustments relate to the determination of income taxes rather than the valuation of the assets. Therefore, it is our tentative view that the accounting treatment for deferred income taxes and investment tax credits relating to the transferred equipment should be determined as described below, separately from the valuation of the equipment.

2. *Deferred Taxes*

52. Deferred income taxes are income taxes charged to telephone company expense in past periods but not actually paid. As related to equipment, deferred income taxes generally result from different depreciation expense for regulatory accounting purposes than for tax purposes due to accelerated tax write-offs. Conceptually, deferred income taxes are the income taxes which would have been paid in past periods if accounting depreciation had been used for tax purposes. Thus, a company is able to avoid paying taxes in the earlier years of an asset's life cycle by charging more depreciation expense for tax purposes than for accounting purposes. It records tax expense in those years, however, based upon its accounting income. In later years when the company has less depreciation available for tax purposes its taxable income exceeds its accounting income. Thus, the differences in expense by year are merely timing differences. Taxes not paid in the past because of these timing differences must be paid in the future.

53. In effect, the taxes deferred because of timing differences represent cost-free capital to the company. For this reason the company's rate base is reduced by the balance of deferred taxes in computing rate of return and revenue requirements. Therefore, ratepayers benefit by paying a lower return element than would have been paid if accelerated depreciation had not been taken for tax purposes. It is because of this benefit to the ratepayer that the Commission has allowed "normalized" tax accounting under which income tax expense is charged based on book income rather than taxable income.

54. AT&T proposes to reduce the transfer price of embedded CPE by the amount of deferred taxes. It argues that the deferred taxes

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[41] AT&T has proposed to appraise all supporting assets and transfer these assets at appraisal value. AT&T Further Supplementary Comments at 16–18. This specific modification is discussed at paras. 60–62, *infra*.

[42] See n.7, *supra*, for AT&T's definition of adjusted net book value.

should follow the asset because it will be liable for those taxes in future periods, after detariffing. We tentatively conclude that this is a reasonable treatment of the deferred taxes, with one exception. The deferred taxes have accumulated at the current tax rates. However, there is the possibility that at the time ABI sells this embedded equipment it may be subject to only a capital gain tax rate. Since the ordinary tax rate is considerably higher than capital gain rates, ratepayers would have paid a tax which is never incurred. We tentatively find that if AT&T is granted capital gains treatment of proceeds from the sale of this equipment, then the ratepayers should be compensated for this overpayment. We invite parties to comment on our analysis of the deferred tax issue.

3. *Investment Tax Credits*

55. AT&T proposes to reduce the net book value of assets transferred to ABI by the amount of unamortized investment tax credits related to the transferred assets. As previously noted, we tentatively believe that the accounting treatment for investment tax credits should be determined separately from the valuation of the assets because the credits are more closely related to the determination of the proper income tax expense than to asset value.

56. The investment tax credit provisions of the income tax law allow taxpayers to deduct a percentage of the cost of qualified assets as a direct offset to income taxes payable in the year the assets are purchased. Unamortized investment tax credits result when, for accounting purposes, these tax credits are not recorded as reductions in income tax expense when they are received but instead are deferred and amortized as reductions of income tax expense over the life of the assets that gave rise to them.

57. After reviewing this matter, we believe there are two possible accounting treatments for the unamortized investment tax credits. They could either be transferred to, and thus reduce, AT&T's investment in ABI which would have the same effect as AT&T's proposal to treat them as an adjustment to net book value; or they could be credited to income tax expense of the telephone companies when the assets are transferred to ABI. The first treatment would transfer the benefit of the unamortized credits to AT&T stockholders, and the second treatment would ensure that the carriers' expenses are reduced by the amount of these tax credits.

58. The argument in favor of the first treatment is that the investment tax credits were generated by the purchase of the assets and therefore the unamortized investment tax credits should follow those assets. This treatment draws support from the accounting which has been followed for investment tax credits, under which the credits have been deferred and amortized over the life of the related assets. It could be argued, therefore, that the unamortized credits

should be transferred with the assets for continued amortization over the life of the assets.

59. The argument in favor of the second treatment is that the assets were purchased and the credits realized under regulation and thus the credits should reduce the costs of regulated service when the assets are retired from regulated service. In this regard it should be noted that investment tax credits are different than deferred taxes in that there are no offsetting future taxes to be paid. Unless they are subject to recapture provisions for early retirement, the investment tax credits represent permanent tax reductions in the year they are deducted on the tax return. Moreover, if the assets were sold to a third party, the unamortized investment tax credits not subject to recapture would be credited immediately to income tax expense of the telephone company. Because investment tax credits are permanent tax reductions realized during the period of regulation, we tentatively believe that the unamortized investment tax credits should be credited to the income tax expense of the carrier when the assets are removed from the regulated accounts. We invite parties to comment regarding our analysis of this issue.

4. *Supporting Assets*

60. While AT&T adheres to the view that the proper valuation standard for the transfer of assets is adjusted net book value, it is willing to transfer supporting assets (all assets excluding CPE) at adjusted net book increased or decreased by appraisals. Apparently, AT&T's modification was offered in response to Commission questions about the possible appreciation of land and buildings which AT&T intends to transfer to ABI. In offering this modification AT&T reserved "the right to consider the results of the appraisals, and the precise nature of the effects of any action with respect to the transfer of supporting assets at a value other than adjusted net book value, before consenting to such transfer." AT&T Further Supplementary Comments at 18. Notwithstanding our overall concern with valuation, the transfer of land (and in this instance the transfer of buildings with associated land) raises a unique issue. In *Charges for Interstate Services*, Docket No. 19129, we took official notice that land is an appreciating asset, *id*. at 68 n.89, and concluded that the ratepayers should receive the benefit of gains resulting from such appreciation. It is specifically because of this conclusion that the question of possible appreciation on land and buildings was raised.[43]

61. In view of the fact that we are considering the transfer of land to ABI based upon independent appraisals, we must address the related accounting problem of recognition of gains in the sale of land.

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[43] While appreciation on buildings *per se* is handled separately there is little doubt that on the whole the buildings to be transferred to ABI are worth more than the net book value.

Charges for Interstate Services, Docket No. 19129, recognized that our current rules do not provide for gains from the sale of land to accrue to the ratepayers. The current accounting rules relative to the sale of land call for gains or losses to flow to the stockholders. For the telephone carriers, the difference between the original cost and the sales price (less commissions and other expenses of making the sale) is credited to Account 360, "Extraordinary Income Credits" or Account 370, "Extraordinary Income Charges," as appropriate. Since this activity has been relatively insignificant in the past, we ordered in *Charges for Interstate Services*, Docket No. 19129, that appropriate accounting revisions to effect this policy be made at the time broad changes to the Uniform System of Accounts are made. Those broad changes are currently being developed in *Revision of the Uniform System of Accounts and Financial Reporting Requirements for Telephone Companies (Parts 31, 33, 42 and 43 of the FCC's Rules)*, CC Docket No. 78–196, Notice of Proposed Rulemaking, FCC 78–453, 70 FCC 2d 719 (1978), which will provide a complete revision of the Uniform System of Accounts. However, we do not anticipate final action in that proceeding until 1985. Because of the significance of the transfer of land in this proceeding, our rules must provide the accounting to recognize gains from its transfer if we adopt the appraisal method for the valuation of land. We therefore propose to revise our rules so that the gain resulting from the transfer of land to ABI will be reflected in Account 526, "Other Operating Revenues." Such an approach, in our view, is required to comply with the standard established in *Democratic Central Committee*, 485 F. 2d at 806, 808–18.[44]

62. Additionally, AT&T proposes to charge the cost of appraisals to Account 171, "Depreciation Reserve." However, the Uniform System of Accounts (Part 31 of the Commission's Rules) requires that these costs be charged to Account 675, "Other Expenses." Account 675 lists the "[c]ost of valuations, inventories, and appraisals of telephone plant . . . in compliance with orders of Federal, State, or other regulatory authorities" as appropriate charges to this account. Therefore, if the rules we promulgate in this proceeding order these appraisals, then it is our tentative view that the cost of the appraisals be charged to Account 675. It also is our tentative view, however, that it may be appropriate to require a division of these appraisal costs between the BOCs and ABI. We request parties to comment regarding this proposed treatment of these costs.

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[44] In the case of any gains resulting from the increased value of land and buildings, and also in the case of any gains resulting from the sale of embedded CPE under regulation, see paras. 63–64, *infra*, it may be necessary, in order to satisfy the requirements of Democratic Central Committee, to establish a mechanism to ensure that the carriers' revenue requirements are offset by the amount of these gains so that the carriers' ratepayers would directly receive the benefit of the gains.

5. *Accounting for Proceeds of CPE Sold Under Regulation*

63. Under our current accounting rules the proceeds realized from the sale of embedded CPE are treated as gross salvage and thus are credited to the depreciation reserve. Similarly the transaction costs associated with the sale are treated as cost of removal and thus are charged to the depreciation reserve. In the past, these accounting procedures ensured that all gains and losses were ultimately passed on to the ratepayers over the remaining life of the assets remaining in each category of depreciable plant. However, these accounting rules could create problems in connection with the removal of embedded CPE from regulated service. Many BOCs and independent companies are now offering some embedded CPE for sale at state-tariffed rates. These rates may exceed net book value plus transaction costs, yielding capital gains on equipment sold. In applying our current accounting rules, these gains lower the net book value of the remaining CPE in the account.

64. Given the fact that only selected types and quantities of CPE are being offered for sale, we question whether this is the appropriate accounting treatment because any gains realized from sales would lower the net book value of the embedded CPE transferred to unregulated service, thus giving carriers' investors the benefit of the gains. Therefore, we are soliciting comments as to the appropriateness of the above approach. As an alternative to the above approach we solicit comments on the appropriateness of charging transaction costs to operating expenses and crediting the difference between the sales price and the net book value to revenues.

6. *Accounting Procedures for Independent Telephone Companies*

65. In our *Second Computer Inquiry* decision we did not place a separate subsidiary requirement on independent telephone carriers. Rather, we allowed these carriers the option of establishing a separate subsidiary or offering CPE and enhanced services through their existing corporation. If a carrier chooses to offer these services and equipment through its existing corporation it must use nonratemaking (below-the-line) accounts to account for these activities, even though we have not prescribed the final accounting requirements. Now that we are considering the transfer of embedded CPE, it is appropriate to establish the proper accounting and reporting for the investment, expenses, and revenues associated with all nontariffed operations. We are considering the establishment of accounting procedures for independent telephone companies similar to those proposed for record carriers in CC Docket No. 82–678.[45]

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[45] Amendment of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers of the Commission's Rules and Regulations and Conforming Amendments to Annual Financial Reports Form O for Wire-Telegraph and Ocean-Cable

66. The Commission, in *Amendment of Parts 34 and 35*, CC Docket No. 82–678, proposes to establish rules under which nonregulated CPE activities are accounted for in separate books. The *Notice of Proposed Rulemaking* in that proceeding lists the following objectives: (1) assure availability for regulatory purposes of data which are not distorted by nonregulated activities; (2) establish specific accounts to identify account balances associated with nonregulated activities; (3) allow maximum latitude for carriers in establishing their accounting systems for nonregulated activities; (4) identify accounts affected by deregulation and establish instructions for transfers from prescribed accounts in Parts 34 and 35 of the Commission's Rules to the accounts for nonregulated activities; (5) provide for recording joint transactions and any necessary allocations between the regulated entity and its nonregulated activities; and (6) monitor the scope of nonregulated activities and any potential for adverse impacts on regulated services.

67. Under the Commission's proposal, carriers' accounting for nonregulated CPE activities would be revised by including all investment, revenues, and expenses for these activities in separate books of account. Only the net investment, and net income or loss, of nonregulated activities would be reflected, below the line, on the carrier's regulated books. The Commission proposal would eliminate Account 1610, "Miscellaneous Physical Property," Account 1615, "Allowance for Depreciation; Miscellaneous Physical Property," Account 5110, "Income from Miscellaneous Physical Property," and Account 5115, "Income from Merchandising, Jobbing, and Contracting." Investment, revenues, and expenses currently recorded in these accounts would be transferred to books for nonregulated activities. The Commission proposal also would add Account 1625, "Nonregulated Investments," and Account 5111, "Income from Nonregulated Investments," to account for nonregulated activities.

68. Interested parties are requested to comment on the applicability of the Commission's approach to the independent telephone companies, and to suggest the appropriate accounts, allocation procedures, and controls necessary to ensure that the below-the-line operation receives its full share of each company's costs. Parties may also suggest alternative approaches, including accounting which they consider more appropriate.

H. *Intrasystem Wiring*

69. The Commission, in *Modification to the Uniform System of Accounts*, CC Docket No. 82–681, Notice of Proposed Rulemaking, FCC 82–4265 47 Fed. Reg. 44770 (released Oct. 1, 1982), proposed to

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Carriers and Form R for Radiotelegraph Carriers with Respect to Accounting for Customer-Premises Equipment after Detariffing, CC Docket No. 82–678, Notice of Proposed Rulemaking, FCC 2d 82–423, 47 Fed. Reg. 44781, at para. 5 (released Oct. 1, 1982) (hereinafter Amendment of Parts 34 and 35).

detariff new intrasystem wiring associated with PBXs and key systems. Intrasystem wiring (also referred to as multiwiring or complex wiring) was defined as all cable or wire on the customer side of the demarcation point and its associated components (*e.g.*, connecting blocks, terminal boxes, conduit between buildings on the same customer's premises) which connects station components to one another or to the common equipment. The Commission also proposed to treat the embedded intrasystem wiring as an integral part of the valuation procedures to be developed in setting the value of embedded CPE in this proceeding. Thus, it was our tentative view that the embedded investment of the intrasystem wiring should be treated in the same manner as, and simultaneously with, its related embedded CPE. *Id.* at para. 23.

70. We now request parties to address the question as to whether it is desirable to include the intrasystem wiring as an integral part of the embedded CPE and thus account for it as "part and parcel" of the embedded CPE to be transferred. Various parties may perceive the transfer of embedded intrasystem wiring to ABI as having a detrimental effect upon the evolution of a competitive CPE environment, such that this wiring should not be transferred to ABI. We seek comment on this issue, including whether the advantages of detariffing embedded intrasystem wiring would be diminished if this wiring remained with the BOCs while the related embedded CPE is transferred to AT&T at divestiture. In addition, we seek comment on whether it would further our policies and objectives to require AT&T, before divestiture, to transfer ownership of embedded intrasystem wiring to ABI as part of any potential transfer of embedded CPE.[46]

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[46] Although the MFJ orders the transfer of embedded CPE to AT&T, the District Court may require all inside wiring to remain with the BOCs. Such a requirement would conflict with our proposal of an intrasystem concept because intrasystem wiring is an element of inside wiring (approximately 25 percent to 30 percent). Several parties, in comments regarding AT&T's Plan of Reorganization in United States v. AT&T (D.D.C., filed Dec. 16, 1982), have argued that all inside wiring, including intrasystem wiring, should be transferred to AT&T. The Department of Justice supports AT&T's proposal in the Plan to allocate inside wiring to the BOCs. Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization at 84–91, United States v. AT&T (D.D.C., filed Mar. 24, 1983). The District Court presumably will address this issue as part of its ruling on the proposed plan. The Department of Justice has made clear that the treatment of inside wiring in the MFJ is not intended to preclude the Commission from deregulating inside wiring and determining the manner in which the BOCs may engage in the offering of inside wiring after divestiture. Response of the United States to Public Comments on Proposed Modification of Final Judgment at 47 & n.*, United States v. AT&T (D.D.C., filed May 20, 1982). The Department also has indicated that the MFJ "is not intended to foreclose the FCC . . . from establishing mechanisms for the recovery of amounts in [Account 232, relating to inside wiring], including through charges to the users of [intrasystem] wiring." Response of the United States to Public Comments and Action on AT&T's

I. *Treatment of Independent Telephone Companies*

71. In fashioning appropriate rules and procedures for the detariffing of embedded CPE in a manner consistent with the objectives of our *Second Computer Inquiry* decision, we recognize that the MFJ raises issues which are uniquely applicable to AT&T. Because of this, it is our tentative view that the independent telephone companies need not be subject to the same timeframe for detariffing their embedded CPE as may govern AT&T. A reasonable period of time should be afforded for the detariffing of their embedded CPE. As to any of the options proposed in this section, it is our tentative conclusion that all embedded CPE provided by the independents should be detariffed not later than December 31, 1987.[47]

72. Various mechanisms are available to implement detariffing by this date. In general, this Commission could adopt any one of several approaches relying on various degrees of Federal scrutiny. One option could be to let states exercise their discretion as to the manner in which embedded CPE is to be deregulated within their respective jurisdictions. This approach would be subject to the general caveat that no state action is taken which is inconsistent with this Commission's general determinations in this proceeding, such as valuation requirements and mechanisms necessary to comply with *Democratic Central Committee*. States would be free to deregulate CPE on as rapid or gradual a basis as deemed appropriate under the circumstances, consistent with the requirement that all CPE be deregulated by December 31, 1987. This approach in large measure gives due consideration to the states' traditional role in the regulation of CPE. It also provides a means whereby states have sufficient flexibility to tailor detariffing plans of individual carriers so as to minimize any potential dislocations to consumers. Moreover, it appears administratively more expeditious to defer implementation to the various states as opposed to requiring Federal approval of detariffing plans of all carriers or mandating a uniform detariffing plan irrespective of the circumstances which may exist in particular localities. For these reasons we tentatively conclude that states

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Proposed Plan of Reorganization at 88 n.*, United States v. AT&T (D.D.C., filed Mar. 24, 1983).

[47] This is the date on which the interstate revenue requirement associated with that plant will be reduced to zero. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, 89 FCC 2d 1 (1982), *appeal docketed sub nom.* MCI Telecommunications Corp. v. FCC, Nos. 82-1237 & 82-1456 (D.C. Cir. Mar. 4, 1982). In Amendment of Part 67, CC Docket No. 80-286, the Commission adopted the Popenoe Plan for defining the monthly interstate revenue requirement associated with embedded CPE during the five years ending on December 31, 1987. We anticipate that an individual company's requirement, as defined by that plan, would remain unchanged by that company's schedule for removing its embedded CPE from its rate base.

should have the flexibility to deregulate embedded CPE of the independents within the timeframe we are proposing.

73. A less preferred option would be for this Commission to set forth a detailed plan for the detariffing of all CPE on a nationwide basis. This does not appear necessary at this point when reasonable means are available to state regulators to effectuate the detariffing of CPE consistent with our *Second Computer Inquiry* decisions. It is necessary, however, to ensure that, if states do not take appropriate action to detariff embedded CPE by December 31, 1987, a Federal mechanism is in place to deregulate this equipment. Accordingly, we are proposing that if a state does not have a plan to detariff embedded CPE in effect as of July 1, 1985, this Commission would exercise its preemptive powers and issue guidelines under which all embedded CPE not covered by a state detariffing plan is deregulated.

74. Accordingly, we seek comment on this approach to the detariffing of embedded CPE provided by the independents. We also seek comment on the applicability of the accounting procedures we have set forth in this *Notice* to the independents, particularly insofar as they may relate to a state's efforts to deregulate embedded CPE.

J. *Treatment of IRCs and Western Union*

75. This proceeding also addresses the treatment of embedded CPE provided by the IRCs and Western Union. For Western Union, the embedded CPE involved includes Telex I equipment, TWX (Telex II) equipment, equipment used to provide satellite services, equipment used to provide private line services, and equipment used for Info-Comm services. For the IRCs, the embedded CPE involved includes all nontelex equipment. Embedded telex equipment offerings of the IRCs already have been detariffed by the Commission. *Interface of the International Telex Service with the Domestic Telex and TWX Service*, Docket No. 21005, 86 FCC 2d 411 (1981). With respect to the IRCs, we already have noted our intention to address these issues in this proceeding.[48]

76. We tentatively propose to treat the embedded CPE offered by the IRCs and Western Union in the following manner. First, all of the embedded base of the IRCs and Western Union must be detariffed not later than December 31, 1987. Second, the IRCs and Western Union must submit plans to this Commission, not later than June 30, 1984, which will be subject to approval by the Commission and which shall explain the detariffing principles and procedures which the applicant proposes to follow. These plans may incorporate proposals to detariff portions (or the entirety) of the embedded base before the December 31, 1987, deadline. The Commission, in reviewing these applications, will apply general guidelines intended to protect ratepayer and user interests while also giving the

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[48] See Amendment of Parts 34 and 35, CC Docket No. 82-678, at para. 5.

companies sufficient flexibility to meet their own business needs in carrying out the detariffing process.

77. Third, the principles which we adopt in this proceeding in connection with the detariffing of embedded CPE by AT&T and the independent telephone carriers also will apply to the IRCs and Western Union.[49] Finally, the accounting procedures ultimately adopted in *Amendment of Parts 34 and 35*, CC Docket No. 82–678, to ensure that nonregulated activities are accounted for in separate books shall apply to the embedded CPE offerings of the IRCs and Western Union after detariffing. See para. 65, *supra*.

78. We seek comments from interested parties regarding two sets of questions. First, are the detariffing principles and procedures we are proposing for the IRCs and Western Union sufficient to balance equitably the interests of ratepayers, users, and the record carriers? To the extent that deficiencies are perceived in the proposed plan, what alternatives should be considered as a better means of meeting the objectives of *Second Computer Inquiry* and this proceeding?

79. Second, do we need to adopt special rules for the true-up of the value of embedded assets already removed from regulated service, or will it be appropriate to carry out this true-up process on the basis of the generally applicable rules which we adopt in this proceeding?

IV. CONCLUSION

80. Today we propose policies to govern the detariffing of embedded CPE held by the BOCs, the independent telephone companies, the IRCs, and Western Union. We have set out our general regulatory concerns and objectives and, in the case of the BOCs and AT&T, we have summarized the AT&T detariffing proposal, discussed the comments of parties regarding an initial version of the AT&T plan, and sought further comments addressing the modified version of this plan. For the independent companies, we have presented a set of options for detariffing their embedded CPE and we have invited comment regarding these options or alternative proposals. In the case of the IRCs and Western Union, we have posed a general set of questions regarding whether our proposals sufficiently balance the interests of ratepayers, users, and the carriers and whether the valuation rules developed in this proceeding should be applicable to any embedded CPE already detariffed by these carriers.

81. One of the fundamental goals of *Second Computer Inquiry* has been to carry forward the policies of this Commission regarding deregulation and the fostering of competition in the enhanced

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[49] We already have indicated that a true-up procedure regarding the transfer value placed on embedded telex CPE already detariffed by the IRCs may be necessary as part of this proceeding. Amendment of Parts 34 and 35, CC Docket No. 82–678, at para. 19.

services and CPE marketplaces. In this proceeding we are seeking to effectuate this goal as it relates to the embedded CPE base of the Bell System, the independent telephone companies, and the record carriers. We have expressed our tentative view that a transitional plan which combines the offering for sale of embedded CPE with the detariffing of that portion of the embedded base which is not sold offers the most promise for a transition to a deregulated environment with the least amount of customer dislocations and administrative costs.

82. In the case of the Bell System, AT&T has placed before us a detariffing and transfer plan which generally comports with our views regarding the most effective means for carrying out the transition. We emphasize, however, two concerns regarding the AT&T proposal. First, our perception of the plan is that it represents a framework upon which we can construct a more complete structure for realizing our objectives. Our review of the comments in this proceeding indicates that the AT&T proposal does not address several issues which are of concern to various parties in this proceeding, and that a number of details remain to be worked out before we can be assured that a plan is fashioned which promotes our goals and objectives. The AT&T proposal, as we have noted in our discussion, has been modified to accommodate many of the concerns which have been raised, and it is our belief that further adjustments and modifications to the plan as a result of this proceeding may render the plan a suitable vehicle for carrying out the transition.

83. Second, our discussion has pointed out that several basic problems have to be resolved in order to accomplish detariffing in accordance with the schedule suggested in the AT&T proposal. At the center of these problems is the question of whether the portion of the embedded base which is offered for sale, and the rules under which the embedded base is valued for purposes of sale and transfer, will be sufficient to meet our regulatory objectives and the standards of *Democratic Central Committee*. Another set of problems involves the question of what provisions must be included in the plan regarding the terms and conditions of sales and leases by ABI in order to protect the interests of embedded CPE customers. Further, we must decide whether embedded intrasystem wiring should be treated as an element of the related embedded CPE for purposes of valuation and transfer. Finally, we must resolve several accounting issues, including the proper treatment of deferred taxes and investment tax credits.

84. We recognize that it would be facile to suggest that there are easy solutions to these problems, and we have sought to stress in this *Notice* that traditional utility regulation of carrier-provided CPE—as well as the way in which various consumers obtain and use their telephones—will be affected by the policies adopted by the Commission in this proceeding. It is our view, however, that the modified

AT&T proposal has made substantial contributions toward resolving these issues. Further, we have presented tentative proposals in this *Notice* which are designed to expedite the deregulation of embedded CPE without jeopardizing competition or ratepayer and customer interests. In addition, we must keep squarely in view the fact that competitive market forces are increasingly rendering price regulation of CPE impractical and unwarranted. This compels that deregulation of the embedded base occur sooner rather than later. We also must not lose sight of the fact that, because of the timetable of divestiture, there is the potential that AT&T (and, as a consequence, its ratepayers) may be forced to incur costs associated with maintaining the embedded base if detariffing and transfer to ABI are delayed. We consider it to be our responsibility to seek the avoidance of these costs if we can do so through devising a transitional plan which also promotes our procompetitive goals while minimizing dislocations and other costs. This *Notice* is a step in devising such a plan. We now seek the comments of interested parties as a further means of assisting us in this task.

85. In the case of the independent companies and the record carriers, we are able to view our objectives from a perspective which is not dominated by the impending divestiture of the Bell System. With regard to the independents, our primary concern is that detariffing be completed not later than December 31, 1987, the date on which the interstate revenue requirement for embedded CPE is reduced to zero. We also seek to ensure that the independents, working with state commissions, have sufficient latitude to establish detariffing plans which enable them to recover their investment in embedded CPE with minimum consumer dislocation. With regard to the record carriers, we also propose complete detariffing by the end of 1987 while granting the carriers flexibility in formulating their own plans, subject to our approval. Finally, we also are proposing that the accounting rules we adopt in this proceeding apply to the independents and the record carriers as well as to AT&T.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

86. Interested parties are requested to comment upon the following initial regulatory flexibility analysis, which is included in this *Notice* in compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612.

A. *Reasons for Action; Objectives; Legal Basis*

87. This *Notice* proposes policies of general applicability designed to implement the policies established in *Second Computer Inquiry* with respect to embedded CPE owned by various common carriers. The primary objective of this proceeding is to adopt detariffing and transfer plans for embedded CPE which facilitate the establishment of a deregulated, competitive market for CPE, while

at the same time protecting ratepayer interests, minimizing user dislocations, and holding down administrative costs. The legal authority for this proposed rulemaking is contained in Sections 4(i), 4(j), and 201-205 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205.

B. *Applicability to Small Entities*

88. The provisions of this proposed rulemaking would apply to AT&T, ABI, the BOCs, the independent telephone companies, the IRCs, and Western Union. It is our tentative view that none of these companies falls within the definition of "small business" as that term is used in the Regulatory Flexibility Act. In the case of independent telephone companies, although we recognize that some of these carriers are small, we reiterate our conclusion in a recent proceeding that they are outside the narrow definition in that Act. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, at para. 360 (local exchange carriers are excluded from definition of "small entity" because they are dominant monopolies in their fields of operation).

89. It also is our view, however, that the policy objectives of the Regulatory Flexibility Act are similar to those set out in Sections 2(b) and 203(a) of the Communications Act to 1934, 47 U.S.C. §§ 152(b), 203(a), the provisions of which are intended to relieve many small carriers from reporting requirements and other requirements established in the Act. Our intention in this proceeding, in proposing options for detariffing embedded CPE owned by independent telephone companies, is to minimize the transitional burdens imposed upon those companies. See paras. 71-73, *supra*, for a description of these options. We specifically invite the small independent companies, their trade associations, and others who may represent their interests to submit comments regarding these options and regarding other mechanisms which may meet our regulatory objectives in this proceeding while also minimizing reporting, recordkeeping, and compliance burdens upon the small independent carriers.

C. *Other Considerations*

90. We conclude that the proposed rules do not duplicate, overlap, or conflict with any existing Federal rules. It is our view that we are not required to examine significant alternatives to the proposed rules which would minimize significant economic impact upon small entities, because we have concluded that the proposed rules will not apply to small entities. As we have noted, however, we are considering several options regarding detariffing of embedded CPE owned by the independent companies, and our rulemaking will be guided, in part, by our intention to fashion a detariffing plan for the independents which minimizes any adverse economic impact upon them.

VI. COMMENT FILINGS AND ORDERING CLAUSES

91. We have presented proposals which we believe will enable carriers to complete the transition to full deregulation of the CPE market with minimal cost and inconvenience to carriers and subscribers. We seek comments discussing whether these proposals adequately address the issues discussed in this *Notice*. If interested persons believe that the proposals fail to address relevant concerns we ask that they suggest modifications which would make the detariffing and transfer plan responsive to those concerns.

92. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered in a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever occurs earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding.

93. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation, and that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

94. ACCORDINGLY, IT IS HEREBY ORDERED, That, pursuant to Sections 4(i), 4(j), and 201–205 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201–205, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules, in accordance with the discussion and delineation of issues in this *Notice* and on the basis of previous notices and filings in this proceeding.

95. IT IS FURTHER ORDERED, That all interested persons MAY FILE comments on the issues and proposals discussed in this *Notice* not later than August 1, 1983 and that replies may be filed not later than August 22, 1983. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs, comments, or replies

shall be filed with the Federal Communications Commission, Washington, D.C. 20554, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C., offices. In reaching its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance on any such information or ideas is noted in the *Order*.

96. IT IS FURTHER ORDERED, That the Secretary shall cause this *Notice of Proposed Rulemaking* to be published in the Federal Register.

97. IT IS FURTHER ORDERED, That the Secretary shall transmit a copy of this *Notice* to the Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

98. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this *Notice* to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARIO, *Secretary*

* Appendix A and B-may be seen in the FCC Dockets Branch.

Control, Transfer of, Procedures
License, Assignment of, By Receiver in Bankruptcy
License, Assignment of, Involuntary
License, Assignment of, Procedures

Application for assignment of license granted. A violation of Section 310(d) of the Communications Act of 1934, as amended, requiring prior Commission consent to the transfer of control or assignment of a license, was not disqualifying where an application was promptly filed.
–*D.H. Overmyer Telecasting Co. Inc.*

FCC 83-224

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

D. H. OVERMYER TELECASTING CO., INC.
Debtor in Possession - Bankruptcy Court
S.D. New York
(Assignor)
and

D. H. OVERMYER TELECASTING CO., INC.
(Assignee)

For the Involuntary Assignment of License of Station WDHO-TV, Toledo, Ohio.

File No. BALCT-810212KF

D. H. OVERMYER TELECASTING CO., INC.
(Assignor)
and

D. H. OVERMYER TELECASTING CO., INC.
Debtor in Possession - Bankruptcy Court
N.D. Ohio E.D.
(Assignee)

For the Involuntary Assignment of License of Station WDHO-TV, Toledo, Ohio.

File No. BALCT-810212KG

FIRST NATIONAL BANK OF BOSTON

For the Involuntary Transfer of Control of D. H. Overmyer Telecasting Co., Inc.,

File No. BTC-810330KE

Debtor in Possession - Bankruptcy Court
N.D. Ohio E.D., Licensee of Station
WDHO-TV, Toledo, Ohio.

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983 Released: May 20, 1983)

BY THE COMMISSION: COMMISSIONERS FOGARTY, JONES AND SHARP NOT PARTICIPATING.

1. The Commission has before it for consideration: (1) the above-captioned applications; (2) a petition for special relief and an informal objection to the application of the First National Bank of Boston, filed by The Overmyer Company, Inc.[1]; (3) opposition pleadings filed by the First National Bank of Boston; and (4) various related pleadings.

2. The Overmyer Company, Inc. (TOC) is the parent corporation of D. H. Overmyer Telecasting Co., Inc. (Telecasting), licensee of Station WDHO-TV, Channel 24, Toledo, Ohio. The circumstances leading to the present proceedings began in 1971 when the First National Bank of Boston (FNBB) made a loan to TOC for which the stock of Telecasting, the licensee, was pledged as collateral. In 1975, after notice of default, FNBB acquired ownership of 49% of Telecasting's stock and initiated receivership proceedings in Ohio to acquire ownership of the remaining shares. However, before the matter was resolved, the proceeding was stayed by the actions of TOC and Telecasting, each separately filing for Chapter XI bankruptcy protection in the United States Bankruptcy Court in the Southern District of New York.[2] Nonetheless, through the efforts of FNBB, Telecasting's bankruptcy proceeding in New York was eventually dismissed. However, on the same day of the dismissal, Telecasting initiated a new Chapter XI proceeding in the United States Bankruptcy Court of the Northern District of Ohio, Eastern Division.[3] In this second proceeding, FNBB continued to press its claims to the remainder of Telecasting's stock. On March 25, 1981,

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[1] The Overmyer Company captioned the informal objection as a "Petition to Deny (Informal Objection)." However, since Section 309 of the Communications Act of 1934, as amended, does not provide for the filing of petitions to deny against involuntary transfer applications, the pleading will be treated as an informal objection under Section 73.3587 of the Commission's Rules.

[2] On November 11, 1976, the Commission granted an application (BALCT-603) for the involuntary assignment of the license which occurred when Telecasting entered bankruptcy proceedings. Essentially, the license went from Telecasting, as an independent entity, to Telecasting as a debtor in possession under the court's supervision.

[3] Two of the pending applications reflect the change of courts overseeing the Telecasting bankruptcy proceeding. When the New York court dismissed the first proceeding, an application (BALCT-810212KF) was submitted concerning the resulting involuntary assignment of the WDHO-TV license from Telecasting as a debtor in possession in New York to Telecasting as an independent entity. The

the court issued an order recognizing the bank's right to the remaining shares and directed that FNBB begin to oversee the licensee's operation, subject to the court's supervision. FNBB took control of Telecasting almost immediately and, on March 30, 1981, filed the application (BTC-810330KE) seeking Commission consent to the involuntary transfer of control of Telecasting pursuant to the bankruptcy court's order. Thereafter, TOC filed a petition for special relief with the Commission, seeking an order that FNBB relinquish control of Telecasting. TOC also filed an informal objection to FNBB's involuntary transfer application. These requests were opposed by FNBB. Action on the applications and pleadings were deferred pending a decision by the bankruptcy court in Ohio adjudicating all outstanding claims in the Telecasting bankruptcy proceeding. This decision was issued on September 17, 1982, and is currently on appeal. Between FNBB's assumption of control of the licensee and the September 17, 1982 decision of the bankruptcy court, a significant number of pleadings were filed with the Commission by both parties regarding FNBB's involuntary transfer of control application. Since some of the matters raised in these pleadings were rendered moot by the court's decision, the parties were requested by the Commission's staff to submit a summary of those matters still at issue. These summaries were filed on January 6, 1983, and the matters discussed below only address those issues raised or referred to in these documents.

Issues in Contest

3. TOC maintains that FNBB's assumption of control of Telecasting, without the prior consent of the Commission, violated Section 310(d) of the Communications Act of 1934, as amended. It states that FNBB acquired 100% of Telecasting's stock, designated new officers and directors for the licensee and has otherwise exercised *de facto* control over WDHO-TV's operation. Moreover, TOC contends that FNBB is not acting in a representative capacity for the court, such as a receiver, a bankruptcy trustee or even as a debtor in possession. TOC underscores this point by noting that FNBB is not a disinterested party, being one of Telecasting's largest creditors, and arguing further that the bank has a substantial beneficial interest in the Telecasting property. For these reasons, it also contends that the Commission's "short form" involuntary transfer of control procedure was not the proper procedure for FNBB to follow for its acquisition of control. In TOC's view, a substantial change in ownership occurred which required utilization of the Commission's "long form" procedure, especially since FNBB was allegedly acting in its own behalf,

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second application (BALCT-810212KG) reflects the involuntary assignment of the license to Telecasting as a debtor in possession under the bankruptcy court in Ohio.

and not for the protection of all creditors. TOC would thus distinguish the present case from other situations involving the court appointment of receivers or trustees. It would further distinguish this case from the appointment of a debtor in possession, since in such situations there is no real change in control. Consequently, TOC argues the present proceeding constitutes a sham, designed to avoid the procedural and substantive requirements of the Commission's "long form" application process.

4. TOC further maintains that FNBB was deliberately attempting to circumvent the Commission's jurisdiction by acquiring control through the bankruptcy court. It alleges FNBB knew that the Commission's prior consent was required for a change in control because of the bank's prior involvement in the communications industry and by the explicit terms of the stock pledge agreement by which Telecasting's shares were held as collateral. TOC further states that the bankruptcy court improperly impinged on the Commission's responsibilities. Citing *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), TOC argues that the Commission has exclusive jurisdiction over the disposition of licenses, which the bankruptcy court failed to observe in ordering the transfer of control. TOC avers that if the court's action is left unchallenged, a precedent will be established which will allow scores of similar court effectuated changes in control. While recognizing that under *La Rose* v. *FCC*, 494 F.2d 1145 (D.C. Cir. 1974), the Commission is under some duty to accommodate federal bankruptcy policy, TOC maintains that *La Rose* does not permit a bankruptcy court to order a change in control without the prior consent of the Commission. It thus argues that a decision such as *La Rose*, which urges reconciliation between the Communications Act and federal bankruptcy statutes, is irrelevant to FNBB's deliberate and illegal assumption of control. TOC argues that the present proceeding involves more than questions of local contract or debtor/creditor law, but concerns a violation of Section 310(d) of the Communications Act and whether the Commission or a bankruptcy judge will determine who controls broadcast facilities. TOC further maintains that FNBB's request for Commission consent subsequent to the change in control does not resolve the issues.

5. TOC also challenges the underlying basis of the court order which effectuated the transfer. It charges that the foreclosure on Telecasting's stock violated the Uniform Commercial Code. Further, that the bank's assumption of control without Commission consent not only violated the Communications Act, but also the terms of the pledge agreement. TOC additionally argues that the FNBB loan has been repaid through accounts receivable from TOC's other subsidiaries, which the bank has allegedly collected but misappropriated and converted. Citing *Granik* . v. *FCC*, 234 F.2d 682 (D.C. Cir. 1956), TOC argues that the alleged contract violation must be investigated by

the Commission, since any breach would reflect on the public interest and since a grant of the transfer might improperly influence the court. TOC further charges that it was not properly represented at the foreclosure hearing and that the Commission is under no obligation to enforce a court order based on a proceeding depriving a party of its due process rights. Moreover, it alleges that FNBB has refused to cooperate in attempts to arrive at a settlement which would benefit all creditors. TOC also argues that the bank took control while the bankruptcy court's order was still in the process of being appealed, frustrating TOC's ability to get meaningful relief. The unorthodox nature of FNBB's assumption of control, according to TOC, is underscored by the fact that the bank took control on March 25, 1981, and did not file an application for Commission consent until almost a week later, on March 31, 1981. TOC thus contends that the bank's transfer of control application should be designated for hearing. In the meantime, citing *Radio Corpus Christi*, 70 FCC 2d 1555 (1979), it argues that the Commission should issue a cease and desist order, requiring FNBB to relinquish control, and defer further action until all matters can be fully resolved. TOC also points out that the effectiveness of the bankruptcy court's order should be reviewed in light of the United States Supreme Court's decision in *Northern Pipeline Const.* v. *Marathon Pipe Line Co.*, 102 Sup. Ct. 2858 (1982), which found portions of federal bankruptcy law unconstitutional.

6. TOC additionally maintains that the present circumstances raise questions of whether FNBB has the basic qualifications to be a Commission licensee. TOC contends that the bank's submissions to the Commission contain serious misrepresentations. For example, it points out that FNBB represented in the 1971 loan agreements that Commission consent would be acquired prior to foreclosing on Telecasting's stock, yet the bank failed to do so. TOC also maintains that FNBB practiced deceit by failing to fulfill an offer of a settlement after TOC withdrew its appeal of a bankruptcy court decision. In addition, it contends that FNBB has improperly attempted to influence an applicant seeking a construction permit which would be mutually exclusive with an application for renewal of the WDHO-TV license.[4] Furthermore, TOC accuses FNBB of not keeping the Commission fully apprised of all relevant circumstances since the operation of the licensee is now under the control of the bank's nominee. Such an alleged change in control, it contends, also required the submission of a "long form" application and the Commission's prior consent. TOC also alleges that the bank has not

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[4] FNBB has submitted an application seeking renewal of the WDHO-TV license. A separate license renewal application has also been filed by TOC which additionally challenges FNBB's license renewal application. These applications are mutually exclusive with other pending construction permit applications for WDHO-TV's frequency.

made a full disclosure regarding the citizenship and other business interests of its principals, information necessary to determine its qualifications. TOC additionally accuses FNBB of not fulfilling upon pledges to find a buyer for the station. Finally, TOC states that the bank delayed capital improvements in the facility, causing poor performance and a temporary loss of service. For all these reasons, TOC maintains that a substantial and material question of fact exists as to whether FNBB is qualified to operate the station.

7. FNBB opposes TOC's challenges to the bank's involuntary transfer of control application. FNBB argues that the matter should be treated as any normal involuntary transfer proceeding. It contends that the change in control took place as a matter of law, through the bankruptcy court's enforcement of the terms of the stock pledge agreement. It further argues that its application should be granted so as to avoid any appearance of a conflict between the Commission and the bankruptcy court. FNBB maintains that a grant would be consistent with the principles established in *La Rose* v. *FCC*, *supra*, which require administrative agencies to follow federal policies generally outside their areas of expertise, in order to assure their actions will serve the public interest. More specifically, it contends *La Rose* stands for the proposition that the Commission must accomodate the Bankruptcy Act in its decision, so as to protect the licensee's innocent creditors. It maintains that the Commission generally provides such accomodation by automatically authorizing an involuntary transfer of control upon a court's appointment of a receiver, trustee or debtor in possession. Moreover, it points out that TOC voluntarily submitted itself to the jurisdiction of the court when Telecasting was designated as a "debtor in possession" by that court. FNBB further argues that the court's order placing it in control was particularly important in the present case for three reasons. First, the court had found that TOC and other commonly owned companies were engaging in dishonest acts and attempting to defraud innocent creditors of Telecasting, which activities made it inappropriate that TOC remain in control. Second, under Ohio law, FNBB alleges it was entitled to acquire control under the stock pledge agreement because of the default on its loan. Third, it maintains that the court found the takeover of Telecasting to further the policies of the Bankruptcy Code by protecting the rights of the station's creditors, and that the public interest requires that such a policy be accommodated. The bank would also equate the positions of receiver, trustee and debtor in possession for the purposes of determining control under the Communications Act. Finally, FNBB contends that any further delay in granting the transfer would be harmful to the orderly administration of the Telecasting bankruptcy estate.

Discussion

8. At the outset, we note there is no objection to the grant of two

of the captioned applications (BALCT-810212KF and BALCT-810212KG). These uncontested involuntary assignment applications reflect the change of status of Telecasting from a debtor in possession under the New York Court to the same status under the Ohio Court. Consequently, they will be granted without further discussion so as to assure continuity with respect to the factual occurrences involved in this proceeding. As to TOC's challenge to FNBB's application for the involuntary transfer of control of Telecasting as a debtor in possession to the bank, the first issue presented is whether a grant of the application is warranted in view of alleged mistakes, illegalities and irregularities concerning the bankruptcy court's decision. The second concerns whether the Commission can find FNBB qualified to be a licensee based on the information before it. The remaining issues concern the appropriateness of filing a "short form" application rather than a "long form" and whether the bank violated the Communications Act by assuming control of the licensee without prior Commission consent.

9. As noted above, one objection of TOC to a grant of the bank's involuntary transfer application is on the grounds that the bankruptcy court made serious mistakes of fact and law in ordering the change in control of the licensee. Specifically, TOC claims that the underlying debt to FNBB was paid, making foreclosure on the pledged stock unnecessary; that it was not adequately represented at the bankruptcy hearing; and that the Supreme Court decision in *Northern Pipeline Const.* v. *Marathon Pipe Line Co., supra*, made the Bankruptcy Court's order ineffective. With respect to these arguments, we have consistently held that the Commission will not generally question the appointment of a bankruptcy trustee or receiver where a court is seeking to protect the creditors of a financially disabled licensee. *E.g., H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973). We have also held that private contractual disputes are more appropriately resolved by local courts of competent jurisdiction, because the Commission usually lacks the expertise, the resources and the jurisdiction to adjudicate such matters fully. *E.g., Carnegie Broadcasting Co.*, 5 FCC 2d 882 (1966). *See also Regents* v. *Carroll*, 338 U.S. 586 (1950). In the case cited by TOC, *Granik* v. *FCC*, 234 F.2d 682 (D.C. Cir. 1956), the court held that parties who had contractual claims to the ownership of a licensed facility possessed standing to file petitions to deny assignment of license applications. The present circumstances, however, do not revolve around a question of standing. Rather, they present a question of what forum can best resolve the issue of whether a bankruptcy court's order was appropriate. We find that such disputes should be left to those tribunals which are specifically charged with reviewing such matters on appeal. Moreover, TOC has not demonstrated that a grant of the bank's application will prejudice its pursuit of appellate relief. The facility will continue to

be under the supervision of the bankruptcy court, which, if instructed by a higher court, can order, subject to the prior consent of the Commission, that control of the facility return to TOC. For these reasons, further inquiry on these matters is not warranted.

10. A second matter raised by TOC concerns whether FNBB possesses the requisite qualifications to be a licensee. With regard to this matter, we note that the Commission's review of an applicant's qualifications in the context of an involuntary transfer application, filed pursuant to the order of a bankruptcy court, is ordinarily limited to the information called for by the "short form" application, FCC Form 316. Under such circumstances, as opposed to proceedings where a new, fully independent licensee is being reviewed, the Commission is only considering a party who will be operating the facility on a temporary basis; *i.e.*, only until the bankruptcy estate is settled and a new licensee can be approved by the Commission. *See Gulf Coast Radio, Inc.*, 45 FCC 1865, 1866 (1965). Moreover, where an entity acquires control in a proceeding such as this, it is doing so only under the supervision of a court. In the present case, FNBB has shown the requisite qualifications to acquire control of TOC in the context of an involuntary, "short form" proceeding. First, neither TOC nor our review of the proceedings has revealed any facts which would raise questions concerning FNBB's candor. We find that the bank's actions and representations only reflect a good faith effort to pursue or protect its interest in the WDHO-TV facility. Consequently, further inquiry into this matter is inappropriate.[5] We are also satisfied that FNBB meets the citizenship requirements imposed by the Act. First, FNBB has certified that it meets these requirements and TOC has failed to present any facts which dispute this representation.[6] Moreover, FNBB has indicated that the three people it has placed in charge of the licensee are U.S. citizens.[7] As a final matter, except for the issues surrounding the bank's alleged improper assumption of control, a matter which is discussed below, the only other facts alleged by TOC which might reflect on the bank's qualifications regard the charge that FNBB failed to make

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[5] On May 26, 1982, attorneys for TOC filed a motion to strike portions of FNBB's pleadings and a motion to censure the bank's attorney under Section 1.24 of the Commission's Rules. TOC's attorneys were responding to allegations regarding the appropriateness of certain legal fees paid by Telecasting to them while TOC was still in control of the licensee. They believed the allegations were personally derogatory. Upon review of the FNBB pleadings, we do not find the allegations in question to be scurrilous or otherwise sufficient to warrant granting the TOC motions.

[6] This certification was contained in the pending renewal application for WDHO-TV which FNBB submitted on behalf of the licensee (BRCT-820601VM).

[7] Additionally, we find no merit to TOC's contention that an application should have been filed to transfer control from FNBB to its "nominees." It appears from the information before us that the "nominees" serve only as employees of the bank. Accordingly, no application was required to be filed.

necessary capital improvements in the WDHO-TV facility, which resulted in a temporary disruption of service. However, considering that the station was in the midst of a bankruptcy proceeding, any major expenditures could have been contrary to the interests of the station's creditors. Furthermore, even though the service was temporarily interrupted for one day, normal operations were quickly restored and TOC reports no further occurrence of such a loss of service. For these reasons, we do not find the incident raises a substantial question as to the bank's qualifications.[8]

11. The remaining TOC objections are that FNBB's use of a "short form" application, rather than a "long form," was inappropriate under the circumstances, and that FNBB violated Section 310(d) of the Communications Act by assuming control of the licensee before acquiring Commission consent. A "long form" transfer or assignment is appropriate where a new party will operate a station on a normal basis and we are thus required under the Act to allow a thirty-day period for public comment before determining whether the change in control would serve the public interest.[9] *See* Sections 310 and 308 of the Act. "Short form" approval, in contrast, does not require a thirty-day waiting period and is used only where control is changed as a result of an involuntary court proceeding; the death of a principal; or where there is not a substantial change in ownership. *See* Section 309 of the Act; and Sections 73.3540 and 73.3541 of the Rules. Although TOC argues otherwise, the present circumstances involve an involuntary transfer necessitating the filing of only a "short form" application. FNBB took control upon the order of the bankruptcy court; it will only remain in control until a regular licensee is approved; and, while it holds control, it will be under the court's supervision. Furthermore, for purposes of the Communications Act, we find it inappropriate to accept TOC's proposition that distinctions should be made between court appointed agents, such as FNBB, and debtors in possession, trustees and receivers. While each designation has its own significance under federal bankruptcy law, they all represent essentially the same basic situation with regard to the control of a licensee; *i.e.*, in each case a licensee is not an independent entity, but subject to the control of a court appointed and supervised officer. Thus, when such an appointment is made or when the person holding the appointment is changed, involuntary, "short form" procedures apply.

12. We turn now to FNBB's alleged premature assumption of

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[8] It appears that TOC also questions FNBB's qualifications under our multiple ownership rules. However, the rules are not applied to involuntary, "short form," transfer situations. See Section 73.636 of the Commission's Rules, Note 8.

[9] A "transfer of control" takes place where a new party acquires control of a corporate licensee through the purchase of a controlling stock interest in the licensee. An assignment takes place where there is a purchase of the station's assets and the license is assigned to the purchaser who then becomes the licensee.

control. Section 73.3541 of the Rules provides that in the event of the "legal disability" of a licensee, *e.g.*, the appointment of a bankruptcy trustee or receiver, an application on FCC Form 316 (the "short form") will be filed requesting Commission consent to the involuntary transfer or assignment of the subject broadcast license. In the present case, such an application was filed within five days of the court's order placing FNBB in control. Thus, the bank acted promptly in filing its application under the requirements of the rule. What has prevented our prompt disposition of the application in this case has been the unusual maneuverings by FNBB and the Overmyer interests as to the proper court, and the filing of numerous pleadings contesting the involuntary transfer. The time needed to process those pleadings, however, is not a matter that reflects adversely on FNBB. We also note that the court ultimately found that TOC and other co-owned companies were engaged in numerous fraudulent arrangements, whereby funds owned by Telecasting to various creditors were being usurped for the benefit of a TOC principal, Daniel H. Overmyer. In fact, it appears from the court's decision, that these practices may have taken place until FNBB assumed control of the licensee in 1981. To quote from the court's opinion, "This Court has heard evidence of and witnessed fraudulent and deceitful manipulation of facts, corporate fictions and the court system. This Court has never encountered such a systematic distortion of truth and the legal system." *In re D. H. Overmyer Telecasting Co., Inc.*, 23 B.R. 823, 917 (Bktcy. N.D. Ohio E.D. 1982). It ultimately found that, based on misconduct between 1975 and 1981, Overmyer and his various companies were liable for an amount in excess of $3,400,000, representing funds fraudulently conveyed from the licensee. 23 B.R. at 932–33.[10]

13. In *La Rose* v. *FCC*, 494 F.2d 1145 (D.C. Cir. 1974), the U.S. Court of Appeals for the District of Columbia Circuit reversed a Commission order which denied the license renewal application of a broadcast station operating under the control of a bankruptcy receiver. One point emphasized by the court was the need for the Commission to reconcile its policies under the Communications Act with those of other federal laws and statutes. 494 F.2d at 1146, note 2. Moreover, this same need for reconciliation is emphasized by the U.S. Supreme Court in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 132 (1945). In the present case, we are faced with a conflict between the efforts of a federal bankruptcy court to protect the interests of defrauded creditors and the enforcement of the prior consent requirements of Section 310(d) of the Act. Given this need for reconciliation and the extraordinary circumstances faced by FNBB,

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[10] The Court also found that all dealings between the licensee and either members of Overmyer's family or his companies since 1973 involved conduct defrauding FNBB.

we do not find the bank disqualified as a temporary operator of Station WDHO-TV because it took control of the station prior to receiving the consent of the Commission.[11]

Conclusion

14. Accordingly, we find that TOC has failed to raise a substantial and material question of fact that a grant of the subject involuntary transfer application would not serve the public interest. Specifically, TOC has failed to raise any question that FNBB does not have the requisite qualifications to be a Commission licensee under an involuntary transfer proceeding. Moreover, we find that a grant of the application, under the circumstances, would, in fact, serve the public interest, convenience and necessity.[12]

15. Accordingly, IT IS ORDERED, That the application (BALCT-810212KF) seeking Commission approval for the assignment of the license of Station WDHO-TV from D. H. Overmyer Telecasting Co., Inc., debtor in possession under the United States Bankruptcy Court, Southern District of New York to D. H. Overmyer Telecasting Co., Inc., IS GRANTED.

16. IT IS FURTHER ORDERED, That the application (BALCT-810212KG) seeking Commission approval for the assignment of the license of Station WDHO-TV from D. H. Overmyer Telecasting Co., Inc., to D. H. Overmyer Telecasting Co., Inc., debtor in possession

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[11] In so holding, we wish to emphasize that, as a general position, a receiver or trustee should await a grant of its application before assuming control of the station involved. Only the highly unusual circumstances of the present case warrant such a departure. We specifically reject FNBB's contention that it could assume control as a matter of law, through the court's enforcement of a stock pledge agreement.

[12] Daniel H. Overmyer was the controlling stockholder of TOC when most of the activities found to be fraudulent by the bankruptcy court took place. On January 29, 1979, an application (BTCTV-790129LC) was filed seeking Commission consent to the transfer of control of TOC, from Overmyer to Clark Television, Inc. The transferee was wholly owned by the Clark Trust of which Shirley C. Overmyer, the wife of Daniel H. Overmyer, was settlor and trustee, and of which their children were the beneficiaries. FNBB, who had not yet assumed control of the licensee, filed an informal objection to the transfer application alleging that the change in control was part of a course of action designed to evade or frustrate the legitimate claims of creditors. Nevertheless, in a letter dated February 19, 1981, from the Chief of the Broadcast Bureau's Renewal and Transfer Division to FNBB's attorney, the Commission denied the bank's objection and granted the transfer. The letter found that FNBB had failed to show how a grant of the transfer would prejudice the claims of creditors and stated further that the most appropriate means of pursuing such claims would be through a local court of competent jurisdiction. On March 18, 1981, FNBB filed a petition to stay the consummation of the transfer and a petition for reconsideration of the Commission order. As noted previously, a week later, on March 25, 1981, FNBB was ordered to assume control of the licensee by the bankruptcy court. Nonetheless, FNBB's petitions for stay and reconsideration are still pending. However, in light of the court's action and our own determinations in the current proceeding, we find FNBB's petitions are moot.

under the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, IS GRANTED.

17. IT IS FURTHER ORDERED, That the petition for special relief filed by The Overmyer Company, IS DENIED.

18. IT IS FURTHER ORDERED, That the motion to strike and the motion to censure filed by The Overmyer Company, IS DENIED.

19. IT IS FURTHER ORDERED, That the informal objection of The Overmyer Company to the application for the involuntary transfer of control of D. H. Overmyer Telecasting Co., Inc., debtor in possession under the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, from The Overmyer Company to the First National Bank of Boston, IS DENIED.

20. IT IS FURTHER ORDERED, That the application (BTC-810330KE) for the involuntary transfer of control of D. H. Overmyer Telecasting Co., Inc., debtor in possession under the United States Bankruptcy Court, Northern District of Ohio, Eastern Division, from The Overmyer Company to First National Bank of Boston, IS GRANTED.

21. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send, by Certified Mail, Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Commission assigns orbital locations for new and previously authorized domestic fixed satellites, modifying previous 1980 plan, 84 FCC 2d 584 (1981). Action results from reduced orbital spacing criteria in the 4;6 GHz and 12;14 GHz bands adopted concurrently in *Report and Order* in CC Docket No. 81–704. –*Domestic Fixed-Satellite Service*

FCC 83–186

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service.

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: August 12, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. By separate orders[1], we are today authorizing the construction of 19 additional domestic fixed satellites and the launch of 19 new or previously constructed satellites. These newly authorized in-orbit satellites will constitute a substantial increase by 1987 in the domestic satellite capacity that will be available to users. To accommodate this growth, we are adopting reduced orbital spacing criteria in both the 4;6 and 12;14 GHz bands in today's *Report and Order.*[2] The purpose of this order is to assign an orbital location for each of the currently authorized domestic satellites.[3]

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[1] Advanced Business Communications, Inc., FCC 83–187; American Telephone and Telegraph Company, FCC 83–188; American Satellite Company, FCC 83–189; Hughes Communications, Inc., FCC 83–190; Rainbow Satellite, Inc., FCC 83–191; RCA American Communications, Inc., FCC 83–192; Satellite Business Systems, FCC 83–193; Southern Pacific Communications Company, FCC 83–194; United States Satellite Systems, Inc., FCC 83–195; and Western Union Telegraph Company, FCC 83–196; all adopted today.

[2] "In the Matter of Licensing of Space Stations in the Domestic Fixed Satellite Service", *Report and Order* in CC Docket No. 81–704, FCC-83–184, adopted today.

[3] We also identify in the Appendix several unassigned orbital locations. They will be available for the next group of space station applications to be processed. *See*

Background

2. In our *1980 Orbit Assignment Order*[4], we adopted a tentative plan of orbital location assignments intended to govern the launch of new domestic satellites until about 1983. We then began the proceedings in CC Docket No. 81–704 to evaluate the feasibility of reducing orbital separations to 2 ° in both the 4;6 GHz and the 12;14 GHz bands to satisfy additional service requirements.[5] In our *Report and Order*, we conclude that an average spacing of about 2.5 ° at 4;6 GHz, and a uniform spacing of 2 ° at 12;14 GHz, are immediately feasible. Such orbital spacings are also needed to accommodate all of the domestic satellites proposed in the current group of applications being processed.[6]

3. Because there are only three United States domestic satellites presently in orbit at 12;14 GHz, we will assign orbital locations at uniform 2 ° intervals at this time. However, at 4;6 GHz, there are presently a dozen operational satellites with thousands of licensed earth stations in service. Satisfactory operations with 2 ° satellite spacings are likely to require the upgrading or replacement of many of these existing antennas. We wish to delay as long as possible such impacts on current users and maximize the opportunities for full equipment amortization. Thus, orbital separations between 2.5 ° and 3 ° are to be provided between many domestic satellites during the next couple of years. However, new earth station equipment compatible with 2 ° orbital separations should be readily available within the next year or so. Thus, 2 ° separations can be implemented between new satellite networks established at 4;6 GHz within the next few years.

4. Our *1980 Orbit Assignment Order* summarized the policies and procedures we apply in assigning orbital locations to domestic satellites, and we have restated and clarified them in today's *Report and Order*. We have consistently held that the desires of an applicant for a particular orbital location do not limit our flexibility to assign orbital locations that best serve the public interest.[7] Any variations in the characteristics of different orbital locations in the same

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Memorandum Opinion and Order, FCC 83–185, adopted today. Additional orbital locations are also available for new domestic satellites, and we may pursue further reductions in orbital spacings in the course of processing those applications to accommodate more satellites in orbit.

[4] Orbit Deployment Plan-Domestic Satellite, 84 FCC 2d 584 (1981).

[5] *See* Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981).

[6] We also decided that a 2 ° orbital spacing criterion at 4;6 GHz is the appropriate long-term objective if continued growth and new entry is to be maintained in the domestic satellite industry. These reductions in orbital spacings also demonstrate the feasibility of accommodating an increasing number of domestic satellites operated both by the United States and by other countries through the current international frequency coordination procedures.

[7] *1980 Orbit Assignment Order*, *supra* note 4, at 601. *See also Report and Order*, *supra* note 2.

portion of the geostationary arc do not appear to be comparatively significant; nor do requests by different applicants for the same orbital location give rise to comparative hearing rights.[8] In general, we assign orbital locations to balance the desires of the applicants, the actual traffic volume and distribution requirements of the applicants, constraints on satellite locations imposed by space station design limitations, announced plans of other countries for their own satellites, and broad considerations of fair treatment of existing and new domestic satellite operators. Moreover, we also seek to minimize disruption of service to existing domestic satellite users wherever possible.

5. This flexible orbital assignment process, rather than more traditional or conventional administrative selection mechanisms, has allowed new domestic satellite facilities to be constructed without the costs or delays of more traditional evidentiary or comparative hearings. Users have come to rely on the domestic satellites currently in service, and the continuation of these services with minimal interruption, as well as the orderly satisfaction of new and growing traffic requirements, is the principal measure of the efficacy of our licensing decisions today. With the long leadtimes, high costs, and risks associated with domestic satellites, our administrative practices must be fashioned to account for these features of the industry. We recognize, of course, that all applicants will not be completely happy with every orbital location assignment. However, such a result could not be avoided by any administrative selection process to date devised. Our orbital assignment process is, nevertheless, a reasonable exercise of our administrative discretion to insure that the benefits of domestic satellite technology are brought to the American public in a timely, economical and efficient manner.[9]

General Approach

6. The following table summarizes the number of orbital locations to be assigned to each space station licensee.[10] These figures

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[8] *Id.*, *See also*, Western Union Telegraph Company, 47 FCC 2d 274 (1974).

[9] *See e.g.*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980); 47 U.S.C. §§ 151, 154(i), 154(j) and 303.

[10] RCA American Communications, Inc. and Alascom, Inc. are joint licensees of one of the Satcom satellites included in this table under the RCA Americom name. In Western Union Telegraph Company, 86 FCC 2d 196 (1981), the Commission assigned two hybrid 4;6 and 12;14 GHz orbital locations to the Advanced Westar satellites to be operated by Space Communications Company (Spacecom). These satellites are no longer planned to be placed into commercial domestic satellite service by Spacecom. Thus, there is no need to continue the assignment of these two hybrid orbital locations for that purpose. *See* Western Union Telegraph Company, FCC-196, adopted today. As a result, only four locations are being assigned today for Westar satellites at 4;6 GHz because Western Union has only enough authorized facilities to effectively occupy four orbital locations on a long-term basis. *Id.*

include both today's authorization actions and the authorizations granted in 1980.

COMPANY NAME	NUMBERS OF ORBITAL LOCATIONS (AUTHORIZED) BY FREQUENCY BAND (GHz)					
	PREVIOUS (1980)		ADDITIONAL		TOTAL (1983)	
	4/6	12/14	4/6	12/14	4/6	12/14
Adv. Bus. Comm.	–	–	–	2	–	2
Am. Sat. Co. (Hybrid)	–	–	2	2	2	2
AT&T (CGC)	3	–	1	–	4	–
GSAT	–	2	–	–	–	2
Hughes	2	–	1	–	3	–
Rainbow Sat.	–	–	–	2	–	2
RCA Americom	4	–	2	3	6	3
SBS	–	3	–	2	–	5
SPCC (Hybrid)	2	2	1	1	3	3
Spacecom (Hybrid)	2	2	-2	-2	–	–
USSSI	–	–	–	2	–	2
WUT	2	–	2	–	4	–
TOTAL	15	9	7	12	22	21

As in our *1980 Orbit Assignment Order*, the orbital assignments we are making here will form the basis for beginning the international frequency coordination procedures. This plan also considers the launch schedule and other information provided to us by the applicants.

7. We will not summarize every argument made by individual applicants or petitioners as to why a particular orbit location should or should not be assigned to it or another applicant. We have fully considered each such argument. In all cases, the orbital locations assigned to an applicant provide a reasonable accommodation of its requests, taking into account the requirements of the other applicants and the objectives enunciated in today's *Report and Order*.

8. We will assign orbital locations today between about 70 ° and 143 ° West Longitude at 4;6 GHz[11], and between about 70 ° and 130 ° West Longitude at 12;14 GHz.[12] A few locations have been specifically identified as "unassigned" within these portions of the orbital arc in the Appendix. Moreover, additional orbital locations are available

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[11] Orbital locations between about 55 ° and 143 ° West Longitude generally provide an earth station elevation angle of at least 5 ° throughout the contiguous states.

[12] Orbital locations between about 60 ° and 130 ° West Longitude provide a minimum 10 ° earth station elevation angle throughout the contiguous states. This higher elevation angle is desirable at 12;14 GHz to reduce the impact of increased propagation impairments at these higher frequencies compared to 4;6 GHz.

outside these ranges which can still be assigned to domestic satellites in the future.[13] In the central portion of this arc, agreements have been reached among the Administrations of Canada, Mexico and the United States on the placement of Canadian and Mexican domestic satellites.[14] The requirement to accommodate these other satellites effectively divides the usable orbital arc into an eastern sector and a western sector for United States domestic satellites. We will also address the orbital assignments we are making today to United States domestic satellites in terms of these two sectors for convenience.

9. In assigning orbital locations to domestic satellites, we have attempted to apply certain basic principles in addition to the orbital separation criteria adopted in today's *Report and Order*.[15] First, we have sought to minimize the number of relocations of satellites presently in orbit. While a few relocations appear unavoidable in implementing reduced orbital spacings to achieve the best overall use of the orbit and spectrum, we believe we have held them to the minimum practical. We have also tried to delay any needed relocations to the latest date possible. Thus, a significant amount of time is available to plan for such operations.

10. Second, we are implementing the orbital spacing criteria adopted in our *Report and Order* today. This means that orbital locations in the 12;14 GHz bands will be assigned at uniform 2 ° intervals beginning at the orbital position nearest to a Canadian or Mexican satellite that can be assigned to a United States satellite. We will also implement our selection of an average 2.5 ° orbital separation at 4;6 GHz in a similar fashion. Orbital separations of 3 ° will generally be provided between the first few 4;6 GHz domestic satellites to the west of a Mexican satellite at 116.5 ° West Longitude. This will provide each 4;6 GHz system with the capability of serving existing small antennas in all 50 states, particularly for the distribution of video and audio program material. By providing slightly larger spacings for these services during the next few years, existing users will be better able to amortize their current investment. Additional costs to upgrade or replace facilities needed to maintain signal quality are likely when these spacings are reduced to 2 ° to accommodate additional satellites in the future. To the east of the Canadian satellite at 104.5 ° West Longitude, orbital locations in the 4;6 GHz bands will be assigned at 2.5 ° intervals. Many

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[13] *See e.g., 1980 Orbit Assignment Order, supra* note 4, at 598–599; applications of Cablesat General Corporation, File Nos. 2798/2799/2800-DSS-P/LA-82 which propose coverage of only a portion of the contiguous states by a single satellite.

[14] *See Report and Order, supra* note 2 We also expect that additional detailed coordination will also be required with Canada and Mexico to effectively implement this orbital arrangement. Licensees are expected to fully cooperate in these activities.

[15] *See also* our *1980 Orbital Assignment Order, supra* note 4, at 600–605.

services appear capable of satisfactory operation at such orbital spacings. With this magnitude of separation between the second and third satellites in the domestic satellite system operated by a licensee, the overall costs to users for new or upgraded equipment appear to be relatively small while the usable in-orbit capacity increases significantly. At the edges of the orbital arc usable to serve the United States, 2 ° orbital spacings at 4;6 GHz will be provided. Satellites located in this portion of the arc are proposed for longer term expansion of domestic satellite services. The installation of new 4;6 GHz earth station facilities will generally be required for operations in such new satellite networks in any event. Thus, they can also be designed to be compatible with 2 ° orbital spacings from the outset at little or no incremental cost beyond the initial investment cost of the facility.

11. Finally, we have attempted to maximize our ability to accommodate hybrid satellites in orbit in the same manner as we did in our *1980 Orbit Assignment Order*. We have also discussed the difficulties such satellites present in our *Report and Order*. However, because we are able to accommodate all hybrids proposed in the current group of applications without serious orbital use inefficiencies, we have not precluded their use at this time.

Western Orbital Locations

12. We have long recognized that the portion of the orbital arc between about 119 ° and 135 ° West Longitude is particularly well suited for domestic satellites providing services to all 50 states at 4;6 GHz.[16] Orbital locations at 119.5 ° West Longitude at 4;6 GHz and at 120 ° West Longitude at 12;14 GHz are available for United States satellites to the west of the proposed Canadian and Mexican domestic satellites. In this western portion of the arc, the Satcom III-R satellite was recently launched and positioned at 131 ° West Longitude location for operations at 4;6 GHz. Thousands of licensed receiving antennas are pointed at this satellite, and we have previously recognized the difficulties that would be entailed by its relocation.[17] Therefore, we will not require a relocation of Satcom III-R from its 131 ° West Longitude location. At 4;6 GHz, the orbital locations at this time of 131 °, 128 °, 125 °, 122 ° and 119.5 ° West Longitude between a Mexican satellite at 116.5 ° and 135 ° West Longitude provide 3 ° separations between all but one pair of satellites.[18] In the 12;14 GHz bands, orbital locations to the west of a

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[16] *See e.g., 1980 Orbit Assignment Order, supra* note 4, at 597–600. However, 50 state coverage is still available from orbital locations outside this range. *Id.*

[17] *Id.* at 614.

[18] One 2.5 ° orbital spacing interval at 4;6 GHz permits a configuration of orbital assignments that does not require relocation of Satcom III-R. Uniform 3 ° separations at 4;6 GHz would necessarily require the 131 ° West Longitude location to be changed to 131.5 ° West Longitude. This particular set of 4;6 GHz

Canadian satellite at 117.5 ° West Longitude are available at 120 °, 122 °, 124 °, 126 °, 128 °, 130 ° and 132 ° West Longitude with uniform 2 ° spacings between United States domestic satellites. The 122 ° and 128 ° West Longitude locations are hybrid locations because they are coincident under the different spacing criteria for 4;6 GHz and 12;14 GHz adopted in the *Report and Order*.

13. Unless uniform 2 ° separations are implemented now at 4;6 GHz, any set of orbital assignments in this portion of the orbital arc that accommodates new satellites is going to require at least some relocation of current domestic satellites. The Westar V and Comstar D-4 satellites operational at 4;6 GHz have recently been positioned at 123 ° and 127 ° West Longitude, respectively. Neither of these two locations match the locations identified above as being available under a 3 ° spacing criteria at 4;6 GHz. Thus, either these satellites will have to be relocated to accommodate the new satellites to be positioned in this portion of the orbital arc, or some other spacing criteria will have to be developed involving even smaller separations between at least some of the satellites. However, any modified spacing criteria would also have to take under consideration the orbital locations to be assigned at 12;14 GHz. Two hybrid satellites with 50 state coverage requirements also need to be accommodated.

14. A great number of variations are possible. However, of the possible combinations of orbital arrangements at 4;6 GHz, the set of orbital locations identified above (i.e., 119.5 °, 122 °, 125 °, 128 °, 131 ° and 134 ° West Longitude) appears to make most overall efficient use of the orbit at 4;6 GHz when 12;14 GHz satellites spaced 2 ° apart are also considered.[19] This allows two hybrid locations at 122 ° and 128 ° West Longitude, with no orbital use inefficiencies at 12;14 GHz. However, the set of orbital assignments listed in the Appendix will require the relocation of Comstar D-4 from 127 ° to 125 ° West Longitude and Westar V from 123 ° to 119.5 ° West Longitude in the 1984 time frame.[20] The 134 ° West Longitude location, a slight shift

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locations also allows the identification of two hybrid locations between 120 ° and 135 ° West Longitude which at 12;14 GHz provide uniform 2 ° orbital spacings and 10 ° earth station elevation angles throughout the contiguous 48 states.

[19] The initial RCA domestic satellites, Satcom I and Satcom II, are located at 135 ° and 119 ° West Longitude, respectively. In our *1980 Orbit Assignment Order*, we assigned the 139 ° and 143 ° West Longitude locations to the replacements for these satellites. The 119 ° and 135 ° West Longitude locations were then reassigned to the initial satellites of Hughes and Southern Pacific. We also ordered RCA Americom and the other two licensees involved to closely coordinate their orbital operations to insure an orderly transition in the use of these orbital locations. Recent correspondence to the Commission raises questions about the willingness of the parties to promptly undertake such coordination. We expect this matter to be resolved promptly, and expect all parties to fully cooperate in the implementation of today's assignment plan. Failure to do so will require us to apply whatever sanctions are needed to enforce our orders.

[20] With the scheduled launch of the Westar VI and Telstar satellites before then, it should be possible to limit network outages to simple point-over maneuvers

from the 135 ° West Longitude location in our *1980 Orbit Assignment Order*, will continue to be assigned to the Galaxy I satellite of Hughes Communications for program distribution services. Other orbital assignments in this portion of the arc are set forth in the Appendix.

15. At 4;6 GHz, orbital locations with 50 state coverage capabilities are also available at 137°, 140 ° and 143 ° West Longitude with 3 ° orbital spacings. The recently launched Satcom V will continue to be located at 143 ° West Longitude for Alaskan services.[21] In our *1980 Orbit Assignment Order*, we assigned the 139 ° West Longitude location to the RCA Americom Satcom I-R satellite for in-orbit protection and specialized private-line services. If a uniform 3 ° spacing is maintained in this portion of the orbit, the available locations would be 137 ° and 140 ° West Longitude. However, we believe it prudent to provide for growth requirements by planning on 2 ° orbital separations in this portion of the orbital arc. Thus, the 139 ° West Longitude location will continue to be assigned to Satcom I-R. The 137 ° and 141 ° West Longitude orbital locations will be available for assignment to satellites that are cross-polarized with respect to Satcom.[22]

Eastern Orbital Locations

16. Under the current arrangements between the United States, Canada and Mexico, orbital locations are available to the United States at 101 ° West Longitude at 4;6 GHz and at 105 ° West Longitude at 12;14 GHz. In our *Report and Order*, we decided to generally assign 4;6 GHz orbital locations at 2.5 ° separations in this portion of the arc where satellites currently operate and provide at least some 50 state coverage. We also decided that 2 ° separations at 4;6 GHz would be provided for future expansion satellites in the easternmost portion of the arc where only 48 state coverage is possible.[23] Uniform separations of 2 ° are to be provided at 12;14 GHz.

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rather than more lengthy tracking operations as the satellite is slowly moved from one location to another. We also note that this arrangement will allow the Southern Pacific hybrid satellite to be adjacent to Westar V, as requested by Southern Pacific, to maximize the opportunities for dual feed earth station antennas to receive programming from both satellites.

[21] RCA Americom indicates it has renamed this satellite from Satcom II-R as it appeared in the *1980 Orbit Assignment Order*. *See* RCA Americom letter dated November 3, 1982. This satellite was sold to Alascom, Inc. upon its launch. *See* Alascom, Inc., FCC 82T-25, released October 25, 1982.

[22] Coordination of these locations with Mexico appears necessary in light of Mexico's recently announced plans for third and fourth satellites in this portion of the orbit.

[23] The 2.5 ° spacing at 4;6 GHz is intended to be a transition between an eventual 2 ° separation criterion to satisfy future traffic growth, and the perceived need at this time to delay replacement of recently installed small antennas. This magnitude of orbital spacing allows flexibility to accommodate existing networks

17. Beginning with the orbital locations for United States satellites closest to proposed Canadian satellites, we identify 101°, 98.5°, 96°, 93.5 ° and 91 ° West Longitude at 2.5 ° orbital separations at 4;6 GHz, and 105°, 103°, 101°, 99°, 97°, 95°, 93 ° and 91 ° West Longitude at 2 ° orbital separations at 12;14 GHz. We also note that hybrid satellites are possible at 101 ° and 91 ° West Longitude. Since the hybrid spacing is 10 ° in this case, the next hybrid satellite location is at 81 ° West Longitude.

18. In the 12;14 GHz bands, the 105 ° and 103 ° West Longitude locations approximate the current orbital assignments to GSAT[24] and 99°, 97°, and 95 ° the current orbital assignments to SBS.[25] Only the SBS satellites are actually in orbit at this time, although at slightly different locations.[26] No party has made a strong case opposing the continuation of these 1980 orbital assignments. However, they will have to be revised slightly to reflect the reduction from 3 ° to 2 ° in orbital spacing at 12;14 GHz.

19. However, we decline to honor the request of SBS for five contiguous orbital locations. First, such an arrangement would exclude from this portion of the orbital arc other applicants with frequency re-use satellites at 12;14 GHz which are also capable of providing some Alaska and Hawaii service.[27] SBS has not demonstrated sufficient 50 state traffic requirements to fill five satellites.[28] Other applicants are proposing satellites with greater dual frequency use and capability of providing Alaska and Hawaii services if located in this general portion of the orbital arc.[29] Thus, we believe that additional orbital locations in this portion of the orbital arc should be not assigned to SBS satellites, but should be assigned to those satellites which can more effectively utilize these locations to serve the public.

20. In summary, the 101 ° and 93 ° West Longitude locations at

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without immediate equipment replacement during the short-run. However, users of satellites in this portion of the arc are advised to begin planning now for 2 ° orbital separations at 4;6 GHz that may be needed in the future to accommodate additional growth requirements.

[24] GTE Satellite Corporation, 84 FCC 2d 562 (1981).

[25] Satellite Business Systems, 86 FCC 2d 180 (1981).

[26] The SBS satellites were placed into service at 100°, 97 ° and 94 ° West Longitude in 1980, 1981, and 1982, respectively.

[27] We have also previously analyzed some of the trade-offs in this portion of the arc between coverage of all 50 states and propagation difficulties in serving the southeastern section of the United States at 12;14 GHz with frequency re-use satellites. *See* GTE Satellite Corporation and Satellite Business Systems, *supra* notes 24 and 25.

[28] *See e.g.*, Satellite Business Systems, 77 FCC 2d 981 (1980). We would not necessarily object at this time to the operation of additional contiguous satellites by SBS if they are placed sufficiently closer together in orbit through appropriate internal system frequency management so as not to require relocation of any other satellite from its assigned location.

[29] Of course, satellites with cross-polarized frequency re-use and 50 state coverage capabilities can also operate successfully from other orbital locations to the west.

12;14 GHz will be assigned to satellites in the next group of applications which employ frequency re-use and which have the capability and in fact propose to serve the Alaskan and Hawaiian markets. We do not presently expect such satellites to be launched until 1986. Until then, SBS may continue to operate its satellites at the present locations of 100°, 97 ° and 94 ° West Longitude. However, SBS must eventually relocate its satellite at 100 ° to 99 ° West Longitude and its 94 ° satellite to 95 ° West Longitude to provide 2 ° separations at 12;14 GHz between its satellites and the satellites authorized to be launched into the 101 ° and 93 ° West Longitude locations at the time such satellites are in fact launched.

21. The 91 ° West Longitude orbital location is available in both the 4;6 GHz bands at 2.5 ° orbital separation intervals and the 12;14 GHz bands with 2 ° orbital separations. Thus, it will be assigned to a hybrid satellite. The 91 ° West Longitude orbital location is presently occupied by Westar III operating only at 4;6 GHz. That satellite was launched in 1979 with a nominal seven year lifetime[30], and will have to be relocated to accommodate a hybrid satellite at this location. However, with the launch of Westar VI, a 93.5 ° West Longitude location assignment at 4;6 GHz can be implemented with a point-over maneuver after a Westar satellite relocation. This may allow the hybrid location at 91 ° West Longitude location to be made available at an early date.[31]

22. To the east of 101 ° West Longitude, orbital locations can be identified in the 4;6 GHz bands at 98.5°, 96 ° and 93.5 ° West Longitude. The Westar IV satellite was recently launched into 99 ° West Longitude. The difference between 98.5 ° and 99 ° West Longitude does not appear significant. However, relocation of Westar IV to 98.5 ° West Longitude may require a significant earth station repointing exercise.[32] Thus, we believe that flexibility on the precise orbital position of Westar IV can be retained until the identity of the satellite to be located at 101 ° West Longitude is decided. Operations with 2 ° orbital separations at 4;6 GHz between Westar IV and that satellite may prove to be feasible and a relocation of Westar IV avoided.[33]

23. AT&T will be assigned 96 ° West Longitude and Hughes 93.5 ° West Longitude. Both appear to have requirements for 50 state services. Locations may not be available until 1984. First, we expect that AT&T will replace Comstar D-1/D-2 with a Telstar satellite at

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[30] Western Union Telegraph Company, FCC 79-444, released July 24, 1979.

[31] In light of the decision of the parties not to proceed with the Advanced Westar system, Western Union has no need for a hybrid location, such as the previously assigned 91 ° West Longitude location. Thus, Western Union cannot claim any preferred status with respect to the assignment of this orbital location to another satellite today. *Cf.*, RCA American Communications, 84 FCC 2d 633, 641 (1981).

[32] *See e.g.*, Comments of Equatorial Communications in CC Docket No. 81-704.

[33] A hybrid satellite is also possible at 101 ° West Longitude.

96 ° West Longitude. Hughes may then occupy the 93.5 ° West Longitude location with its third Galaxy satellite for 50 state coverage requirements.

24. With 2.5 ° orbital separations at 4;6 GHz and 2 ° separations at 12;14 GHz, the hybrid spacing interval is 10 ° of arc. Thus, after 91 ° West Longitude, the next regular hybrid locations are at 81 ° and 71 ° West Longitude. However, as discussed in paragraph 27, *infra*, an adjustment to 69 ° West Longitude will be made for the latter hybrid assignment. We will assign the 91 ° and 69 ° West Longitude locations to Southern Pacific and the 81 ° West Longitude location to American Satellite Company.

25. Orbital locations at 89°, 87°, 85°, 83 ° and 79 ° West Longitude will be assigned to satellites operating only in the 12;14 GHz bands. We decline to accept RCA Americom's request for three contiguous satellites in this portion of the orbit because it has not adequately justified an operational need for contiguous locations. SBS has indicated that its system has been designed for satellite operations only between 90 ° and 125 ° West Longitude. Given the three contiguous locations assigned in the center of this arc, we believe it appropriate that the fourth and fifth satellites be assigned locations at the extremities of this arc to maximize the number of the more desired locations available for initial assignments of other carriers. Thus, we will assign one of these 12;14 GHz locations between 79 ° and 89 ° West Longitude each to SBS, RCA Americom, Advanced Business Communications, United States Satellite Systems and Rainbow Satellite. RCA Americom's third 12;14 GHz satellite will be assigned a location farther to the east for 48-state coverage.

26. At 4;6 GHz, with 2.5 ° separations, orbital locations are available at 88.5°, 86 ° and 83.5 ° West Longitude between the hybrid locations of 91 ° and 81 ° West Longitude. However, because RCA Americom recently launched its Satcom IV satellite into 83 ° West Longitude to serve a large number of cable television systems, it may also be acceptable to maintain this satellite at 83 ° West Longitude, rather than 83.5 ° West Longitude, if the hybrid at 81 ° West Longitude is cross-polarized to the RCA Satcom design. One of the other 4;6 GHz locations mentioned above will be assigned to AT&T to replace Comstar D-3 and the other location will be assigned to the Westar system.

27. The next regular hybrid location would be 71 ° West Longitude. However, it is also desirable to begin implementing 2 ° orbital separations in this portion of the orbital arc. We also have to consider the plans of Colombia and Brazil for 4;6 GHz satellites at 75 ° and 70 ° West Longitude, respectively.[34] In reviewing the available options, the set of orbital locations at 78.5 °, 76 °, 74 °, 72 °, 69 ° and

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[34] Pending completion of international frequency coordination, it appears that a 1 °

67 ° West Longitude at 4;6 GHz and 79 °, 77 °, 75 °, 73 °, 71 ° and 69 ° West Longitude at 12;14 GHz, appear to be consistent with these requirements and orbit use efficiency. However, in this case the hybrid location is 69 ° West Longitude. Generally, the satellites assigned orbital locations in this portion of the arc are expected to handle medium-to-long term growth requirements. Thus, sufficient time should be available to insure that the new ground facilities intended for operations with these satellites are compatible with 2 ° orbital separations.

28. To the east of 71 ° West Longitude, orbital locations will be assigned at uniform 2 ° intervals except as needed to effect international frequency coordination. Additional hybrid satellites can also be located in this portion of the orbital arc since the orbital separations will be 2 ° in both the 4;6 GHz and the 12;14 GHz bands, subject to international frequency coordination constraints.

Implementation

29. By this order, we are assigning orbital locations to currently authorized domestic satellites as set forth in the Appendix. All orbital location assignments are, of course, subject to change upon summary order of the Commission. Should changes be necessary, parties will be given 30 days notice. Several events could trigger the need for such changes. Examples include the need to reflect the results of international frequency coordination, the need to reflect changed operating or traffic conditions, or the need to accommodate additional satellites as a result of the processing procedures we are adopting today for the next group of domestic satellite space station applications.[35] Space station operators may proceed with the launch of satellites into the orbital locations listed in the Appendix without further authorization from the Commission.[36] The orbital locations listed in the Appendix will also form the basis for our international frequency coordination efforts, and the satellite licensees are required to provide the Commission with the necessary information at the earliest practical date, as well as other technical assistance needed to successfully complete these procedures.

30. In developing this plan of current orbital assignments, we have no intention of disuading operators from identifying alternative assignments which might be more compatible with launch

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separation from a Colombian SATCOL satellite at 75 ° West Longitude and a 1 ° separation from a Brazilian SBTS satellite at 70 ° West Longitude are desirable to assist our coordination efforts.

[35] *Memorandum Opinion and Order, supra* note 3.

[36] *See generally, 1980 Orbit Assignment Order, supra* note 4 at 609–613; *Report and Order, supra* note 2. Temporary authorizations may be granted for transitional arrangements, or for the continued operation of earlier launched satellites after their replacements. However, no such temporary operation will be permitted to hinder the implementation of the plan of orbital spacings specified in the Appendix.

schedules or interference considerations. We welcome requests for reassignments of orbital locations to achieve such ends. However, such requests must be consistent with the basic structure of this plan, and should have the agreement of all, or at least most, of the satellite operators affected by the exchange of locations. Also, temporary transitional arrangements to implement these assignments may be needed for reasons of operational efficiency. They too may be proposed. Any such alternative orbital arrangement must be presented to the Commission for approval within 30 days of the release of this order if it is to be evaluated at an early stage in the international frequency coordination procedures that will be started for the current orbital assignment plan listed in the Appendix. In any event, we expect all operators to cooperate fully in the course of implementing this plan. All satellite operators are also required to coordinate their orbital maneuvers with other affected satellite operators. Particular problems, if they can not be resolved by the parties, can be brought to the Commission for resolution.

31. In the past, we have been reluctant to identify unassigned orbital locations and@or reserve them for future use. We continue to believe that our orbital assignment policies and decisions should be premised on accommodating only firm requirements, rather than preserving options for clearly speculative ventures. We have expressed concern with the ability of several of the operators receiving authorizations today to proceed promptly with the construction and launch of the proposed satellites. However, as explained in today's *Report and Order*, the conditions imposed in their authorizations will insure that the orbital locations tentatively assigned to them will be available for re-assignment at an early date if they fail to fulfill the representations made in their applications.

32. Moreover, it is clear that additional, qualified companies are willing and ready to enter the market, and current and newly authorized operators are confident that their systems will grow to the point of requiring additional orbital locations in the coming years. Thus, we are identifying several, but not all, potential orbital locations that will be available for satellites in this next group of applications even if further reductions in orbital separations are not made. Additional orbital locations are also available for assignment outside the range of locations listed in the Appendix.

33. Thus, operators may propose exchanges or small adjustments of their orbital assignments without necessarily becoming part of the next processing group. However, we do not intend to assign any of the explicity unassigned locations outside of the proceeding we are beginning today for processing the next group of applications. We also do not intend to assign any additional orbital locations(s) that might become available through default of one of today's grantees until we act on the next group of space station applications. Thus, if existing operators desire additional locations, their requests must be

made in accordance with the procedures and time-frame we are adopting by separate order.[37]

34. At least some of the rule revisions being adopted today in CC Docket No. 81-704 to achieve reduced orbital separations will not become effective until 30 days after their publication in the Federal Register. We have also indicated that changes in assigned orbital locations would be made by summary order but upon 30 days notice. Therefore, to insure that all the procedural requirements of the Administrative Procedure Act have been fully satisfied, we will make both our *Report and Order* and this orbital assignment order effective 30 days after publication in the Federal Register.

35. At the same time, however, we have no desire to impose any further delays on the construction and launch of either presently authorized satellites or those satellites we have initially approved today. We therefore believe that the satellite operators should be permitted to proceed immediately with the implementation of their facilities provided such activities are consistent with today's decisions. Because it can be argued that our authorizations today can take effect only when the reductions in orbital separations also take effect, we will designate the effective date of today's authorizations also to be 30 days after publication of the *Report and Order* in the Federal Register. All of today's rule, policy and facility authorization decisions therefore will take legal effect at the same time in the interest of consistency and to insure all statutory notice requirements are satisfied. In the meantime, however, all grantees are authorized[38] to proceed immediately at their own risk with the construction, launch and operation of the satellites authorized today, including procurement of launch services, provided such activities are consistent with the terms and conditions of the station authorizations and today's decisions.

Conclusion

36. We find, upon review of the applications and record before us, that the public interest, convenience and necessity will be served by the adoption of the orbital location assignments specified in the Appendix.

37. Accordingly, IT IS ORDERED that the orbital location plan specified in the Appendix IS ADOPTED and the grantees of such outstanding space station authorizations shall promptly undertake such actions as are necessary to implement this orbital location plan,

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[37] *Memorandum Opinion and Order, supra* note 3. As noted above, we encourage exchanges of orbital locations among grantees if such exchanges result in more efficient or effective orbital use or service to the public.

[38] *See e.g.*, Sections 214, 309 and 319 of the Communications Act, as amended, 47 U.S.C. § § 214, 309 and 319, for our authority to permit such activities to begin immediately.

including coordination with other satellite operators, in accordance with the policies, terms, conditions and procedures specified above, and to the policies and procedures adopted in today's *Report and Order* in CC Docket No. 81–704, FCC 83–184.

38. IT IS FURTHER ORDERED that the orbital location assignments specified in *Orbit Deployment Plan - Domestic Satellite*, 84 FCC 2d 584 (1981), *Hughes Communications, Inc.*, 84 FCC 2d 578 (1981), *Southern Pacific Communications Company*, 84 FCC 2d 650 (1981), *COMSAT General Corporation*, 84 FCC 2d 547 (1981), *RCA American Communications, Inc.*, 84 FCC 2d 633 (1981), *Western Union Telegraph Company*, 86 FCC 2d 196 (1981), *Satellite Business Systems*, 86 FCC 2d 180 (1981) and FCC 82–489, released November 10, 1982, and *GTE Satellite Corporation*, 84 FCC 2d 562 (1981) ARE MODIFIED in accordance with the orbital location assignment plan specified in the Appendix, subject to the policies, terms, conditions and procedures specified above, and to the policies and procedures adopted in today's *Report and Order* in CC Docket No. 81–704, *supra*.

39. IT IS FURTHER ORDERED that the temporary assignment of any orbital location is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbit or spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of inorbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order* in CC Docket No. 81–704, *supra*, or this decision. No space station authorization, nor any right granted by such authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding such authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

40. IT IS FURTHER ORDERED that the Secretary of the Federal Communications Commission shall cause this order to be published in the Federal Register.

41. IT IS FURTHER ORDERED that these orbital assignments shall become effective 30 days after publication of the *Report and Order* in CC Docket No. 81–704, *supra*, in the Federal Register, but grantees ARE AUTHORIZED to proceed immediately upon the adoption of this order with construction, launch and in-orbit operations of authorized satellites in accordance with these orbital assignments and the outstanding station authorizations.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix

APPENDIX

1983 Orbital Assignments

Orbital Positions (West Longitude)	*User*	*Frequency Band(s)*
143°	SATCOM V	4/6 GHz
141°	Unassigned	4/6 GHz
139°	SATCOM I-R	4/6 GHz
137°	Unassigned	4/6 GHz
134°	GALAXY I	4/6 GHz
132°	Rainbow	12/14 GHz
131°	SATCOM III-R	4/6 GHz
130°	ABCI	12/14 GHz
128°	American Satellite	4/6 GHz and 12/14 GHz
126°	RCA	12/14 GHz
125°	TELESTAR/COMSTAR	4/6 GHz
124°	SBS	12/14 GHz
122°	SPACENET	4/6 GHz and 12/14 GHz
120°	USSSI	12/14 GHz
119.5°	WESTAR V	4/6 GHz
117.5°	Canada	12/14 GHz
116.5°	Mexico	4/6 GHz and 12/14 GHz
113.5°	Mexico	4/6 GHz and 12/14 GHz
112.5°	Canada	12/14 GHz
111.5°	Canada	4/6 GHz
110°	Canada	12/14 GHz
108°	Canada	4/6 GHz
107.5°	Canada	12/14 GHz
105°	GSTAR	12/14 GHz
104.5°	Canada	4/6 GHz
103°	GSTAR	12/14 GHz
101°	Unassigned	4/6 GHz and 12/14 GHz
99°	SBS	12/14 GHz
98.5°	WESTAR IV	4/6 GHz
97°	SBS	12/14 GHz
96°	TELSTAR	4/6 GHz
95°	SBS	12/14 GHz
93.5°	GALAXY III	4/6 GHz
93°	Unassigned	12/14 GHz
91°	SPACENET	4/6 GHz and 12/14 GHz
89°	SBS	12/14 GHz
88.5°	TELSTAR	4/6 GHz
87°	RCA	12/14 GHz
86°	WESTAR	4/6 GHz
85°	USSSI	12/14 GHz
83.5°	SATCOM IV	4/6 GHz
83°	ABCI	12/14 GHz
81°	American Satellite	4/6 GHz and 12/14 GHz
79°	Rainbow	12/14 GHz
78.5°	WESTAR	4/6 GHz
77°	RCA	12/14 GHz
76°	TELSTAR	4/6 GHz
75°	Unassigned	12/14 GHz
74°	GALAXY	4/6 GHz
73°	Unassigned	12/14 GHz

Orbital Positions (West Longitude)	*User*	*Frequency Band(s)*
72°	SATCOM	4/6 GHz
71°	Unassigned	12/14 GHz
69°	SPACENET	4/6 GHz and 12/14 GHz
67°	SATCOM	4/6 GHz

Fairness Doctrine, Controversial Issue of Public Importance
Fairness Doctrine, Personal Attack

> Under the Commission's personal attack rule, broadcaster incurs obligations only when an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, during the discussion of a controversial issue of public importance.
> *–Eulogio Cardona y Beltran*

FCC 83-262

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
EULOGIO CARDONA Y BELTRAN
against
RADIO STATION WFBA [1]
San Sebastian, Puerto Rico

ORDER

(Adopted: May 26, 1983; Released: June 3, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

1. The Commission has before it an Application for Review of the Broadcast Bureau ruling of November 9, 1981,[2] filed by Mr. Eulogio Cardona y Beltran.

2. After a careful review of the information before us, we believe that the Broadcast Bureau's ruling is correct and the Application for Review does not contain sufficient grounds to warrant reversal or alteration.

3. In order for the personal attack rule to be applicable, an attack upon a person or group's "honesty, character, integrity or like personal qualities" must occur "during the discussion of a controversial issue of public importance." The burden is on the complainant to establish that a discussion during which an alleged attack occurred was both controversial and of public importance. Initially, Mr.

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[1] On January 15, 1982, the Commission granted assignment of the license for WFBA. On July 12, 1982, the present licensee was given Commission approval to change its call sign to WLRP.

[2] A copy of that ruling is attached (Appendix.)

Beltran identified the issue discussed as "the financial dealings of the different sport franchise holders and the corrective action that the legislative branch of the local government should take." We agree with the Bureau that the licensee was reasonable in determining that this does not constitute a controversial public issue. We further agree with the Bureau that subsequent recharacterization of the issue by Mr. Beltran that the real "issue in controversy is if Mr. Cardona y Beltran is entitled to equal time to answer . . . the attack," also fails to demonstrate the licensee's unreasonableness.

4. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Nov. 9, 1981

680
IN REPLY TO:
8330-L
C8-607
C9-269

Mr. Eulogio Cardona y Beltran
c/o Celso E. Lopez II, Esq.
Apartado AA
San Sebastian, Puerto Rico 00755

Dear Mr. Beltran:

This refers to your complaint filed on June 26, 1981, against radio station WFBA, San Sebastian, Puerto Rico. You state that on May 4, 1981, Mr. Felix Bonet-Velez, President and principal stockholder of WFBA, falsely accused you "of being a fraudulent sport leader and of personally and improperly stealing a substantial amount of money belonging to the San Sebastian softball team." You maintain that these comments constituted attacks upon your honesty, character and integrity during the presentation of a controversial issue of public importance. You define the controversial issue as "the financial dealings of the different sport franchise holders and the corrective action that the legislative branch of the local government should do to stop allegedly fraudulent actions of the franchise holders." You allege that station WFBA has failed to meet its obligations under the personal attack rule by failing to notify you, provide a tape or accurate summary of the broadcast and present you with an opportunity to reply. You also state that the station has failed to respond to your complaint.

On July 1, 1981, we asked the station if it had replied to your complaint and if it had not, what its reasons were. On July 21, 1981, Pepino Broadcasters, Inc., licensee of station WFBA, filed its response to our inquiry and, rather than discuss why it did not reply to your complaint, it commented on the merits. It explains that in Puerto Rico organizations often raise money by conducting street fairs called "verbenas" which are licensed by the government and conducted on public property. The view of WFBA management is that organizations obtaining licenses should be required to report and account to the municipal government how much money was raised at the verbenas. The licensee apparently believes that you have defined this issue, financial accountability, as the controversial issue of public importance which was being discussed when you were allegedly attacked. The licensee states that it believes that your complaint is based on the fact that the station expressed its view on this issue about the time that you and the local softball team held a verbena. However, the licensee contends that this issue was discussed in general terms, with no specific mention of you or your organization. The licensee further states that nothing was discussed which "could possibly come under the 'personal attack rule'", and "no charge was made or implied that any impropriety or irregularity had been, or would be, made in connection with the

verbenas held by . . . [the local softball team] or any other organization." The licensee also questions whether the issue of financial accountability is "of sufficient controversy to raise an issue under the Fairness Doctrine." It states that it is not aware that the matter has been discussed in any other public forum or has been written about in the press. It also declares that if this issue is considered to be a controversial issue of public importance, you had the opportunity to express your viewpoint on Station WFBA, May 9 and 16, 1981.[1]

You filed reply comments on August 18, 1981, and supplemental comments on September 9, 1981. You deny the licensee's contention that the controversial issue of public importance you defined was whether organizations which hold verbenas should account financially to the municipal government. You maintain that you agree with the licensee's viewpoint on this issue and have informed the public of the money raised at your verbena. You claim that the station is acting in bad faith and is attempting to confuse the Commission by focusing your dispute with it on this issue. You state, "What the present complaint involves is a false accusation made by Mr. Bonet-Velez over the airwaves stating that Mr. Cardona y Beltran stole money from a local softball team," and "the issue in controversy is if Mr. Cardona y Beltran is entitled to equal time to answer the personal attack leveled against him." You argue that Mr. Velez has "lied" to the Commission by denying that the broadcast accused you of appropriating money, and therefore he is morally unfit to be a Commission licensee. You state, "the truth of the matter is not only a charge was made about an alleged irregularity, a direct accusation was leveled against Mr. Cardona y Beltran claiming that he personally stole $4,000.00."

In addition, you submit two affidavits with your August 18 reply. One affidavit is from Mr. Ismael Rosado Vega, who summarizes what he heard on the May 4 broadcast, and the other affidavit is from Mr. Severiano Mendez Gonzalez, treasurer of the local softball team.[2] In your September 9 pleading, you assert that Mr. Velez engaged in further misconduct by questioning Mr. Vega in an attempt to discredit his testimony and obtain a statement from him denying that his affidavit was self-prepared. You submit a second affidavit from Mr. Vega, attesting to this conduct by Mr. Velez and stating that Mr. Velez "threatened" him.[3]

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[1] The licensee asserts that Mr. Beltran conducts a program of his own on WFBA and has spent approximately ten minutes discussing the financial accountability issue.

[2] The substance of these affidavits is more fully discussed below.

[3] Mr. Vega states, "he (Mr. Velez) made an implied threat concerning the collection of information about numerous persons with the purpose of using that information in the allocation of the station public service air time."

DISCUSSION

A broadcaster's obligations under the personal attack rule are triggered only if there has been an attack upon honesty, character, integrity or like personal qualities of an *identified* person or group, during the discussion of *a controversial issue of public importance*. It is unclear from the pleadings before us what issue you have defined as the controversial issue of public importance which was being discussed when you were allegedly attacked. The licensee believes that you defined the controversial issue as whether one should account to the local government how much money was raised at a verbena held on public ground. However, you deny that this issue is controversial. In your supplemental pleading of September 9 you state that the controversial issue is whether you are entitled to equal time to answer the personal attack against you. However, the personal attack rule generally does not apply to this type of issue. The Commission has made it clear that criticism of a complainant, itself, does not create the necessary controversial issue of public importance. The Commission has stated:

> Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance. . . . This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public-interest issues, but such issues are not the focus of the Fairness Doctrine. [*Personal Attacks; Political Editorials*, 8 FCC 2d 721, 725 (1967)].

Thus, for the personal attack rule to apply, you must demonstrate that you were personally attacked during the discussion of a controversial issue of public importance; specifically identify the issue; and establish why it is controversial and of public importance. To establish that an issue is controversial you must show that the issue is subject to vigorous debate with substantial elements of the community in opposition to one another. To establish that an issue is of public importance you must demonstrate the degree of attention paid to it by government officials, community leaders, and the media, and the impact that the issue has on the community. *Fairness Report*, 48 FCC 2d 1, 11 (1974).

There is also a question as to whether you or your organization were specifically identified during the May 4 broadcast and whether an attack was made on your financial propriety. The licensee denies that you were identified or that there was "anything that could possibly come under the

personal attack rule." According to the affidavit you submitted from Mr. Ismael Rosado Vega, in which he summarizes the May 4 broadcast, it appears that your name was never mentioned. The affidavit states in part:

> He [Mr. Bonet-Velez] called on the local government to stop *certain person* who disguised themself [sic] as sport leader and get a team and later on claim he lost money. He said of a *certain man* who asked to be allowed to celebrate a "Verbena" because he had lost more than $1,000.00 out of his pocket.
>
> Mr. Bonet-Velez stated that *this man* sold the "Verbena" for $2,500.00 and had other incomes which totally [sic] $5,000.00. He asked if the losses were $1,000.00 where are the $4,000.00 remaining? [Emphasis added]

Mr. Vega also states that a considerable number of people contacted him and asked if you had "appropriated" this money. Further, the affidavit you submit from Mr. Severiano Mendez Gonzalez states that a considerable number of people approached him and asked "about the accusation made by Mr. Felix Bonet-Velez against Mr. Eulogio Cardona y Beltran regarding the illegal appropriation by Mr. Beltran of the amount of $4,000.00 belonging to the local softball team." He also asserts, that as treasurer of the local softball team, he can attest that none of the money raised at the verbenas has been stolen.

The Commission has held that a personal attack must be made on an identified person or group. The burden is on the complainant to establish this or to show that the attack was understood by the general public to be directed towards a specific group or individual. *Horace Rowley III*, 69 FCC 2d 1074 (1978). You have not established that it was unreasonable for the licensee to conclude that you were not identified in the May 4 broadcast or that the general public would not identify you. Although you assert that a considerable number of people inquired about the broadcast, you have furnished no information to show that a substantial segment of the community knew that the remarks were directed against you. *C.f. Station WBAX*, 17 FCC 2d 316 (B/c Bur. 1969). Accordingly, in light of your failure to establish that a controversial issue of public importance was discussed and that a personal attack was directed at you, we cannot conclude that the licensee incurred any obligations under the Personal Attack rule.[4]

Mr. Eugene Cardona y Beltran

With respect to the allegation that Mr. Velez "threatened" Mr. Vega, we see no grounds for Commission intervention. Mr. Vega's claims that Mr. Bonet-Velez "made an implied threat concerning the collection of information about numerous persons with the purpose of using that information in the allocation of the station public service air time." You assert that the station plans to use this information "as a reference to steer to or away from them the station public service programs." It is not clear what this means. However, we should point out that the Commission interferes in a broadcaster's programming decisions or in its selection of issues or spokespersons only to the very limited extent permitted by the Fairness Doctrine and its corollary, the personal attack rule. In addition, broadcasters are licensed to serve the public interest and they must make decisions based on public interest considerations, not private interest considerations. The statement above, however, does not appear to indicate that the licensee is not serving the public interest. Therefore, absent conduct violative of Commission's rules and regulations, a statement by the licensee that it is collecting information to use in its allocation of air time does not warrant Commission involvement.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal

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[4] In a subsequent affidavit dated August 31, 1981, Mr. Ismael Rosada Vega states, "That on May 4, 1981, I heard Mr. Bonet-Velez broadcast where he accused Mr. Eulogio Cardona y Beltran of stealing money from the local softball team." This appears to be Mr. Vega's interpretation of the May 4 broadcast and not an assertion that your name was mentioned on the broadcast, since the information submitted in Mr. Vega's first affidavit indicated that there was no reference to you by name.

Regulations, Volume 47, Section 1.115.

Sincerely,

Stephen F. Sewell, Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

Channel Assignment
FM Stations, Class A, B, C
Frequency Assignment
Station Separation
Table of Assignments

> Final rule making order adopted to permit the operation of an increased number of FM broadcast stations. Rule changes were needed to meet the demand for FM broadcast service that could not be satisfied under the present rules. New rules allow Class A stations to operate on all channels, authorize three new classes of stations, and reclassify existing stations, after a period of three years, according to their operating facilities.
> *-FM Broadcast Stations*
> BC Docket No. 80–90

FCC 83-259

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments.	BC Docket No. 80–90 RM-2587 RM-3226 RM-3367

REPORT AND ORDER (PROCEEDING TERMINATED)

(Adopted: May 26, 1983; Released: June 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT; COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT; COMMISSIONER SHARP ABSENT.

INTRODUCTION

1. The Commission's *Notice of Proposed Rule Making* ("*Notice*") in this proceeding suggested a number of rule changes to increase the availability of FM stations within the present assignment structure.[1]

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[1] 78 FCC 2d 1235; 45 Fed. Reg. 17602; adopted February 28, 1980.

2. The FM band extends from 88–108 MHz and is divided into 100 channels numbered from 201 to 300. The lower 4 MHz contains Channels 201 to 220 and is reserved for noncommercial educational stations. The upper 80 channels between 92 MHz and 108 MHz may be used by both commercial and noncommercial stations. The use of these channels is governed by the FM Table of Assignments ("Table") found in Section 73.202(b) of the Commission's Rules. It provides a listing of communities in which stations are operating, or may operate, and the channel on which they must transmit.

3. When a new station is desired, the Table must be amended through a rule making proceeding to add the requested community and channel. The proposed station must be located a sufficient distance from pertinent co-channel and adjacent channel stations and still be capable of providing a strong signal over the desired community. The distance separation requirements are based upon the assumption that each station is currently, or at some future time will be, operating with maximum facilities (effective radiated power, "ERP," and antenna height above average terrain, "HAAT"). Thus, the Table permits stations to begin operating with less than maximum facilities and to increase them as their financial situations improve.

4. The Commission authorizes three classes of FM stations. Class A stations operate only on 20 designated channels and have a service radius of 15 miles. The service radius is determined from the co-channel distance separation requirements, which provide protection from interference to approximately the station's 1 mV/m contour. Class B or C stations operate on the remaining 60 channels. Whether a station is designated Class B or Class C depends upon its geographic location. Class B stations are assigned in the more densely populated parts of the nation and have a service radius of 40 miles, representing protection of their 0.5 mV/m contour. Areas where Class B stations may be located are designated Zones I and I-A. Class C stations are assigned elsewhere (Zone II) and have a service radius of 57 miles, representing protection of their 1 mV/m contour.

5. The *Notice* recognized that under the present allotment rules, additional service cannot be offered to many parts of the nation where demand has not been satisfied. Commission studies identified three existing standards that appeared to limit new FM service:

(a) Class A stations may operate only on 20 designated channels, thereby foreclosing substantial areas from using the 60 Class B/C channels for these smaller stations;

(b) the distance separation requirements assume stations are operating with maximum permissible facilities, although 80% of the Class C stations and 35% of all FM stations were not operating with maximum, or near maximum, facilities at the time the *Notice* was adopted; and

(c) the Class B separations, which reflect protection of the 0.5 mV/m field strength contour rather than the 1 mV/m contour, prohibit many communities from obtaining additional FM allotments.

6. Based on these findings, the Commission proposed to respond to the continuing demand for FM assignments by:

(a) allowing stations with Class A facilities to operate on the 60 Class B/C channels if a Class A channel was not available;

(b) increasing the number of classes allowed from three to five by adding Class B1 (operating facilities between Classes A and B) and Class C1 (operating facilities between Classes B and C) stations, so protection would more closely approximate service area;

(c) permitting Class B stations to operate in the same areas as Class C stations (Zone II);

(d) adopting a new distance separation table based on providing uniform protection to the 1 mV/m (60 dBu) contour of all stations (the primary impact of the adoption of this proposal would be on Class B stations whose separations are now based on the 0.5 mV/m contour);

(e) requiring existing Class B and Class C stations operating with less than maximum, or near maximum, facilities to reach the minimum power and antenna height specified for the new classification system within three years, or be reclassified based on their actual operating facilities; and

(f) allowing *new* Class C stations six years to reach their minimum power and antenna height requirements because they would be the only class of station to have a minimum antenna height requirement.[2]

7. Central to the *Notice's* proposals was the retention of the basic Table of Assignments framework. It did not propose to modify the allotment structure represented by the Table. Instead, the Commission sought to focus on those changes that could achieve immediate benefits and to defer consideration of more complex proposals until a later date. These included such matters as terrain shielding, directional antennas, etc.

8. Those parties that submitted comments and reply comments that relate directly to our discussions are listed in Appendix A.* Seven months after the close of the reply comment period, the National Radio Systems Committee ("NRSC") submitted new FM receiver measurement data.[3] On August 3, 1982, the Commission reopened the record to accept the NRSC report and two others filed by

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[2] The Commission also proposed to adopt the International System of Units (commonly termed the metric system) for the FM broadcast service because it was considering modifying many of the technical rules.

[3] The National Radio Systems Committee is co-sponsored by the EIA and the NAB and "is comprised of persons from the broadcasting and electronics manufacturing industries and others interested in improving the overall technical quality of radio broadcasting and reception. The NRSC by its charter does not assume a position of advocacy on any matter before the Federal Communications Commission or any other governmental body. One function, however, is to provide agencies with information on transmitting and receiving technology which may be used in rulemaking proceedings."

[Committee description taken from the comments of the NRSC; October 16, 1981.]

the Advisory Committee on Radio Broadcasting ("Advisory Committee").[4] In addition to accepting the reports, the Commission allowed 30 days for other parties to comment on these late-filed studies.[5]

9. Subsequently, the Advisory Committee submitted additional reports and again requested that the Commission re-open the record to accept them and to request comments on their findings.[6] The Commission declined the Committee's request stating that it would consider the reports to be *ex parte* comments submitted under the guidelines governing non-restricted proceedings. Thus, the Commission could consider these reports in its deliberations and any other comments submitted in response to the filing of the reports could also be considered to be *ex parte* comments.

Summary of Actions Taken

10. The Commission has reviewed each of the comments filed. Based on that review, we have decided to amend the rules in the following manner:

(a) Class A stations will be allowed on Class B/C channels;

(b) the distance separation requirements will *not* be modified for existing station classes to reflect uniform protection to the 1.0 mV/m contour (thus, separations for Class B stations in Zones I and I-A still will be based on the 0.5 mV/m contour rather than the 1.0 mV/m proposed);

(c) one new class of station, Class B1, with an expected service range of 45 kilometers (28 miles), will be allowed to operate in Zones I and I-A;

(d) two new classes of stations, Classes C1 and C2, with expected service ranges of

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[4] The Commission acted in response to a petition from the Advisory Committee. This committee evolved from the "Advisory Committee on AM Broadcasting in Region 2." The latter committee was established to advise the staff of the Commission during its preparation for, and participation in, the International Telecommunications Union Regional Administrative Conference on AM Broadcasting in the Western Hemisphere. The purview of the AM conference committee was expanded to include FM broadcast issues when its charter was amended on September 10, 1980. It was renamed the "Advisory Committee on Radio Broadcasting" and its organization was altered to specify two subgroups within the committee. One subgroup was to address technical matters while the other concentrated on spectrum allocation matters. [See the *Memorandum Opinion and Order* issued by the Commission on September 22, 1980 (FCC 80-537).]

[5] The studies are entitled: (1) *Report to the National Radio Systems Committee from the FM Subcommittee Task Force*, July 24, 1981 ("NRSC Report"); (2) *FM Broadcasting Receiver Characteristics and Protection Criteria*, July 7, 1982, ("Technical Subgroup Report"); and (3) *Report on FM Allocation Policies*, July 9, 1982 ("Allocations Subgroup Report").

[6] The studies submitted by the Advisory Committee are entitled: *Subjective Evaluations of Audio Degraded by Noise and Undesired FM Signals* ("Subjective Audio Study"), November 17, 1982; *A Study of FM Station Mileage Separations* ("Mileage Separations Study"), November 17, 1982; *Potential Effects of BC Docket No. 80-90 on FM SCA Operations* ("SCA Study"), November, 1982; and *A Study of Stereo Radio Listening* ("Stereo Listening Study"), December 7, 1982.

72 kilometers (45 miles) and 52 kilometers (32 miles), respectively, will be allowed to operate in Zone II;

(e) existing stations will be required to meet minimum facility requirements within three years or be reclassified to a station class based on the new classifications. For Class C stations, a minimum antenna height requirement of 300 meters (984 feet) HAAT will be adopted;

(f) new Class C stations will be required immediately to meet minimum facilities rather than being provided six years within which to comply; and

(g) the rules contained in the FM service will be converted to the International (metric) System of Units.

These amendments are intended to provide for additional FM stations in many parts of the country and still permit existing stations to provide service equivalent to that embodied in the present allotment rules. They represent, in our best judgment, the optimum rule changes necessary to allow new stations while preserving the unique qualities of the FM service.

ANALYSIS OF THE RECORD

11. Our analysis of the record in this proceeding first will set forth those comments that relate generally to the legal and policy issues presented in the *Notice*. After a summary and discussion of those comments, we will proceed to a recitation and analysis of those comments that addressed general technical issues. Then the record on each specific proposal set forth in the *Notice* will be summarized and discussed. Finally, we will discuss various matters that are ancillary to the adoption of the changes set forth in paragraph 10, *supra*, including the implementation of those changes.

Legal and Policy Matters

12. A number of parties argued that sufficient information was not available, nor sufficient thought given, for the proposals in the *Notice* to be satisfactorily considered. ABC, NAB, and other parties urged the Commission to develop a master plan for an integrated AM and FM aural broadcast service before seriously considering any deviations from the existing service structures. They claimed the current approach of instituting separate proceedings for each service represented a conviction to create new radio outlets without regard to public service costs. Cox and Multimedia supplied detailed historical perspectives of the development of the FM service. Noting FM's complementary nature to the AM service, they argued that the suggested modifications be considered in an omnibus proceeding.

13. ABC also argued that the instant proceeding is an ineffective mechanism for dealing with important issues such as demand, economic viability, appropriate service area size, assignment priorities, and viable alternatives. The Advisory Committee urged the Commission to make more extensive economic studies of FM stations

before taking final action. Its reports to the Commission, along with comments submitted by NBC and ABC, cited economic losses and small profit margins as indications that further competition would be undesirable in many situations. PAB and NRBA claimed that additional outlets in marginally profitable markets would result in less local news and public affairs programming. ABC pointed out that, according to several court decisions, the Commission is expected to assess the merits of adding new broadcast stations by balancing public service gains against losses.

14. Some parties argued that demand by potential broadcasters does not represent a public interest determination as required by the Communications Act. Still others claimed that adoption of the proposals in the *Notice* would violate Section 307(b) of the Communications Act, which requires a "fair, efficient and equitable distribution of radio services." They suggested that these factors only can be fully examined if the Commission issues a Notice of Inquiry into these subjects before proposing specifics in a Notice of Proposed Rule Making.

15. NBC contended that the current FM service is efficient and diverse. Quoting from the Spring 1980 Arbitron data, it stated that of the top 100 markets containing 71% of the population over 12 years of age, 88 markets contain 5 or more FM stations; and of the top 150 markets containing 77% of the population over 12 years of age, 123 markets contain 5 or more FM stations. A study performed by A.D. Ring & Associates ("A.D. Ring") was submitted to support the proposition that the proposals would not increase availability in larger markets. The study investigated potential FM stations under the proposed changes for 24 of the top 100 markets. It indicated that no additional FM stations were possible in any of the top 12 markets and only one was found in the top 15 markets. Of the 9 remaining markets studied (markets 16 to 96 at ten market intervals), it indicated that the proposed changes would result in no Class C or C1 stations, 4 Class B stations to 3 communities, 19 Class B1 stations to 7 communities, or 34 Class A stations to all 9 communities.[7] Because no additions would be possible in the highest demand markets (*i.e.*, the top 12), several parties claimed that the proposed changes served no useful purpose.

16. After reviewing the comments submitted in this proceeding, we believe that no more appropriate forum exists within which to comprehensively examine the public interest need for additional FM radio service and the rule changes necessary to bring it about. Every effort has been made to establish as complete a record as possible and to encourage widespread public and industry involvement. We expanded the purview of the Advisory Committee to include the FM

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[7] Presumably, some combination of Classes A, B1, and B stations is possible in most of the communities. However, this is unclear from the data submitted.

service, extensively delayed this proceeding by extending the comment period several times, and even accepted late-filed comments. The Commission believes the record before us is adequate to explore all pertinent issues. All matters addressed by the commenting parties (including those studies concerning new receiver characteristics, average distance separations, and audio listener tests and surveys) have been fully examined and factored into our decision. The need for additional outlets and the rule changes necessary to accommodate them have been carefully weighed against the effects such changes would have on the present FM service. We have concluded that the public interest is best served by adopting most of the rule changes proposed. There exists no reason to investigate further the desirability of modifying the rules, as many parties suggested, because such an investigation would only re-confirm what the record before us already indicates and would needlessly delay the benefits of additional FM station availability. Moreover, as subsequent discussion indicates, we have been keenly aware of the interrelationships of the AM and FM services in satisfying our statutory mandate to

> make such distributions of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.[8]

17. When assigning radio broadcast stations, the Commission's basic objectives have been to provide

> - at least one service to everyone,
> - diversified service to as many persons as possible, and
> - outlets for local expression addressing each community's needs and interests.[9]

We recognize that these goals can be self-contradictory; therefore it is necessary to strike compromises that both foster service to all and provide for outlets for local expression in as many communities as possible. Such compromises have been struck in the past, resulting in radio service in the United States to 98% of the population with at least one primary fulltime aural service (*i.e.*, one primary nighttime AM or one FM signal of 1 mV/m field strength or greater). *Further Notice of Proposed Rule Making*, Docket No. 20642, at paragraph 53. The rule changes adopted herein will foster the same goals, providing opportunities for new local outlets while preserving existing primary service areas.

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[8] Section 307(b) of the Communications Act of 1934, as amended; 47 U.S.C. §307(b).

[9] The Commission recently simplified its FM allotment priorities and reaffirmed these goals for this broadcast service. New FM channels are to be allotted: first, where they will provide a first fulltime aural service; second, where they will provide a second fulltime aural service or a first local service; and third, where they are necessary to meet other public interest matters. (See the *Report and Order* in BC Docket No. 80-130, reconsideration pending, adopted on May 20, 1982.) Those comments seeking a re-examination of the FM priorities have been satisfied by Commission action in BC Docket No. 80-130.

18. Some of the comments stated that demand for assignments does not represent the necessary Commission finding that such assignments are "in the public interest." Demand, however, does represent an applicant's judgement of a community's interest in and potential financial backing for a new station. We regard this as a fair basis on which to examine the public interest aspects of new proposals. As a practical matter, if a community really has little potential for establishing an additional station, we believe it unlikely that applicants or investors would be willing to extend the effort or financial backing that is required. As a second matter, potential competition should not be curtailed by the Commission second guessing a market's potential. Other comments claimed that increased competition could result in disservice to the public by reducing existing programming services. Our experience is that the public generally benefits from program diversity brought about by increased competition. In an individual situation, however, based on an application and appropriate pleadings, the Commission may be called upon to evaluate the overall adverse impact on service that could result from the institution of a new service in a community. See, *e.g.*, *Carroll Broadcasting v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

19. We also believe there is ample evidence to support the need for more FM stations. The Station Requirement List, submitted to the Region 2 Conference on AM Broadcasting, represents approximately 3,000 separate locations where the Commission foresaw a potential need or demand for nearly 4,000 additional radio stations in the immediate future.[10] The importance of the list for this

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[10] The Commission notified this list to the International Frequency Registration Board (IFRB) to insure international protection of our future radio needs. The list of potential station requirements for various countries in the Western Hemisphere was submitted to the Second Session of the Administrative Conference on AM Broadcasting in Region 2 held in November and December, 1981, to establish future planning needs. Although time did not allow adoption of all these requirements, provisions were made for adding them after the conference. (See *List of Requirements Concerning Stations to be Authorized between 1 January 1983 and 31 December 1987*, Appendix to Document No. 19-E, 16 October 1981.)

This inventory of potential interest or demand for additional fulltime radio stations was compiled from lists of:

a) locations of all daytime-only AM stations;

b) cities asserted as needing minority-owned or public radio stations as defined by National Black Media Coalition and National Public Radio in the *Report on New Station Demand and Viability* as submitted by the Advisory Committee on December 17, 1980;

c) a few places where declarations of interest were filed in response to BC Docket No. 79-164 (the 9 kHz proceeding); and proceeding is not the specific communities noted but the magnitude of the communities identified as being underserved. More than half of these assignments are in communities with no local AM or FM assignments, no local nighttime service, or are for additional minority-owned or local public radio stations. The Commission's studies have shown that additional AM stations possible as a result of our clear channel actions could only satisfy about 125 of these needs.

20. The A.D. Ring study on the availability of new allotments assumed that demand for new assignments exists only in the larger communities already having assignments. Nowhere in the *Notice* did we imply that the top 100 markets (sampled by A.D. Ring) represent the most serious cases of need. In this regard, the Commission undertook an extensive computer analysis of 200 entries from the Station Requirements List that had no local radio outlets, contained only daytime AM stations, or were asserted as needing additional minority-owned or public radio stations. Our study found that the existing FM allotment rules would allow a total of 57 new stations at 15 of 200 locations studied (see Table I of Appendix B). In other words, 7% of the locations studied could have at least one new FM outlet under the existing rules. For the various proposals under consideration, the studies indicated that the availability of at least one new outlet per location ranged from 41% to 61% of the study locations depending on which modifications are adopted. Thus, the potential of each of the Commission's individual proposals to satisfy the need for additional FM stations can readily be seen.[11]

21. To determine if these results were indicative of availability at a larger number of communities, the Commission conducted another examination using 1000 entries. This study indicated that our earlier findings were conservative. It also showed that under the rules being adopted, additions could be made to approximately: 49% of the communities studied that have daytime AM stations only; 31% of the communities studied that have no local assignments; 40% of the communities studied that were asserted as requiring additional minority-owned stations; and 26% of the communities studied that were asserted as requiring additional public radio

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d) communities of at least 2,500 persons which have no local AM or FM assignments and are located more than 10 miles from cities of at least 25,000 persons (compiled by the staff).

The Commission has made extensive use of this list for international negotiations as well as to evaluate AM service availability for the 9 kHz proceeding.

[11] For convenience, a summary of the studies and number of additions possible for each alternative is listed in Appendix B. Further explanation of these studies, their definition and limitations, can be found in a report entitled "Computer Project for BC Docket No. 80-90 (Increased FM Availability)", May 13, 1982, that has been placed in the docket file.

assignments that cannot be accommodated in the reserved portion of the FM band (82-92 MHz).[12]

22. Other indications of unsatisfied demand for additional FM service may be found in the comments of more than 35 parties who supported the proposals in this proceeding. Although the *Notice* specifically requested that commenters not submit requests for new FM allotments, approximately half indicated that additional FM stations needed in their communities were not available without the changes proposed. We also note that we receive approximately 200 petitions annually to amend the FM Table of Assignments, and that approximately 60% of the new assignments have two or more competing applications submitted.

23. In sum, we are persuaded that there exists a substantial demand for new FM service that cannot be satisfied under existing rules. We are persuaded further that the rule changes adopted herein provide the most efficacious means of accommodating that demand.

Technical Matters

24. Technical oppositions to the proposals in the *Notice* generally alleged that few stations operate with maximum facilities at minimum spacing. Therefore, stations are covering larger areas with a higher quality service than would be expected under the present rules.

25. The proposals contained in the *Notice* were, with one exception, based on the same technical assumptions as the allotment and assignment rules adopted in 1963. These rules consider interference protection to be determined solely by the separation, power, and antenna height limitations. They do not recognize concepts such as protected and interfering contours for individual stations. The distance separations provide protection from co-channel and first adjacent channel interference within a "primary" service range.[13]

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[12] The difference in availability between the existing rules and the modifications adopted herein is shown in * Appendix B, Figures 1 and 2. These figures show the approximate distribution of additions for 1000 study locations throughout the contiguous United States. Every asterisk or star on Figure 1 indicates an approximate location (with respect to referenced communities) where an additional FM station may be added under the existing rules. Figure 2 indicates the possible station locations under the new rules adopted today, assuming all existing stations elect to increase facilities to avoid being reclassified.

[13] When originally adopted in 1963, the minimum separations were based on the existing FM propagation curves. These curves are not expected to predict service or interference at any particular location at any one time. However, they are useful for predicting service on a large area basis and therefore are used to analyze general assignment questions. Thus, the predicted service area of a class of station is indicated by the propagation curves for the generalized situation and may, or may not, reflect the actual service provided by a given station. For this reason, the rules state that the only protection to which a station is entitled is

At that time, the Commission decided that service ranges of 15 miles for Class A stations, 40 miles for Class B stations, and 65 miles for Class C stations would provide reasonably adequate service areas while permitting a sufficient number of FM assignments to be made.[14] Assuming that stations operate with maximum facilities, the minimum co-channel separations yielded protection of the 0.927 mV/m contour for Class A, 0.562 mV/m for Class B, and 0.944 mV/m for Class C stations. The *Notice* proposed separations that would have protected the 1.0 mV/m contour for all classes of stations; in other words it retained the approximate service areas of the Class A and Class C stations but reduced it for Class B stations.

26. In response, the comments claimed service far beyond these contours and noted that the present FM allotment rules result in an interference-limited service. That is, the predicted *interference-free* service areas are generally greater than those anticipated by the minimum separation requirements because few, if any, stations are limited in every direction by co-channel and adjacent channel stations operating with maximum facilities at minimum spacings. Several parties claimed that a signal at the 0.05 mV/m (34 dBu) level may be received. ABC noted that calculations provided by A.D. Ring indicated that a field strength of 0.063 mV/m (36 dBu) will permit satisfactory stereophonic service (in the absence of interference) while good monophonic reception is possible with a field strength of only 0.0056 mV/m (15 dBu). Still other parties noted that the CCIR, the International Radio Consultative Committee, recommends .25 mV/m (48 dBu) for general planning purposes.

27. Metromedia, Cox, Multimedia, and NBC submitted detailed showings of what they considered the interference-free service contours of their stations. ABC stated that an examination of their 7 owned and operated stations revealed that their existing interference-free service areas were greater than the area recognized by the minimum distance requirements. Metromedia submitted studies claiming the interference-free service offered by three of its stations would be reduced by 28, 37, and 43% of their geographic service areas if the proposals suggested in the *Notice* were adopted. Similar NBC studies indicated population losses for its stations of between 4.8 and 33% if their interference-free service areas were restricted by the proposals. It further noted that those losing service would not have it replaced by the new stations. NBC claimed that locations between 33 and 60 miles from New York City would lose most, if not

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that provided by the distance separation requirements, not the predicted service area indicated by the propagation curves (see Section 73.209 of the Rules). We are not changing this concept in this proceeding.

[14] The propagation curves in use in 1963 predicted a 65 mile service range for Class C stations. Those curves were refined in 1975 (53 FCC 2d 855), and the new curves indicate that the 180 mile co-channel separation figure yields a 57 mile service range as indicated at paragraph 4, *supra*.

all, of the New York City service. Thus, it concluded, the suburban and rural populations surrounding the larger cities would suffer the greatest losses. Cox and Multimedia also claimed that the only practical way of serving many suburban areas is with wide-area metropolitan stations.

28. Another A.D. Ring study submitted by ABC claimed a net loss in service would result from the Commission's proposals. It contained several theoretical assignment situations where new stations were interjected into certain currently permitted station groupings. All additions resulted in a net loss of service area.[15] It claimed this proved that any increases in FM availability would be to the detriment of present listening audiences.

29. NTIA, in reply, argued that stations should only be protected to "a primary service area" and service beyond that limit is properly considered secondary or unprotected. It also argued that the A.D. Ring study did not consider several factors, including the use of directional receiving antennas in rural areas (which would reduce the level of the interfering signal), the capture effect of FM receivers to distinguish the desired signal from the weaker undesired co-channel signal (which would reduce the large areas of degraded audio quality)[16], and the population densities in the interference zone (which should be much smaller than those near new community outlets).

30. Upon review of these comments, we note that the Commission recognized in 1963 that certain amounts of potential interference-free service had to be discounted if a sufficient number of assignments were to be made. Thus, we adopted mileage separations which struck a balance between the size of a station's contemplated service area and the number of stations that could be authorized throughout the country. Our experience since then has indicated that the balance was not incorrectly determined. From 1,100 commercial FM stations in 1963, we now have 3,800, and the demand for new FM stations is evident by the number of new channel

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[15] The evaluations indicated a net loss in service area of:

(a) 2,075 square miles if a Class B station were located at the center of 4 Class B stations located at the four corners of a square 170 miles on a side;

(b) 563 square miles if a Class B1 station were located at the center of 4 Class B stations located at the four corners of a square 153 miles on a side;

(c) 1,695 square miles if a Class B station were located at the tip of a triangle 120 miles from 2 Class B stations that are 170 miles from each other; and,

(d) 2,649 square miles if a Class B1 station were located at the tip of a triangle 108 miles from 2 Class B stations that are 153 miles from each other.

[16] Reception of one of two co-channel FM signals of nearly equal strengths is possible because FM receivers are capable of responding to the stronger of the two signals. AM receivers provide mixed reception in these cases.

allotments requested every year and the instances of competing applications for available channels.

31. We recognize that the introduction of new stations into the current scheme could cause interference to the reception of existing stations beyond their normally contemplated service areas. Indeed, this is the case under present rules where the Commission regularly receives letters complaining of lost FM service (outside the primary service area) when a new station is activated or an existing station modifies its facilties. Proposed rule changes that would permit additional new stations would similarly create losses of secondary services. The opponents of the rule changes, however, have failed to provide any information that the populations allegedly losing such extended services exceed the population gains from new stations.[17] We believe that these losses are more than compensated for by the provision of new services, particularly to communities without local service. In this regard, we note that 98% of the population of the United States currently receives at least one fulltime primary aural service. The new stations contemplated herein would not adversely affect that primary service, but they would provide local service (or local fulltime service) to communities that are precluded under current rules. In this manner, the percentage of the population enjoying primary aural service and the number of communities with local stations may be increased. On balance, therefore, we believe that the provision of new primary service and first and/or second local service is a higher priority than the preservation of service beyond the normally protected service area of existing stations. This is particularly the case where that extended service may be adversely affected under current rules if: the providing station changes its location; a limiting station is authorized under current distance separation requirements; or an existing limiting station changes or increases its facilities within current restrictions. Accordingly, we do not believe it appropriate to protect these extended service areas at the expense of new primary service.

32. Some commenters also alleged that the present minimum separation requirements result in a low quality signal at the outer edge of a station's primary service range. They noted that while the original protection ratios are satisfactory for regular FM broadcast operations, they are unable to protect multiplexed operations

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[17] The previously referenced theoretical A. D. Ring study is limited to areas of alleged loss of service only. It, therefore, could not provide information on the population within those areas, the population that would receive primary service from the presumed new station, or the other services available in the asserted "loss" area. The interference-free service areas that Cox and Multimedia claimed for their stations, however, each contain between 17 and 34 FM stations located either within or directly along the claimed service contours of each station. Between 7 and 14 of these locally assigned FM stations are located within the areas they claim will lose service (except for Station WAIA, Miami, Florida, where the interference-free service is mostly over swamp land).

(stereophonic broadcasting and subsidiary communications operations). The comments urged sufficient protection of the service contour to permit "satisfactory" reception of these operations at the full extent of their service range.

33. In support of this argument, these comments called attention to the international standard for stereophonic reception which is based on a 50 dB audio frequency ("AF") signal to noise ("S/N") ratio. (The international standard is contained in the recommendations of the CCIR.) To provide for this level of quality, they argued that the distance separation requirements should be increased to provide higher radio frequency ("RF") desired to undesired ("D/U") signal protection ratios.[18] The Technical Subgroup Report summarized several recent studies and submitted curves indicating the effect of various distance separations on co-channel protection ratios for a desired 1 mV/m (60 dBu) signal.[19] This report and several comments noted that the NRSC Report concluded that reception of a signal yielding a 50 dB AF S/N ratio in the stereophonic mode requires RF D/U protection ratios of 40 dB for co-channel, 25 dB for first adjacent channel, and -20 dB for second adjacent channel stations.

34. Also, Group W alleged that FM subcarrier services could not be provided effectively if stations operated at minimum separation distances. They stated that any modifications which would decrease current protection could significantly reduce the quality of subcarrier services. The SCA Study, submitted by the Advisory Committee, echoed this argument and noted that further investigations should be performed.

35. Although the Commission was aware of the fact that some FM stations were providing stereo service in 1963 when it first addressed this issue in Docket No. 14185, and that such service required greater protection for high quality reception, it did not select separations to protect stereo service to the limit of the

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[18] The Advisory Committee, urging protection of stereophonic service, submitted three studies dealing with this topic: the Stereo Listening Study; the Subjective Audio Study; and the Mileage Separations Study. These studies indicated that (1) approximately one-half of all radio receivers are capable of stereophonic reception, with stereophonic listening about twice as common as monophonic listening; (2) a 50 dB AF S/N ratio was necessary for satisfactory stereophonic reception (if the presence of the interfering signal was to be only "slightly annoying" according to a panel of expert listerners); and (3) the average co-channel separation between stations yields a 34 to 40 dB RF D/U signal protection ratio.

[19] The reports concerning protection standards are: *Report to the National Radio Systems Committee from the FM Subcommittee Task Force*, July 24, 1981; *Report of the National Quadraphonic Radio Committee to the Federal Communications Commission*, November 1975; *Recommendations and Reports of the CCIR*, 1978; and *A Study into Current FM Receiver Performance and the Relevance of FM Allocation Criteria*, Peter Cahn and Associates, April 1978.

otherwise contemplated service radius. The requests to increase protection ratios were rejected based on the need to provide for a sufficient number of necessary assignments and because stereophonic broadcasts were considered to be an optional enhancement of a station's entertainment programming.

36. Nonetheless, the Commission re-examined the desirability of requiring such protection in response to the comments received in this proceeding. We used the NRSC receiver data to determine the expected service ranges under the present rules for monophonic and stereophonic reception of signals having different qualities. A 30 dB AF S/N ratio was used to represent the "standard quality" monophonic service now provided by the separation requirements. (This figure generally is assumed to form the basis for present protection ratios although, in Docket No. 14185, the Commission did not acknowledge it as such.) A 50 dB AF S/N ratio was used to represent the "high quality" stereophonic service referenced by the comments. We developed the following table based on a receiver having the performance characteristics obtained by averaging the data contained in the NRSC report (assuming co-channel stations operating at minimum distance separations with maximum facilities):

Type of Reception	*AF S/N Ratios*	*RF D/U Ratios*	*Predicted Primary Service Area (miles)*		
			Class A	*Class B*	*Class C*
mono	30 dB	14 dB	19.4	47.5	63.5
stereo	30	*20	16.6	41.5	57.1
mono	50	35	7.9	27.1	41.3
stereo	50	40	6.2	22.6	36.1

*RF D/U ratio used to determine present co-channel separation distances.

Thus, the present co-channel Class C separation requirement of 180 miles permits "standard quality" monophonic reception at a distance of approximately 63 miles while "high quality" stereophonic reception is expected to a range of 36 miles. All minimum separations provide for an "inner ring" of high quality stereophonic service which gradually diminishes to standard quality monophonic service at the limit of the primary service range in the direction of the undesired station.

37. To provide stations with the 40 dB RF D/U protection necessary to achieve a 50 dB AF S/N ratio, however, would require the separation between co-channel Class C stations to be increased from 180 miles to 255 miles. Such an increase amounts to a Class C station's signal experiencing 20 dB RF D/U protection at a distance of 82 miles from the transmitter rather than 57 miles as currently expected. In other words, protection that results in 50 dB AF S/N stereophonic service simply extends a station's monophonic service range. If the new distance separations were the only ones based on the higher protection levels, the new station classes would require distances as great, or almost as great, as the present requirements

for the larger classes. For example, for a new Class C1 station to offer a minimal 34 dB RF protection level, it would have to be located at least 217 miles from an existing co-channel Class C station (while a new Class C would only have to be separated from an existing Class C station by 180 miles). Analysis of the adjacent channels yields analogous results.

38. To require protection at such levels would effectively preclude many new assignments. Even if this proceeding were broad enough to determine a minumum level for predicted stereo service, we do not believe that protection of that service beyond what was contemplated in 1963 would be appropriate. As we found 20 years ago, such protection would significantly increase the necessary separation between relevant channels and thereby substantially decrease the potential for new stations. We believe that the balance as originally struck provides adequate service areas to potentially support a station's operation while giving opportunities to create enough stations to provide a fair, equitable, and efficient distribution of radio service among the several States and communities. See 47 USC 307(b) (1936)

39. We recognize that permitting Class A stations on Class B/C channels and the intermediate classes of stations provide additional opportunities for the creation of stations that may have a limiting effect on the stereo service areas enjoyed by existing stations by virtue of their location at distances exceeding the minimums established in the rules. However, we believe that the potential gains of new service, consistent with the mandate of Section 307(b), far outweigh the losses of enhanced (stereophonic) service predicted by the commenting parties since protection was not afforded the affected areas under the existing rules. In making this judgment, we emphasize that such areas will continue to get the same protection for monaural service as was originally comtemplated in 1963. That is to say, the balance is between new service and enhanced (stereophonic) service, and we find no compelling reason to increase previously granted protections at the expense of needed new service to communities that would otherwise be precluded from getting a new FM service.

40. In this regard, we again emphasize that the communities we have identified as potential locations for new FM assignments under these rules include a substantial percentage of places with no local service or with only daytime AM service where existing rules would not permit a new FM station. We believe that provision of such service outweighs a predicted loss of multiplex services that may already be severely curtailed by existing co- and adjacent channel stations.

41. The requests to increase the protection ratios on which the separations are based are directly related to the arguments concerning service beyond the theoretical protected contour. Parties have

argued that we should protect a station's stereophonic service to what had been the limit of its normally contemplated service radius. They assert that most stations are located at more than the minimum mileage required by our rules and such stations therefore receive stereophonic protection beyond what could be expected at the minimum distance. We do not doubt that this is the case. Our mileage requirements are *minimums* and have never been waived at the allotment stage. Moreover, persons seeking new FM stations desire to serve specific communities. That fact along with the minimum mileage requirement would result in a location at some greater distance in almost all cases. If the service areas were determined solely by the distance to co-channel stations, there would be many cases where an FM station provided monaural and stereophonic service to a significantly larger area than that contemplated by the co-channel separation figures. However, in many cases, limiting stations are those on adjacent channels.[20]

42. Finding that a station's predicted stereo service area is limited by co-channel and adjacent channel stations does not mean that stereo service is unavailable in these areas or that the "losses" are irreversible. In fact, the new receiver data contained in the NRSC report indicates that the 20 dB RF D/U ratio provides for stereophonic reception, if possibly of lesser quality than some parties believe appropriate, and not just monophonic reception as previously thought by the Commission and many parties. Several parties used present protection ratios to claim that their service is being listened to and *enjoyed* at the outer edge of their interference-free contours. Therefore, the arguments suggesting that the signal quality at the present protection level is "unlistenable" appear highly exaggerated. Even the listening tests and surveys indicated only that a 30 dB AF S/N ratio was "annoying" for the "preferred" stereophonic reception mode. As an alternative to higher protection ratios, persons receiving service of inferior quality may easily improve it by installing a directional receiving antenna or improving the performance capability of their receiver. In this manner, persons residing in areas predicted to "lose" service may regain it if they so desire.

43. Several parties also stated that the Commission should protect a station's service range from second and third adjacent channel interference, rather than basing these separations on substitution of signals.[21] Finally, many parties asserted that mobile

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[20] For example, the stereo service area of station WPGC, Morningside, Maryland is limited by a single co-channel station (WJAC-FM, Johnstown, Pennsylvania) and three adjacent channel stations (WFLO-FM, Farmville, Virginia; WFTR-FM, Front Royal, Virginia; and WFLN-FM, Philadelphia, Pennsylvania).

[21] Replacement service assumes that the service of one station will supplant, not simply interfere with, the service of another station. Using this concept, new stations must locate outside the predicted service area of stations 2 or 3 channels removed, and these stations must be outside the service area of the new station.

(*i.e.*, automobile radio) reception problems would be exacerbated if the distance separations set forth in the *Notice* were adopted.

44. ABES and ABC both argued that the second and third adjacent channel separation requirements should recognize the same service area as the co-channel and first adjacent channel separation standards. Not doing so is a direct cause of mobile FM receivers randomly capturing undesired stations. ABES also claimed that tuning in the "educational band" (where the primary service range is given full second and third adjacent channel protection) is comparatively easy versus tuning in the "commercial band" (where the replacement service concept permits closer spacing of stations). It claimed that this difference illustrates the appropriateness of protecting the primary service contour rather than using the replacement service concept. As an example of tuning difficulties, ABES noted mobile reception problems in the Washington-Baltimore area where 56 stations are assigned in the "commercial" portion of the FM band. ABES recommended that *full* protection from second and third adjacent channel interference be afforded to each station's primary service range. ABC and AGK suggested that a compromise "guardband" solution be adopted if full second and third adjacent channel protection standards were unacceptable. Their guardband compromise was to base the distance separation requirements on a -40 dB RF D/U ratio for both second and third adjacent channel separations.[22]

45. NTIA, on the other hand, found only minor interference problems with seven Los Angeles area FM stations that have second and third adjacent operations at less than minimum separations. The data did not address whether the public is experiencing reception problems, except to note that "several station managers knew of no interference problems." NAB, in reply, claimed that the resulting minor interference areas would not be typical because the receiver data referenced more expensive receivers than the average ones used by the public.

46. We recognize that some environments cause FM receivers, particularly mobile receivers, difficulty in maintaining suitable signal strengths to avoid second and third adjacent channel interference. Mobile receivers were not a major planning factor in the present separation requirements or those proposed in the *Notice*. Rather, we used the concept of replacement service. Mobile receivers, however, are subjected to wide variations in signal strength due to multipath reflections as they pass through different environments along highways. In these situations, they are likely to "lock onto" stronger adjacent channel signals rather than the desired signal. The Commission believes that the separation distances can be

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[22] This is the third adjacent channel protection standard required in the educational portion of the FM band (88–92 MHz). See Section 73.509 of the Rules.

modified to reduce mobile reception problems and only minimally affect the potential for additional FM stations. Thus, the rules we are adopting provide "guardband" protection on second and third adjacent channels as suggested by ABC and AGK.[23]

47. Finally, several parties urged consideration of additional FM stations on a case-by-case basis, including consideration of directional antennas and terrain.[24] Cox/Multimedia, however, argued that a protected contour scheme risks engulfing the FM service with the interference and processing problems of the AM broadcast service. In any case, the Commission is not convinced that the benefits of the Table (*i.e.*, ease of comparing community needs, provision for future facility growth, and simplicity of processing procedures) should be abandoned at the present time. Even with the changes adopted herein, many, if not most, existing stations will be provided the opportunity for future growth. Although some parties indicated a preference for the "AM-type" method, this method is too time-consuming to comport with the Commission's goals to facilitate faster processing procedures. The changes adopted herein should provide the opportunity to establish additional radio stations in areas of greatest demand that should not be delayed by case-by-case processing procedures. A go/no-go method as represented by minimum distance requirements still is advantageous and preferred.

Specific proposals

48. Before turning to a discussion of each proposed change, it may be helpful to reiterate the results of the Commission's computer studies on the potential benefits of those changes. Using 200 locations identified as needing additional radio services, the studies determined how many of these could have an allotment under the existing rules and each proposed rule change separately. The resulting progression demonstrates the incremental increase in availability, *i.e.*, the percentage of locations for which at least one new allotment was found, for the individual proposals. (The benefits of each option are set forth in more detail in the individual discussion of each proposed change and in Appendix B.)

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[23] Also, the NRSC Report indicated that the second adjacent channel interfering signal can be 50 dB greater than the desired signal (-50 dB RF D/U) and still provide a 30 dB AF S/N stereophonic output signal. Thus, the -40 dB RF D/U ratio appears generous for distance separation requirements based on a monophonic reception standard.

[24] Although the use of directional antennas, terrain shielding, and co-location of transmitters were not proposed in this proceeding, the Commission did request additional information. We sought guidance on how these methods might be incorporated into our present Table structure. A variety of information on increasing FM availability and the potential problems of employing these techniques were submitted. Specific suggestions related to preservation of the Table were not provided.

Options	*Availability*
1. Existing rules	7%
2. Class A stations on Class B/C channels	41%
3. Class B stations in Zone II	41%
4. Additional station classes B1, C2, and C1	43%
5. Uniform protected contour	55%
6. Reclassification (with Option 5)	61%
(without Option 5)	57%

49. *Option 2, Class A Stations on Class B/C Channels.* This proposal was opposed by ABC, NBC, and others who suggested that, although it could result in new assignments in areas outside the larger radio markets (*i.e.*, outside the top 12 markets), this service would represent an inefficient use of channels reserved for the wider area stations.[25] NTIA, on the other hand, suggested that reserving certain channels for Class A use should be eliminated altogether. They argued that any class of station should be allowed to operate on any channel. NAB, in reply comments, argued that this idea would be contrary to the basic principle of the Table which ensures stations for smaller sized markets.

50. Several parties claimed, and our studies confirmed, that this proposal would provide the single largest increase in availability for most locations. Our study of 200 locations found that availability of at least one new station per location would increase from 7% under the present rules to 41% if this proposal were adopted. Many argued that these outlets would be a new source of interference outside the primary service range of existing stations. As stated previously, however, the Commission believes that the opportunity to establish additional stations should not be curtailed by providing protection to secondary service areas. Therefore, we will allow Class A stations to operate on all channels.

51. NTIA also proposed that Class B and Class C stations be allowed to operate on Class A channels. However, that change should offer few potential assignments, and those that are possible would preclude large areas from future Class A allotments. Therefore, at this time we will allow Class A operations on any channel, but other station classes will not be permitted to operate on the Class A channels.

52. The *Notice* further suggested that Class A stations be permitted to occupy a Class B/C channel only if a Class A channel were not available. No specific comments addressed this proposed restriction. The Commission, however, is concerned that defining

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[25] These parties also argued that adoption of this proposal would result in some Class A stations operating at a competitive disadvantage to higher power stations. This issue was addressed in BC Docket No. 80-130. The Commission found there that intermixture of different classes of stations within the same community should not be foreclosed as a matter of general policy. In any case, the issue now before us is not whether different classes of stations may be intermixed in the same market but whether Class A stations should occupy Class B/C channels.

availability (*i.e.*, reasonable site, city grade coverage, co-location with AM transmitter, antenna farms, etc.) would be difficult. Therefore, we have decided not to adopt this restriction because it would require extensive showings and would be administratively cumbersome to enforce. We believe the applicant to be the best judge of its particular situation and accordingly shall not restrict its choice. Likewise, we will not require these channels to be used by the larger class of station first, as some parties urged. To do so might be counterproductive to the establishment of a local station if a potential applicant lacked the financial resources to construct and operate the larger class of station.

53. *Options 3 and 4, Intermediate Classes of Stations*. The *Notice* proposed creating two new classes of stations: Class B1 with facilities between Classes A and B and Class C1 with facilities between Classes B and C. It also suggested allowing Class B stations to operate nationwide. Thus, three classes of stations (Classes A, B1, and B) would be permitted in Zones I and I-A and all five classes (Classes A, B1, B, C1, and C) in Zone II.

54. Most comments did not focus on allowing Class B stations in Zone II independently of the other proposals. As pointed out in the *Notice*, simply allowing Class B stations to operate in Zone II would not allow many additional assignments unless the distance separations were changed.[26] [The FCC computer studies confirmed that no increase in availability was possible (Option 3 compared to Option 2) and only 12 of the Class A stations from Option 2 could become Class B stations (see Table II of Appendix B).] Consequently, the *Notice* proposed to reduce the protected contour of all Class B stations from 0.5 mV/m to 1.0 mV/m.

55. As for the creation of the proposed Class B1 and Class C1 stations, ABC claimed that the A.D. Ring studies proved they would not be beneficial to the public. It noted that no Class C1 stations could be identified and the Class B1 stations that were found would cause interference to existing services over geographic areas that would exceed the gains from the new services. ABFS noted that additional classes of stations could be supported if variations of the *Notice's* proposals that would provide adequate protection to existing stations were adopted. Specific modifications were not suggested, however, except to urge protection of existing *interference-free* service areas. NTIA again urged an even greater number of station classes. It argued that the distribution of service areas for existing Class B and Class C stations would be more uniform if seven rather than five classes were adopted. In reply, Cox/Multimedia claimed that NTIA's proposal for seven classes does not contain any detailed

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[26] This occurs because the existing rules require Class B stations to be separated from co-channel Class C stations by 170 miles, or only 10 miles less than the co-channel Class C to C requirement of 180 miles.

technical analysis but merely an assumption that "if five classes of channels are efficient, seven would be even more efficient." They argued that NTIA failed to address the effects of tighter constraints on station growth, licensee costs, greater levels of predictable interference, and administrative impact.

56. Although NTIA's seven class proposal may represent more uniform statistical distribution of existing stations, this is a benefit of little value and great cost. An analysis of its proposal indicated only slight differences between co-channel separation requirements for different classes of stations. For example, NTIA's Class C1 station would be separated from a Class C station by 160 miles, while a Class B station would be separated from the same Class C station by only 156 miles, a difference of only 4 miles. These separations would not allow stations sufficient room for facility growth or adequate transmitter site selection. It also would be administratively cumbersome for the Commission to oversee. While we believe additional station classes are desirable, a balance must be reached between complexity and the numbers of potential assignments. Therefore, we shall not adopt the classes proposed by NTIA.

57. The Commission explored the gains possible if stations with Class B facilities were assigned in Zone II and protected to the proposed 1 mV/m contour (*i.e.*, denoted as Class C2).[27] We also explored the proposal to create additional classes of stations so that existing stations would receive protection more in keeping with the service rendered. The FCC computer studies examined the number of assignments possible if three new classes (B1, C2, C1) of stations were added. Thus, separate classes were studied for the two zones: Classes A, B1, and B in Zones I and I-A and Classes A, C2, C1 and C in Zone II. These studies assumed protection of existing stations equal to that embodied in the present separation requirements. This option found that availability would only be 43%, compared to the 41% expected by permitting Class A stations to operate on Class B/C channels (Option 4 versus Option 2). However, the study also indicated that the stations assigned could operate with greater facilities. An additional 11 Class B1, 46 Class C2, and 16 Class C1 stations were found (see Table II of Appendix B).

58. Because the larger class of station represents improved efficiency in terms of service-rendered compared to interference-caused, the Commission is convinced that adopting these additional classes of stations would be beneficial.[28] We believe that allowing

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[27] Since the Class B minimum separation requirements depend upon the zone of operation, stations operating with Class B facilities in Zone II will be termed Class C2 to avoid confusion with Class B facilities in Zone I.

[28] Efficiency according to Docket No. 14185 is defined as: $\text{Eff.} = 363 \times (R/S)^2$, where R is the primary service radius of a station and S is the spacing between stations (see *Notice of Inquiry, Notice of Proposed Rule Making, and Memorandum*

stations with Class B facilities with modified separation requirements in Zone II (Class C2) and creating intermediate classes of stations (Classes B1 and C1) that serve larger areas than Class A stations represent major benefits in terms of spectrum efficiency.

59. *Option 5, Uniform Protected Contour (1 mV/m).* Several parties submitted detailed showings indicating that changing the minimum separation requirements to represent a uniform 1 mV/m protected service contour could severely limit a station's primary service range, especially that of Class B stations. Metromedia and various other parties pointed out that there were specific reasons for Class B stations currently being based on a 40 mile service range. They noted that, in 1963, the Commission found that the large metropolitan communities of the northeast averaged 33 to 40 miles in radius. They argued, therefore, that a minimum limit of 33 miles for Class B stations was totally unacceptable for many communities located in Zone I. ABES stated that such a reduction would be a 32% loss in primary service area for Class B stations and, in one particular case, a loss in population of 175,000 persons for each station located at Indianapolis, Indiana.

60. ABC and others argued that a 1 mV/m protected contour was previously considered and rejected in 1963 in Docket No. 14185. They noted than the Commission refused to create a squeezed-in service by "protecting only the 1 mV/m contour." Cox submitted that reducing the minimum spacing would create a system similar to the AM service and would waste FM's unique potential for wide-area service. ABC claimed that this proposal would not represent any appreciable increase in new FM assignments because only one addition in the A.D. Ring study was due to reduced separation requirements. Because the other proposals yielded greater numbers of potential FM additions, it argued that the uniform protection proposal would not be instrumental in providing for additional FM assignments in needy areas. NTIA in reply claimed that both Class A and Class C stations "have done well" with a 1 mV/m protected contour and suggested that Class B stations "should be able to also." They argued that a decrease in separations would allow new stations at intermediate distances.

61. ABES focused on the impact of the protection of mobile receivers and submitted detailed analyses of several situations in the northeast where several stations are spaced less than the minimum separation requirements. It claimed that the resulting protection of only the 1 mV/m contour in these cases has made matters so severe as to render many signals "unlistenable." Consequently, reducing the minimum separation requirements would result in similar areas where only garbled signals could be received. Because more cities

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Opinion and Order at paragraph 39). Thus, the efficiency of co-channel Class C1 stations is 32%, while co-channel Class A stations are only 19% efficient.

have acquired "New York City-like" architecture that causes increased signal reflection and diffraction since the present distance separations were developed, it suggested the Commission avoid any action that would increase interference to these receivers. ABES stated that in today's environment (*i.e.*, tree-lined highways, bridge abutments, super-highway signs, downtown buildings, etc.), "[t]he desired signal is subject to very rapid changes in level, beyond the ability of the receiver signal "leveling" or automatic volume control to avoid." It further cited cases in New York City, Philadelphia, and along the U. S. Route 1 corridor where co-channel and first adjacent channel stations located at less than minimum spacings have resulted in many cases of "limited coverage within myriads of interference." Thus, ABES argued that greater protection is needed and the distance separations should not be decreased.

62. The Commission recognized in the *Notice* that this proposal would have a substantial impact on the primary service area of existing Class B stations. Because the present separation requirements for Class A and Class C stations afford protection to approximately the 1 mV/m contour (at .912 and 1.023 mV/m, respectively, using current propagation curves), they are, for the most part, unaffected by the proposed change. For the Class B station, however, this proposal would reflect a change from the .524 mV/m to the 1.0 mV/m field strength contours or a decrease in primary service range from 40 miles to 33 miles. The *Notice*, however, questioned whether the increases in availability justified reducing the Class B stations' primary service area. The majority of the commenting parties, citing the A.D. Ring study statistic of only 1 addition, argued the negative. The FCC computer studies, on the other hand, revealed that availability would increase from 43% (Option 4) to 55% with this proposal. Thus, 110 of the 200 study locations would be provided an opportunity for additional outlets instead of 86 (see Table I of Appendix B). Also, the number of stations allowed at these communities would increase from 235 to 332. This new availability, unlike the other proposals under consideration, would be at the expense of the primary service areas of existing stations. In view of this impact and because urbanized areas have grown since 1963, the argument against this proposal is most compelling. The Commission does not consider the incremental increase in availability to justify the loss of existing primary service areas. Again, balancing the total number of potential stations against the potential service rendered, we cannot justify reducing a station's expected service area at this time.[29]

63. *Option 6, Reclassification of Existing Stations.* The *Notice*

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[29] As noted in comments submitted by Bob Zwick, the Commission is aware that the 1 mV/m contour may be located at a distance of 40 miles by allowing an increase in facilities for Class B stations. However, this suggestion would not foster the goal of increasing the availability of FM stations.

further proposed to reclassify all existing stations, after a period of three years, according to their actual operating facilities. The Commission noted that many existing stations are operating substantially below the maximum facilities permitted. Because the minimum separation requirements assume maximum facilities, these stations preclude other FM stations from being authorized, yet do not furnish primary service over the area intended. The three year period was suggested to give each station the opportunity to explore its ability to increase facilities and submit an application for modification of its license.

64. NBC suggested that reclassification of stations where the need for mutual protection could be demonstrated should not occur. They argued that if existing stations chose to operate below minimum facilities, the new assignment "should protect all existing service areas." Metromedia did not technically oppose reclassification stating that ". . . it was a more reasonable approach than reduced distance requirements of providing increased service to the less populated areas in the West." Cox and several others, however, opposed this change, stating that part of FM's unique identity, which allows for future expansion, could be destroyed. They argued that existing licensees would be faced with an unappealing choice. They either would have to risk present economic investment to increase their facilities based on estimates of future community growth, or otherwise be foreclosed from realizing their full potential due to present circumstances. ABES and others noted that stations may not be operating with maximum facilities due not only to economic reasons, but for other reasons as well. They cited the Commission's multiple ownership restrictions (Section 73.240), FAA air hazard limitations, and local zoning restrictions as examples. Because many of these limitations restrict antenna heights, ABES suggested that stations be allowed to increase their power to attain the equivalence of operating with maximum effective radiated power (ERP) and antenna height above average terrain (HAAT).

65. The Commission realizes that many stations are operating at less than "full" facilities because of other Commission regulations, other government agencies' limitations, or restrictions of local jurisdictions. It is exactly this inconsistency, between the Commission providing for expansion when the possibility is virtually nonexistent, that we wish to rectify. Rather than viewing reclassification as discriminatory, the Commission believes that recognizing actual facility limitations is a realistic means of allowing for additional outlets. In fact, we view the preclusion of new stations from relatively underserved communities by stations operating substantially below maximum facilities as being the real case of discrimination. Additional FCC computer studies verified that availability of new FM stations could increase from 43% to 57% if reclassification were considered (see Table III of Appendix B). Because a station's

classification should reflect its potential, either by spacing requirements, economics, or government limitations, the Commission views reclassification as desirable.

66. The ABES' suggestion that stations unable to increase their antenna height be allowed to increase power to attain equivalence of a station operating at the maximum facilities was considered in Docket 14185 and rejected. The Commission stated ". . . an increase in power increases interference more than it does service. Therefore, we should obviously encourage improvement in service through greater antenna height rather than greater power, and affording an opportunity for power increase, without limit or at least to a greater extent, would work in the other direction." [*First Report and Order* at para. 79] Because this argument is true today, we must again reject this alternative.

67. *Time Permitted to Upgrade Facilities.* The *Notice* suggested that existing stations would be given three years to improve their facilities to the minimum for their class, before any reclassification took place. It further proposed that new Class C stations have a period of six years within which to reach minimum facilities before being reclassified. Since these two proposals consistently were confused, an explanation appears in order. The first period of 3 years would apply to *all existing* licenses, construction permits, or applications that were authorized, or on file, on the effective date of this order. Thus, one announced date would be used for evaluating the facilities of existing stations. The later proposal would continually be permitted when *future Class C* applications were authorized. Because the Class C stations would be the only class with a minimum antenna height requirement, this time would provide new Class C stations with an initial opportunity to obtain revenue before possibly constructing a large antenna tower.

68. The comments failed to provide any specific data that would support a deadline either longer or shorter than those proposed in the *Notice*. ABC argued that three years may be inadequate for licensees to reach any minimum operating requirements. They suggested that the Commission authorize liberal extensions of any deadlines. NTIA fully supported reclassification and submitted 24 months (2 years) as a more than adequate time for expansion. However, the reply comments of Cox/Multimedia urged that 2 years was an unrealistic time period to allow stations to make an application for a change in facilities. Several parties wished to have an unlimited time in which to effect the changes. Finally, the difference in the time permitted existing and future stations received no comment.

69. Lacking details, it is incumbent upon us to balance the public interest benefits of the new services possible after reclassification against the inconvenience to broadcasters. On balance, we believe that, for simplicity, a single date should apply to all instances. We

cannot allow an open-ended time period continually to frustrate the opportunity to establish the new stations. Nor do we intend to provide time that is inadequate to consider and submit applications for facilities equal to or greater than the minimum for a class of station. In this regard, we emphasize that licensees can protect their classification merely by filing an application to upgrade their facilities. It is not necessary that the application be granted or the construction be completed by the deadline date. Additionally, we expect that any group seriously contemplating a new Class C service station should have good economic support and be able to begin operations with the larger facilities. Specifying a different six year period for each new Class C authorization would create confusion and be administatively difficult to implement.

70. Based on a weighing of the benefits and inconveniences, and considering the delays in reaping the benefits of the other changes adopted herein, we will indicate a date three years from the effective date of this order by which *all* stations must apply for appropriate minimum facilities. After the 3 year time period for expansion has expired, a complete listing of the FM Table of Assignments will be published to indicate the new class designations that reflect the facilities authorized, or those for which an application has been filed.[30]

71. The Commission is also using the opportunity presented by this proceeding to modify its rules governing "major" and "minor" modifications of station authorizations. Currently, any modification that represents a change of 50%, or more, in the area within a station's predicted 1 mV/m field strength contour is considered a major modification of an authorized FM station. Because the distance separation requirements are based on using maximum facilities, we believe the procedure to increase facilities (that will be encouraged by adopting the reclassification proposal) could be greatly simplified. Therefore, we shall designate these changes as minor modifications.

Miscellaneous

72. *Preferences.* Many existing licensees of either Class A or short-spaced stations requested they be given preference in the assignment of any new channels which may become available. NPR and CPB also requested similar preferential treatment be afforded to

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[30] The Commission does not consider reclassification as a modification of a station's license. Because the license authorizes only the station's actual facilities, it would not have to be altered in anyway. Reclassification is merely the re-designation of a station's potential status in a geographic table of channel reservations. Even if our action could be construed as a license modification, the record adduced in response to present *Notice* is entirely sufficient to explore licensees' concerns, and they would not be entitled to separate hearings based upon reclassification. See, *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2nd Cir. 1968).

educational, noncommercial entities in either the allotment or the assignment process.[31] ABC supported establishing assignment priorities including favoring applicants that seek to convert daytime only AM stations to fulltime local outlets. Several licensees of short-spaced stations submitted detailed examples of how mutual interference problems have curtailed their primary service areas. They also requested preference in the use of any new allotment that could alleviate their present circumstances.

73. The Commission is not convinced that this proceeding is the best vehicle for considering preferences of this type. It has focused on FM allotment matters rather than questions of channel usage by a particular entity or group. We believe these questions are more appropriately considered in separate rule making proceedings focused on licensing policies rather than allotment rules. For example, we note that the outstanding *Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 82-538, has asked for comments on the desirability of providing licensees of daytime-only AM stations a preference for the use of any FM allotments that might become available in their communities. 47 Fed. Reg. 38937 (published September 3, 1982). We believe that preferences for daytime-only AM licensees, existing short-spaced FM licensees and other worthy groups are best resolved in proceedings specifically devoted to such matters.[32]

74. *Puerto Rico.* Portorican American Broadcasting Co. requested special consideration of the problems encountered in Puerto Rico because of terrain. It submitted a detailed explanation of the difficulties experienced trying to improve the facilites of its FM station WOQI, Ponce, Puerto Rico, by changing its transmitter site. It urged the Commission to allow flexibility for existing stations to improve their service before permitting additional outlets on the island.

75. The Commission again is reluctant to consider rule changes for individual situations. Instead, we prefer to account for any specific problems through the present processing methods. In reviewing Portorican's comments, we note that its request involves a waiver to locate at less than minimum spacings to existing FM stations on the island. Further, it urges grant of the waiver using calculations employed in the noncommercial, educational section of the rules (§ 73.509), which is based on protection of existing contours.

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[31] NPR specifically requested individual channels be reserved for future use in communities lacking adequate public radio service.

[32] We recognize that many licensees of existing stations, including AM daytime stations, will be interested in seeking the use of the new FM allotments that will be available as a result of this proceeding. In light of this interest, and in recognition of the valuable community service that these licensees have provided, we intend shortly to issue a Notice of Proposed Rule Making proposing procedural means to facilitate such improvements of existing service.

Inequities because of terrain in Puerto Rico were addressed in the *Fourth Report and Order* (Docket No. 14185) adopted in 1964 and again in a recent *Report and Order* (BC Docket No. 81–421). We prefer to continue this pattern and will address any particular problems that are unique to Puerto Rico in separate proceedings when needed.

76. *Aviation.* The Commission also had a request by ARINC and AOPA to recognize potential increases in interference to aeronautical navigation and communication services that are immediately adjacent to the FM broadcast band at 108–136 MHz.[33] AOPA noted that according to its surveys 43 locations currently experience interference and "innumerable" other cases have had to be rectified through reassignment of aeronautical frequencies. Both argued that the proposals set forth in the *Notice*, except for Class A additions, would have an adverse impact on aviation. They and the FAA also expressed concern over the encouragement of tall antenna towers, especially of Class C stations, that intrude into navigable airspace.

77. The problem of potential interference to avionics by FM stations is well known to the Commission. It has been handled satisfactorily in the past via coordination procedures with the FAA, and we are confident that any potential interference problems can continue to be handled effectively. Finally, we note that the minimum requirement for antenna height above average terrain (HAAT) is not a requirement on the antenna tower structure itself. Thus, it is difficult to estimate the problems that could arise due to the Class C minimum HAAT requirement. Antenna tower heights normally are supplied to the FAA at the application stage when individual antenna height above ground is known. This procedure should continue to enable us to sort out any potential problems due to tower heights.

78. *Existing short-spaced stations.* Short-spaced stations are those licensed prior to adoption of the minimum distance separation requirements that failed to meet the new spacings (*Fourth Report and Order* in Docket No. 14185). ABES urged the Commission to correct the defects adopted for consideration of short-spaced stations in Docket No. 14185 (see Section 73.213). They recommended that the short-spaced station rules be amended to accord full protection from second and third adjacent channel interference. They suggest these cases be administered in a manner similar to the educational rules (Section 73.509), where actual signal strengths are used to determine allowable radiation.

79. The *Notice* stated that the rules governing existing short-spaced stations would be examined later if necessary. In the

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[33] These parties indicated that interference to aviation services can be caused by intermodulation products of two or more FM broadcast signals or by the combined field strengths from high powered FM stations causing receiver desensitization.

meantime we have determined that short-spaced stations shall continue to be subject to the existing rules. If these stations are reclassified, separation will be based on their previous class of station.

80. *Implementation.* The Commission is aware of the tremendous interest many groups and individuals have in the outcome of this proceeding. Since the *Notice* was adopted, status inquiries have been made on a daily basis. These contacts and our own investigations lead us to believe that a pent-up demand will be unleashed after adoption of the rule changes outlined above. Our goal is to respond to requests for new allotments as quickly as possible and minimize the backlog of mutually exclusive petitions. Proceedings addressing such petitions take considerably longer to resolve and place greater demands on the Commission's legal and technical staff than the routine uncontested proceedings. To facilitate prompt service to the public, we also desire to process applications quickly.

81. Unfortunately, our present staff resources are not adequate to respond in a reasonable time even if our expectation of demand is grossly overstated. Consequently, we will delay the effective date of the new rules until sufficient staff is available to handle the increased workload.[34] When additional resources are made available, the Commission will begin modifying its computer programs to permit the use of the new rules. At the same time, we shall institute a rather large scale rule making to amend the FM Table of Assignments using approximately 500 locations from the "needs" list compiled for the Region 2 Conference on AM broadcasting.

82. That rule making will request the public to indicate interest in the proposed assignments or to propose alternative assignments by the comment date. Only in that manner can the Commission avoid receiving an overwhelmingly large number of petitions on the effective date of the new rules. We believe our course of action is preferable since it allows us to maintain control over the initial proposals and any counter proposals that may be made. Similarly, we shall attempt to avoid the filing of a large number of applications for new allotments which might occur if a single Report and Order were adopted that addressed them *in toto*. Therefore we shall adopt a series of Reports and Orders addressing the proposed allotments in individual groups. In this manner, applications should be effectively metered to correspond to the Commission's staff resources.

83. Upon completion of the omnibus proceeding, other FM petitions for amendment of the Table will be accepted and considered. Before the effective date of the new rules, any petitions or

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[34] The Senate Commerce Committee has already recommended an increase in the Commission's FY 1984 budget to specify funds for the processing of FM petitions and applications received because of rule changes made in the instant proceeding. The House Appropriations Committee has also recommended additional FY 1984 funds to increase the staff to respond to the anticipated increased workload.

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applications that do not conform to the "old" rules will be returned. The Commission regrets that this unusual procedure is necessary. However, we must be in a position to address petitions and applications upon the effective date of the new rules and no suitable alternative exists given our present resources.

84. *Metrication*. As indicated in the *Notice*, we believe that this would be an appropriate time to convert the FM broadcast service to the International System of Units in order to conform to the Commission's program for conversion of all our rules to metric (see Public Notice, FCC 76-737, July 28, 1976). The Commission believes the conversions should be realistic values of "convenient" metric figures rather than a simple multiplication by the appropriate factor. For example, antenna height maxima will be 100, 150, 300, and 600 meters rather than the 92, 153, 305, and 610 meters proposed.[35] In all cases, the metric term shall be the determining factor in any discrepancies. Also, the rules adopted today will govern any disputes that may arise and will take precedence over any other rule sections which may refer or relate to the changes being made herein.[36] Obviously, all circumstances cannot be anticipated. Therefore, the Commission will offer continuing guidance on this subject as appropriate.

CONCLUSION

85. Since certain modifications can be made without affecting the primary service areas of existing stations and there appear to be many underserved locations, the Commission is persuaded that changes to the FM allotment rules are appropriate. Therefore, we shall: (1) allow Class A stations to operate on all channels, (2) authorize three new classes of stations, and (3) reclassify existing stations, after a period of three years, according to their operating facilities.

86. Although every effort has been made to hold constant the present degree of expected service, a station's existing predicted primary service area may change slightly due to the introduction of new classes of stations, reclassification, or conversion to the International System of Units. Any subsequent additions to the FM Table of

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[35] We recognize that some requirements will increase while others will decrease. However, conversion to convenient numbers is preferred notwithstanding any slight modifications that may result. Of course, all stations operating with facilities in excess of the maximums adopted will be permitted to continue operating with their existing facilities.

[36] All factors have been converted to the appropriate decimal place of their metric equivalent. For convenience, some conversion factors are listed below:

meters = .3048 x feet

kilometers = 1.609 x miles

square kilometers = .386 x square miles

Assignments resulting in the operation of new stations will be in accordance with the rules established herein, and as such their operation will not constitute a modification of existing licenses under Section 316 of the Communications Act of 1934, as amended. *WBEN, Inc. v. United States*, 396 F. 2d 601 (2nd Cir. 1968). Accordingly, hearings at the time of actual individual changes are not required and are not anticipated. In view of the detailed nature of this proceeding, we are confident that the Mass Media Bureau expeditiously can resolve disputes which may arise as a result of the conversion process. Accordingly, we delegate to the Chief, Mass Media Bureau, such authority.

87. Because the Commission wishes to adopt new classes of stations but reject the uniform protection standard of 1 mV/m (60 dBu), slight adjustments have been made to the proposed facilities of the new classes of stations. Although three additional classes (Class B1, B, and C1) were proposed for Zone II, we believe that the two chosen offer approximately the same variety as the three intended under the uniform protection standard.[37] Therefore, the following is a summary of the classes, maximum facilities, allowed zone, and, for reference only, the approximate co-channel primary service ranges and resultant field strengths:

Station Class	*Maximum Facilities kW & m.(ft.)*	*Permitted Zone*	*Service Radius km.(mi.)*	*Field Strength mV/m (dBu)*
A	3 & 100 (328)	1&2	24 (15)	1.0 (60)
B1	25 & 100 (328)	1	45 (28)	.7 (57)
B	50 & 150 (492)	1	64 (40)	.5 (54)
C2	50 & 150 (492)	2	52 (32)	1.0 (60)
C1	100 & 300 (984)	2	72 (45)	1.0 (60)
C	100 & 600 (1968)	2	92 (57)	1.0 (60)

88. NTIA also suggested that minimum facilities be based on the distance to the 1 mV/m (60 dBu) contour. Although this coverage is an important consideration, the determining factor must be a station's authorized power and minimum antenna heights are, in most cases, unduly restrictive. The Commission continues to believe that the city grade signal requirement is normally the best way to enforce minimum areas of service. Only Class C stations will have a minimum antenna height requirement to exceed the Class C1 maximum of 300 meters (984 feet). Some parties expressed the opinion that this would be a discriminatory policy toward Class C licensees. ABES and others questioned the choice of the minimum

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[37] The definition of Class C1 was kept in order to avoid confusion with the Canadian Class C1 that also is allowed 100 kW ERP and 300 meters HAAT. This results in Class C2 denoting a smaller facility station than Class C1. Although the Class C2 would be allowed the same facilities as a Class B station, its service radius would only be 52 kilometers (32 miles) rather than the 64 kilometer (40 mile) range of the Class B.

height requirement for Class C stations and said that simply choosing one-half the existing maximum height was arbitrary. The Commission, however, is convinced from its own records and the data submitted by NTIA that an antenna height of 600 meters (1968 feet) HAAT is an unrealistic expectation for most of the country. While we do not wish to foreclose the possibility of this extended coverage station altogether, the Commission believes that, since 80% of the Class C facilities operate below the Class C1 requirements, recognizing this condition via a minimum antenna height is completely justifiable.

89. On the other hand, we are attempting to better define a station's class based on its operating facilities. Since the station should clearly belong to one class of station, minimum power requirements will be set as proposed. Therefore, the minimum power per class must exceed the maximum of the next lower class for its zone, except for Class A stations which will continue to have a minimum requirement of 100 watts.

90. The Commission also is adopting an amended distance separation table to incorporate the new classes of stations. New separations are inserted for the new class relationships that recognize that interference within the primary service ranges for each class of station does not exceed an undesired to desired ratio of 1:10 (-20dB) for co-channel stations and 1:2 (-6dB) for first-adjacent channel stations. The existing co-channel and first adjacent channel separations are the approximate metric equivalent rounded off to the nearest kilometer. The second and third adjacent channel separations represent either the existing spacings converted to kilometers or the "guardband compromise" of not allowing the undesired signal to exceed the desired signal by 100:1 (40 dBu) within the desired station's primary service range, whichever is greater. Finally, the distances for stations separated by 53 or 54 channels correspond to those of the major station classification as proposed in the *Notice*.

91. Those allotments and assignments which are within 320 kilometers (199 miles) of the Canadian or Mexican border must conform to the requirements specified in the FM Broadcast Agreement existing between the United States and the respective country. Since the present agreements do not acknowledge Class B1, Class C2, and, in the case of Mexico, Class C1 stations, these classes of stations must meet the criteria of the Class B or Class C station classes. Thus, the new distance separation requirements are presented in three separate tables depending upon whether the allotments and assignments to be considered are located in the United States, Canada, or Mexico.

92. According to the definitions adopted at the 1979 World Administrative Radio Conference (WARC) of the International Telecommunications Union, the term "allotment" rather than "assignment" more closely identifies the designation of a frequency

or channel for use in a specific geographic area. Assignment is the authorization of a radio frequency channel for use by an entity under specific conditions. Thus, a channel may be *allotted* to a community or place but *assigned* to a licensee. A plan of potential channel designations should be referred to as Table of Allotments. The rules will be amended to denote the Table as the: Table of FM Allotments.

93. In view of the foregoing, IT IS ORDERED, pursuant to the authority of §§ 4(i), 303(f), (g) and (r) and 307(b) of the Communications Act of 1934, as amended, that the rules are amended as set forth in the attached Appendix C, effective on the date specified in a future public notice issued by the Commission indicating that resources have been made available for implementing the new rules (see paragraphs 80 thru 83, *supra*).

94. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED. For further information on this matter contact Kathryn S. Hosford, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendices A, B, and Figures 1 and 2 - may be seen in the FCC Dockets Branch.

APPENDIX C

1. Section 73.202 is amended by revising the headnote, paragraph (a) and the heading title of paragraph (b) to read as follows:

§73.202 Table of Allotments.

(a) *General.* The following Table of Allotments contains the channels (other than noncommercial educational Channels 201–220) designated for use in communities in the United States, its territories, and possessions. All listed channels are for Class B stations in Zones I and I-A and for Class C stations in Zone II unless otherwise specifically designated.

(1) Channels designated with an asterisk may only be used by noncommercial educational broadcast stations. Noncommercial educational FM allotments (Channels 201–220) available for use in various communities in Arizona, California, New Mexico, and Texas are listed in §73.504. The rules governing the use of noncommercial educational channels in other communities are contained in §73.501.

(2) Each channel listed in the Table of Allotments reflects the class of station that is authorized, or has an application filed, to use it based on the minimum and maximum facility requirements for each class contained in §73.211.

Note. The provisions of this subparagraph [(a)(2)] become effective [3 years from the effective date of the Report and Order in BC Docket 80–90.].

(b) *Table of FM Allotments*

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2. Section 73.203 is revised in its entirety to read as follows:

§73.203 Availability of channels.

Applications may be filed to construct FM broadcast stations only at the communities and on the channels contained in the Table of Allotments (§73.202(b)). Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for filing. However, applications specifying channels that accord with publicly announced FCC orders changing the Table of Allotments will be accepted for filing even though such applications are tendered before the effective dates of such channel changes.

3. Section 73.204 is revised to read as follows:

§73.204 International agreements and other restrictions on use of channels.

See §§73.207, 73.220, and 73.1650.

4. Section 73.205 is amended by revising the introductory text to read as follows:

§73.205 Zones.

For the purpose of allotments and assignments, the United States is divided into three zones as follows:

5. Section 73.206 is revised in its entirety to read as follows: §73.206 Classes of stations and permissible channels.

(a) The following frequencies are reserved for use by Class A stations:

Frequency (MHz)	*Channel Number*	*Frequency (MHz)*	*Channel Number*
92.1	221	100.1	261
92.7	224	100.9	265
93.5	228	101.7	269
94.3	232	102.3	272
95.3	237	103.1	276
95.9	240	103.9	280
96.7	244	104.9	285
97.7	249	105.5	288
98.3	252	106.3	292
99.3	257	107.1	296

(b) Stations designated as Class A, B1, and B may be authorized in Zones I and I-A. Classes A, C2, C1, and C may be authorized in Zone II. The facilities for each class of station are listed in §73.211. The 20 channels listed in paragraph (a) of this Section may only be used by Class A stations but the other channels may be used by any class of station.

(c) The rules applicable to a particular station, including minimum and maximum facility requirements, are determined by its class. Class designation is based on the zone in which the station's transmitter is located, or proposed to be located.

6. Section 73.207 is amended by revising paragraphs (a) and (b) to read as follows:

§73.207 Minimum distance separation between stations.

(a) FM allotments and assignments must be separated from other allotments and assignments on the same channel and five adjacent channels by certain minimum distances. If transmitter sites do not meet the minimum distances listed in paragraph (b) of this Section, the Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments. Class D (secondary) assignments, however, are subject only to the separation distances contained in subparagraph (b)(3). (See Section 73.512 for other rules governing the channel and location of Class D (secondary) assignments.)

(b) The distances listed below apply only to allotments and assignments operating on the same channel or one of five critical channels adjacent to the desired channel. The five adjacent channels are the first (200 kHz removed from the main channel), the second (400 kHz removed), the third (600 kHz removed), the fifty-third (10.6 MHz removed), and the fifty-fourth (10.8 MHz removed). The distances shown must be met regardless of which is the proposed station (i.e., distances shown from a new Class A station to an existing Class C station are also the distances between a new Class C station and an existing Class A station).

(1) Allotments and assignments in the United States must be separated from other domestic allotments and assignments by the following minimum distances.

Table A
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	105 (65)	64 (40)	27 (17)	8 (5)
A to B1	138 (86)	89 (55)	48 (30)	8 (5)
A to B	163 (101)	105 (65)	69 (43)	16 (10)
A to C2	163 (101)	103 (64)	55 (34)	32 (20)
A to C1	196 (122)	129 (80)	74 (46)	32 (20)
A to C	222 (138)	169 (105)	105 (65)	32 (20)
B1 to B1	175 (109)	114 (71)	50 (31)	24 (15)
B1 to B	211 (131)	145 (90)	71 (44)	24 (15)
B1 to C2	200 (124)	134 (83)	56 (35)	40 (25)
B1 to C1	233 (145)	161 (100)	77 (48)	40 (25)
B1 to C	259 (161)	193 (120)	97 (60)	40 (25)
B to B	241 (150)	169 (105)	74 (46)	24 (15)
B to C2	237 (147)	164 (102)	74 (46)	40 (25)
B to C1	270 (168)	195 (121)	79 (49)	40 (25)
B to C	274 (170)	217 (135)	105 (65)	40 (25)
C2 to C2	190 (118)	130 (81)	58 (36)	48 (30)
C2 to C1	224 (139)	158 (98)	77 (49)	48 (30)
C2 to C	249 (155)	188 (117)	98 (61)	48 (30)
C1 to C1	245 (152)	177 (110)	82 (51)	48 (30)
C1 to C	270 (168)	209 (130)	101 (63)	48 (30)
C to C	290 (180)	241 (150)	105 (65)	48 (30)

(2) (i) Under the Canada-United States FM Broadcasting Agreement, domestic U.S. allotments and assignments that are located within 320 kilometers (199 miles) of the common border must be separated from Canadian allotments and assignments by the following distances. Class B1 and Class C2 allotments and assignments must be considered Class B allotments and assignments when using this table.

Table B
MINIMUM DISTANCES SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400 kHz*	*600 kHz*
A to A	145 (90)	80 (50)	40 (25)	32 (20)
A to B	217 (135)	137 (85)	72 (45)	64 (40)
A to C1	241 (150)	161 (100)	105 (65)	97 (60)
A to C	241 (150)	193 (120)	121 (75)	113 (70)
B to B	249 (155)	169 (105)	97 (60)	72 (45)
B to C1	274 (170)	201 (125)	121 (75)	97 (60)
B to C	274 (170)	225 (140)	137 (85)	113 (70)
C1 to C1	306 (190)	225 (140)	145 (90)	113 (70)
C1 to C	306 (190)	249 (155)	169 (105)	121 (75)
C to C	306 (190)	257 (160)	169 (105)	129 (80)

(ii) Under the Canada-United States FM Broadcasting Agreement, a short spacing of up to 8 kilometers (5 miles) in the direction of a related station may be considered acceptable depending on the circumstances of each individual case.

(3) Under the Mexican-United States FM Broadcasting Agreement, U.S. allotments and assignments located within 320 kilometers (199 miles) of the common border must be separated from Mexican allotments and assignments by the following distances. Class B1 and Class C2 allotments and assignments must be considered Class B and Class C1 allotments and assignments must be considered Class C when using this table.

Table C
MINIMUM DISTANCE SEPARATION REQUIREMENTS
in kilometers (miles)

Relation	*Co-channel*	*200 kHz*	*400/600 kHz*	*10.6/10.8 MHz*
A to A	105 (65)	65 (40)	25 (15)	8 (5)
A to B	175 (110)	105 (65)	65 (40)	16 (10)
A to C	210 (130)	170 (105)	105 (65)	32 (20)
A to D	95 (60)	50 (30)	25 (15)	8 (5)
B to B	240 (150)	170 (105)	65 (40)	25 (15)
B to C	270 (170)	215 (135)	105 (65)	40 (25)
B to D	170 (105)	95 (60)	65 (40)	16 (10)
C to C	290 (180)	170 (150)	105 (65)	48 (30)
C to D	200 (125)	155 (95)	105 (65)	25 (15)
D to D	18 (11)	10 (6)	5 (3)	3 (2)

* * * * *

7. Section 73.208 is amended by revising paragraphs (a), (b) (2), and (c) to read as follows:

§ 73.208 Reference points and distance computations.

(a) (1) The following reference points must be used to determine distance separation requirements when petitions to amend the Table of Allotments (§ 73.202(b)) are considered:

firstly, transmitter sites if authorized;

secondly, reference coordinates designated by the FCC;

thirdly, coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States of America*; or

lastly, coordinates of the main post office.

(The community's reference points for which the petition is submitted will normally be the coordinates listed in the above publication.)

(2) When the distance between communities is calculated using community reference points and it does not meet the minimum separation requirements of § 73.207, the channel may still be allotted if a transmitter site is available that would meet the minimum separation requirements and still permit the proposed station to meet the minimum field strength requirements of § 73.315. A showing indicating the availability of a suitable site should be submitted with the petition. In cases where a station is not authorized in a community or communities and the proposed channel cannot meet the separation requirement a showing should also be made indicating adequate distance between suitable transmitter sites for all communities.

(b) * * *

* * * * *

(2) The coordinates of the other community as listed in the publication listed in paragraph (a) of this Section; or, if not contained therein,

* * * * *

(c) The distance between reference points is considered to be the length of the hypotenuse of a right triangle, one side of which is the difference in latitude of the reference points and the other side the difference in longitude of the two reference points. Distance must be computed by the method given in this paragraph. (This method may be used to accurately determine distances up to 350 kilometers (217 miles)). For these distances, this method will normally be more accurate than calculations using spherical trigonometry that do not correct for the spheriodal shape of the earth. Its accuracy deteriorates rapidly, however, for distances beyond 475 kilometers (295 miles) and it should not be used in those cases.

(1) Convert the latitudes and longitudes to degrees and decimal parts of a degree in accordance with Table I of § 73.698.

(2) Determine the middle latitude of the two reference points to the nearest second of latitude (average the latitudes of the two points).

$$LAT_m = (LAT_1 + LAT_2)/2$$

(3) Determine the number of kilometers per degree of latitude difference for the appropriate middle latitude.

$$LAT_k = 111.108 - .566 \cos(2\ LAT_m)$$

(4) Determine the number of kilometers per degree of longitude difference for the appropriate middle latitude.

$$LONG_k = 111.391 \cos(LAT_m) - .095 \cos(3\ LAT_m)$$

(5) Determine the north-south distance in kilometers.

$$LAT = LAT_k\ (LAT_1 - LAT_2)$$

(6) Determine the east-west distance in kilometers.

$$LONG = LONG_k\ (LONG_1 - LONG_2)$$

(7) Determine the distance between the reference points by the square root of the sum of the squares of the distance obtained.

$$DIST = (LAT^2 + LONG^2)^{1/2}$$

where:

LAT_1 & $LONG_1$ = coordinates of one location in decimal degrees.
LAT_2 & $LONG_2$ = coordinates of second location in decimal degrees,
LAT_m = middle latitude between points,
LAT_k = kilometers per degree of latitude difference
$LONG_k$ = kilometers per degree of longitude difference,
LAT = north-south distance in kilometers,
LONG = east-west distance in kilometers, and
DIST = distance between two reference points in kilometers.

In computing the above, sufficient decimal figures must be used to determine the distance to the nearest kilometer.

8. Section 73.209 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.209 Protection from interference.

* * * * *

(b) The nature and extent of the protection from interference accorded FM broadcast stations operating on Channels 221-300 is limited solely to the protection that results from the distance separation requirements and the rules governing maximum power and antenna heights. These rules are specified in this Sub part.

(c) When the FCC determines that grant of an application would serve the public interest, convenience, and necessity, an antenna location may be specified in a designated antenna farm area that results in separations less than those specified in this Sub part. All FM allotments and assignments must be afforded protection from interference equivalent to the protection afforded under the minimum separations specified in this Sub part.

9. Section 73.211 is revised in its entirety to read as follows:

§ 73.211 Power and antenna height requirements.

(a) *Minimum requirements.* (1) Except as provided in paragraph (b)(2) of this Section, the minimum effective radiated power for:

Class A	stations must equal	0.1 kW	(-10 dBk);
Class B1	stations must exceed	3 kW	(4.8 dBk);
Class B	stations must exceed	25 kW	(14 dBk);
Class C2	stations must exceed	3 kW	(4.8 dBk);
Class C1	stations must exceed	50 kW	(17 dBk); and
Class C	stations must equal	100 kW	(20 dBk).

(2) Class C stations must have a minimum antenna height above average terrain of at least 300 meters (984 feet). No minimum antenna height above average terrain is specified for Classes A, B1, B, C2, or C1 stations.

(b) *Maximum power and antenna height.* (1) The maximum effective radiated power in any direction and maximum antenna height above average terrain (HAAT) for the various classes of stations are listed below:

Class	*Maximum Power*	*Maximum antenna HAAT in meters (feet)*
A	3kW (4.8 dBk)	100 (328)
B1	25 kW (14.0 dBk)	100 (328)
B	50 kW (17.0 dBk)	150 (492)
C2	50 kW (17.0 dBk)	150 (492)
C1	100 kW (20.0 dBk)	300 (984)
C	100 kW (20.0 dBk)	600 (1968)

(2) Antenna heights may exceed that specified in this paragraph if the effective radiated power is reduced so that the distance to the 1 mV/m (60dBu) contour extends no farther than it would if the station were operating with the maximum power and antenna HAAT for its particular class of station. The location of the 1 mV/m (60 dBu) contour is determined using Figure 1 of § 73.333. The antenna HAAT is determined using the procedure contained in § 73.313. When antenna HAAT is less than 30 meters (100 feet), an antenna HAAT of 30 meter (100 feet) must be assumed to determine equivalence. When a station's effective radiated power must be reduced below the normal minimum for its class (specified in paragraph (a)(1) of this Section) the value determined will be the minimum for the particular station involved.

(3) For Class B stations in Puerto Rico and the Virgin Islands, a maximum antenna HAAT of 600 meters (1968 feet) with an effective radiated power of 25 kW will be allowed. For antenna heights above 600 meters (1968 feet), the power must be reduced so that the station's 1 mV/m contour (located pursuant to Figure 1 of § 73.333) will extend no farther from the station's transmitter than with the maximum facilities allowed. For powers above 25 kW (up to 50 kW), no antenna height will be authorized that results in greater coverage by the 1 mV/m contour than can be obtained with the maximum facilities.

(c) *Existing stations.* Stations authorized prior to [the effective date of the Report and Order in BC Docket 80-90] that do not conform to the requirements of this Section, may continue to operate as authorized. Stations operating with facilities in excess of those specified in paragraph (b) of this Section may not increase their effective radiated powers or extend their 1 mV/m field strength contour beyond the location permitted by their present authorizations. The provisions of this Section will not apply to applications to increase facilities for those stations operating with less than the minimum power specified in paragraph (a) of this Section.

10. Section 73.212 is amended by revising paragraph (b) to read as follows:

§ 73.212 Administrative changes in authorizations.

* * * * *

(b) Antenna heights above average terrain will be rounded out to the nearest meter.

11. Section 73.213 is amended by revising paragraphs (a), (e), and subparagraphs (f)(2)(ii) and (iii) to read as follows:

§ 73.213 Stations and spacings below the minimum separations.

(a) Stations authorized prior to November 16, 1964, at locations that do not meet the minimum distances specified in § 73.207 may apply for changes in facilities if the requested facilities conform to those listed in the following table:

Facilities To Be Authorized For Short-Spaced FM Stations

Class of Station	*Separation in kilometers*		*Facilities authorized*	
	Co-channel	*First adjacent*	*Power (kW)*	*Antenna height (meters)*
A to A	72–105		3	100
A to A	64–71		2	100
A to A	less than 64		1	100
A to B		80–105	3 50	100 Class A 150 Class B
A to B		64–79	3 20	100 Class A 150 Class B
A to B		less than 64	3 10	100 Class A 150 Class B
A to C		129–169	3 100	100 Class A 600 Class C
A to C		97–128	3 50	100 Class A 600 Class C
A to C		less than 97	3 100	100 Class A 600 Class C
B to B	201–241	129–169	50	150
B to B	161–200	105–128	20	150
B to B	121–160	80–104	10	150
B to B	less than 121	less than 80	5	150
B to C	225–274	177–217	50 100	150 Class B 600 Class C

B to C	177–224	137–176	20	150 Class B
			50	600 Class C
B to C	145–176	97–136	10	150 Class B
			20	600 Class C
B to C	less than 145	less than 97	5	150 Class B
			10	600 Class C
C to C	241–290	201–241	100	600
C to C	193–240	153–200	50	600
C to C	161–192	121–152	20	600
C to C	less than 161	less than 121	10	600

* * * * *

(e) The powers listed in the table are the maximums the FCC will authorize. Antenna heights may exceed those specified in the table if the effective radiated power is reduced so that the 1 mV/m contour extends no further than it would with the maximum power and antenna height. The antenna height value to be used is that above average terrain and not that in any particular direction. When antenna heights are less than 30 meters (100 feet), a value of 30 meters (100 feet) must be assumed for the purposes of this paragraph.

(f) * * *

* * * * *

(2) * * *

(i) * * *

(ii) When a station does not meet the minimum separations to co-channel or first adjacent channel stations, it may apply for up to the maximum listed facilities for the separations that would exist at the new transmitter site. (See subdivision (iii) of this subparagraph for further restrictions on very short-spaced stations).

(iii) The provisions of this subparagraph apply where the resulting separation after the move would be less than: co-channel, 64 kilometers Class A to Class A, 121 kilometers Class B to Class B, 145 kilometers Class B to C or vice versa, or 161 kilometers Class C to Class C; first adjacent channel 64 kilometers Class A to Class B or vice versa, 80 kilometers Class B to Class B, 97 kilometers Class A or B to Class C, or vice versa, and 121 kilometers Class C to Class C. Stations so situated may apply to move and use either their present facilities or no more than those specified for their distance brackets in paragraph (a) of this Section, if the move would not decrease the short distance by more than 5 kilometers. If the move would decrease the short distance a greater amount, a station will be permitted no more than the facilities that would give it, in the critical direction, a 1 mV/m contour located no further out than that which would result from using the former location and the maximum facilities specified for the distance bracket.

Note. For the purposes of the above Section, Classes B1 and C2 will be considered Class B and Class C1 will be considered Class C until further notice.

12. Section 73.220 amended.

In paragraph (a) the phrase "500 feet" is revised to read "150 meters (492 feet)."

13. Section 73.240 amended.

In paragraph (a)(2) the phase "100 miles" is revised to read "160 kilometers (100 miles)."

14. Section 73.310 is amended by revising the headnote and the first two definitions in paragraph (a) to read as follows:

§ 73.310 FM technical definitions.

(a) *Antenna height above average terrain, (HAAT).* HAAT is calculated by: determining the average of the antenna heights above the terrain from 3 to 16 kilometers (2 to 10 miles) from the antenna for the eight directions evenly spaced for each 45 ° of azimuth starting with True North (a different antenna height will be determined in each direction from the antenna); and computing the average of these separate heights. In some cases less than eight directions may be used. (See § 73.313(d).) Where circular or elliptical polarization is used, the antenna height above average terrain must be based upon the height of the radiation of the antenna that transmits the horizontal component of radiation.

Antenna power gain. The square of the ratio of the root-mean-square (RMS) free space field strength produced at 1 kilometer in the horizontal plane in millivolts per meter for 1 kW antenna input power to 221.4 mV/m. This ratio is expressed in decibels (dB). If specified for a particular direction, antenna power gain is based on the field strength in that direction only.

* * * * *

15. Section 73.313 is amended by revising paragraphs (c) [introduction], (c)(1), (d), (e), (f), (g), and (h) to read as follows:

§ 73.313 Prediction of coverage.

* * * * *

(c) In predicting the distance to the field strength contours, the F(50,50) field strength chart, Figure 1 of § 73.333 must be used. The 50% field strength is defined as that value exceeded for 50% of the time.

(1) The F(50,50) chart gives the estimated 50% field strengths exceeded at 50% of the locations in dB above 1 uV/m. The chart is based on an effective power radiated from a half-wave dipole antenna in free space, that produces an unattenuated field strength at 1 kilometer of about 107 dB above 1 uV/m (221.4 mV/m).

* * * * *

(d) The antenna height to be used with this chart is the height of the radiation center of the antenna above the average terrain along the radial in question. In determining the average elevation of the terrain, the elevations between 3 and 16 kilometers from the antenna site are used.

(1) Profile graphs must be drawn for eight radials beginning at the antenna site and extending 16 kilometers therefrom. The radials should be drawn for each 45 ° of azimuth starting with True North. At least one radial must include the principal community to be served even though it may be more than 16 kilometers from the antenna site. However, in the event none of the evenly spaced radials include the principal community to be served, and one or more such radials are drawn in addition, these radials must not be used in computing the antenna height above average terrain.

(2) Where the 3 to 16 kilometers portion of a radial extends in whole or in part over a large body of water or extends over foreign territory but the 50 uV/m contour encompasses land area within the United States beyond the 16 kilometers portion of the radial, the entire 3 to 16 kilometers portion of the radial must be included in the computation of antenna height above average terrain. However, where the 50 uV/m contour does not so encompass United States land area and (i) the entire 3 to 16 kilometers portion of the radial extends over large bodies of water or foreign territory, such radial must be completely omitted from the computation of antenna height above average terrain, and (ii) where a part of the 3 to 16 kilometers portion of a radial extends over large bodies of water or over foreign territory, only that part of the radial extending from the 3 kilometers sector to the outermost portion of land

area within the United States covered by the radial must be used in the computation of antenna height above average terrain.

(3) The profile graph for each radial should be plotted by contour intervals of from 12 to 30 meters and, where the data permits, at least 50 points of elevation (generally uniformly spaced) should be used for each radial. In instances of very rugged terrain where the use of contour intervals of 30 meters would result in several points in a short distance, 60 or 120 meter contour intervals may be used for such distances. On the other hand, where the terrain is uniform or gently sloping the smallest contour interval indicated on the topographic map should be used, although only relatively few points may be available. The profile graph should indicate the topography accurately for each radial, and the graphs should be plotted with the distance in kilometers as the abscissa and the elevation in meters above mean sea level as the ordinate. The profile graphs should indicate the source of the topographical data used. The graph should also show the elevation of the center of the radiating system. The graph may be plotted either on rectangular coordinate paper or on special paper that shows the curvature of the earth. It is not necessary to take the curvature of the earth into consideration in this procedure, as this factor is taken care of in the charts showing signal strengths. The average elevation of the 13 kilometer distance between 3 and 16 kilometers from the antenna site should then be determined from the profile graph for each radial. This may be obtained by averaging a large number of equally spaced points, by using a planimeter, or by obtaining the median elevation (that exceeded for 50% of the distance) in sectors and averaging those values.

(4) Examples of HAAT calculations:

(i) The heights above average terrain on the eight radials are as follows:

	Meters
0°	120
45°	255
90°	185
135°	90
180°	-10
225°	-85
270°	40
315°	85

The antenna height above terrain (defined in § 73.310(a)) is computed as follows:

(120 + 255 + 185 + 90 - 10 - 85 + 40 + 85) / 8 = 85 meters.

(ii) Same as (i), except the O ° radial is entirely over sea water. The antenna height above average terrain is computed as follows (note that the divisor is 7 not 8):

(255 + 185 + 90 - 10 - 85 + 40 + 85) / 7 = 80 meters.

(iii) Same as (i), except that only the first 10 kilometers of the 90 ° radial are in the United States; beyond 10 kilometers the 90 ° radial is in a foreign country. The height above average terrain of the 3 to 10 kilometer portion of the 90 ° radial is 105 meters. The antenna height above average terrain is computed as follows (note that the divisor is 8 not 7.5):

(120 + 255 + 105 + 90 - 10 - 85 + 40 + 85) / 8 = 75 meters.

(e) In cases where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 3 to 16 kilometer sector, the prediction method may indicate contour distances that are different from what may be expected in practice. For example, a mountain ridge may indicate the practical limit of service although the prediction method may indicate otherwise. In such cases, the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. Such supplemental showings should describe the procedure used and should include sample calculations. Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method. When measurements of area are required, these should include the area obtained by the regular prediction method and the area obtained by the supplemental method. In directions where the terrain is such that antenna heights less than 30 meters for the 3 to 16 kilometer sector are obtained, an assumed height of 30 meters must be used for the prediction of coverage. However, where the actual contour distances are critical factors, a supplemental showing of expected coverage must be included together with a description of the method used in predicting such coverage. In special cases, the FCC may require additional information as to terrain and coverage.

(f) The effect of terrain roughness on the predicted field strength of a signal at points distant from an FM transmitting antenna is assumed to depend on the magnitude of a terrain roughness factor (h) which, for a specific propagation path, is determined by the characteristics of a segment of the terrain profile for that path 40 kilometers in length located between 10 and 50 kilometers from the antenna. The terrain roughness factor has a value equal to the distance, in meters, between elevations exceeded by all points on the profile for 10% and 90% respectively, of the length of the profile segment. (See § 73.333, Figure 4.)

(g) If the lowest field strength value of interest is initially predicted to occur over a particular propagation path at a distance that is less than 50 kilometers from the antenna, the terrain profile segment used in the determination of terrain roughness factor over that path must be that included between points 10 kilometers from the transmitter and such lesser distances. No terrain roughness correction need be applied when all field strength values of interest are predicted to occur 10 kilometers or less from the transmitting antenna.

(h) Profile segments prepared for terrain roughness factor determinations are to be plotted in rectangular coordinates, with no less than 50 points evenly spaced within the segment using data obtained from topographic maps with contour intervals of approximately 15 meters (50 feet) or less if available.

* * * * *

16. Section 73.314 is amended by revising paragraphs (b)(1)(ii), (b)(2) [introduction], and subparagraphs (ii), (v), (vii), and (viii) to read as follows:

§ 73.314 Field strength measurements.

(b) * * *

(1) * * *

(i) * * *

(ii) Each radial is marked, at a point exactly 16 kilometers from the transmitter and, at greater distances, at successive 3 kilometer intervals. Where measurements are to be conducted over extremely rugged terrain, shorter intervals may be used, but all such intervals must be of equal length. Accessible roads intersecting each radial as nearly as possible at each 3 kilometer marker are selected. These intersections are the points on the radial at which measurements are to be made, and are referred to subsequently as measuring locations. The elevation of each measuring location should approach the elevation at the corresponding 3 kilometer marker as nearly as possible.

(2) *Measurement procedure.* All measurements must be made utilizing a receiving

antenna designed for reception of the horizontally polarized signal component, elevated 9 meters above the roadbed. At each measuring location, the following procedure must be used:

(i) * * *

(ii) The antenna is elevated to a height of 9 meters.

* * * * *

(v) A mobile run of at least 30 meters is made, that is centered on the intersection of the radial and the road, and the measured field strength is continuously recorded on a chart recorder over the length of the run.

* * * * *

(vii) If, during the test conducted as described in paragraph (b)(2)(iii) of this Section, the strongest signal is found to come from a direction other than from the transmitter, after the mobile run prescribed in subparagraph (b)(2)(v) of this Section is concluded, additional measurements must be made in a "cluster" of at least five fixed points. At each such point, the field strengths with the antenna oriented toward the transmitter, and with the antenna oriented so as to receive the strongest field, are measured and recorded. Generally, all points should be within 60 meters of the center point of the mobile run.

(viii) If overhead obstacles preclude a mobile run of at least 30 meters, a "cluster" of five spot measurements may be made in lieu of this run. The first measurement in the cluster is identified. Generally, the locations for other measurements must be within 60 meters of the location of the first.

* * * * *

(c) * * *

* * * * *

(2) *Measurement procedure.* All measurements must be made using a receiving antenna designed for reception of the horizontally polarized signal component, elevated 9 meters above ground level.

* * * * *

17. Section 73.316 is amended by revising the headnote and paragraph (e) to read as follows:

§ 73.316 FM antenna systems.

* * * * *

(e) Applications proposing the use of FM transmitting antennas in the immediate vicinity (*i.e.* 60 meters or less) of other FM or TV broadcast antennas must include a showing as to the expected effect, if any, of such approximate operation.

* * * * *

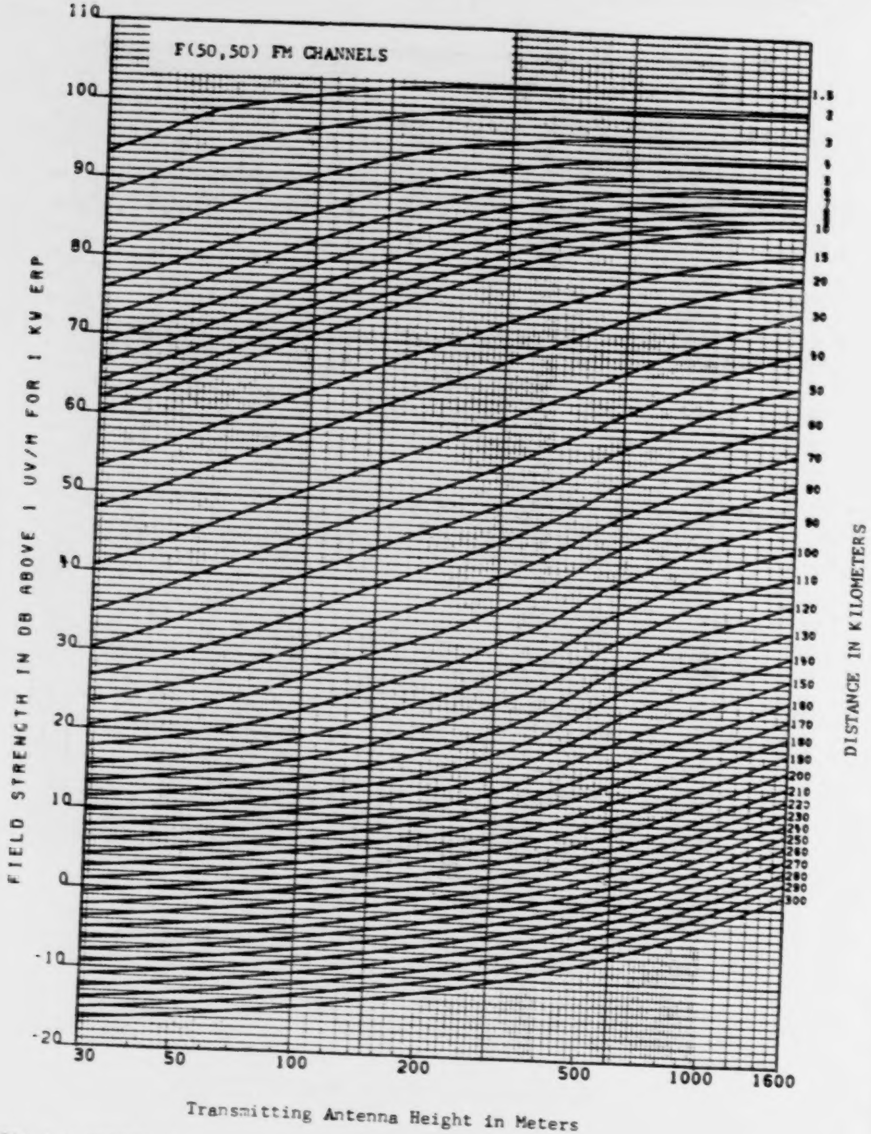
18. Section 73.333 is amended by revising the introductory text, Figures 1 and 1a, and deleting Figure 3 as follows:

§ 73.333 Engineering charts.

This Section consists of the following Figures 1, 1a, and slider, 4, and 5 (Figure 3 deleted).

* * * * *

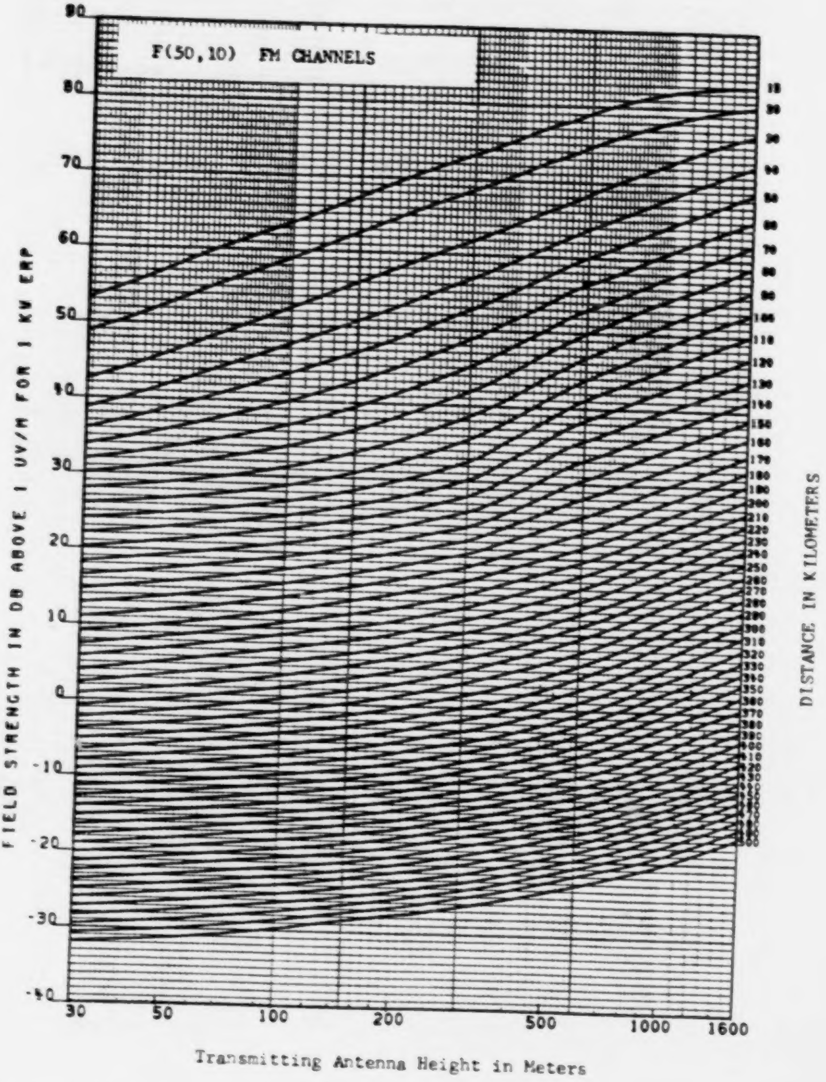
19. Section 73.504 is amended by revising the introduction of paragraph (c) to read as follows:



FCC §73.333 FIGURE 1

FM CHANNELS

ESTIMATED FIELD STRENGTH EXCEEDED AT 50 PERCENT
OF THE POTENTIAL RECEIVER LOCATIONS FOR AT LEAST 50 PERCENT
OF THE TIME AT A RECEIVING ANTENNA HEIGHT OF 9 METERS



FCC §73.333 FIGURE 1a

FM CHANNELS
ESTIMATED FIELD STRENGTH EXCEEDED AT 50 PERCENT
OF THE POTENTIAL RECEIVER LOCATIONS FOR AT LEAST 10 PERCENT
OF THE TIME AT A RECEIVING ANTENNA HEIGHT OF 9 METERS

§ 73.504 Channel assignments under the U.S.A.-Mexico FM Broadcast Agreement.

* * * * *

(c) The minimum distance separations given in § 73.207 apply to the following:

* * * * *

20. Section 73.506 is amended by revising the headnote and paragraphs (a)(3) and (b), and by adding new paragraph (c) to read as follows:

§ 73.506 Classes of Noncommercial Educational FM stations and channels.

(a) * * *

* * * * *

(3) Noncommercial educational stations with more than 0.01 kW transmitter power output are classified Class A, B1, B, C2, C1, or C, depending on the effective radiated power, antenna height above terrain, and the zone in which the station's transmitter is located, on the same basis as provided for in §§ 73.205, 73.206, and 73.211 for stations on the non-reserved FM channels.

(b) Any noncommercial educational station except Class D may be assigned to any of the channels listed in § 73.501. Class D noncommercial educational FM stations applied for or authorized prior to June 1, 1980, may continue to operate on their authorized channels subject to the provisions of § 73.512.

21. Section 73.507 is amended by revising paragraph (c) and note to read as follows:

§ 73.507 Minimum distance separation between stations.

* * * * *

(c)(1) Stations separated in frequency by 10.6 or 10.8 MHz (53 or 54 channels) from allotments or assignments on non-reserved channels will not be authorized unless they conform to the following separation table:

Class of stations:	Required spacing kilometers	(miles)
A to A	8	(5)
B to A	16	(10)
B to B	24	(15)
C to A	32	(20)
C to B	40	(25)
C to C	48	(30)

(2) Under the United States-Mexican FM Broadcasting Agreement, for stations and assignments differing in frequency by 10.6 to 10.8 MHz (53 or 54 channels), the following separations apply to U.S. noncommercial educational FM allotments and assignments and Mexican allotments or assignments in the border area.

Class of stations:	Required spacing kilometers	(miles)
C to D	24	(15)
B to D	16	(10)
C to D	8	(5)
D to D	3	(2)

Note. For purposes of this Section, Classes B1 and C2 will be considered Class B, and Class C1 will be considered Class C until further notice.

22. Section 73.509 is amended by revising paragraph (e) to read as follows:

§ 73.509 Protection from interference.

* * * * *

(e) No application for FM Channel 200 will be accepted if the requested facility would cause interference to Channel 6 operations, including TV translators on this channel. Such objectionable interference will be considered to exist whenever the 15 dBu contour of the proposal, based on the F(50,10) curves in § 73.333 Figure 1a, would overlap the 40 dBu contour of the television station, based on the F(50,50) curves in § 73.333 Figure 1.

23. Section 73.511 is amended by revising paragraph (b) to read as follows:

§ 73.511 Power and antenna height requirements.

* * * * *

(b) On Channels 218, 219, and 220 specified in § 73.501, no educational station will be authorized with effective radiated power greater than that specified in § 73.211(b)(1) for the respective class of station, and the maximum effective radiated power permissible shall also be subject to the provisions of § 73.211(b)(2).

23. Section 73.3573 is amended by revising paragraphs (a)(1) and (c) as follows:

§ 73.3573 Processing FM broadcast and FM translator station applications.

(a) * * *

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for FM stations authorized under this Part is any change in frequency, station location, or class of station; or, any antenna location which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area.) For FM translator stations authorized under Part 74, it is any change in frequency (output channel), primary stations, or authorized principal community or area. However, the FCC may, within 15 days after the acceptance for filing of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of §§ 73.3580 and 1.1111 pertaining to major changes.

* * * * *

(c) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed.

* * * * *

Dissenting Statement of FCC Commissioner James H. Quello

In Re: FM Drop-Ins - Docket No. 80-90

I don't believe the engineering record or the hypothetical need developed in Docket 80–90 justifies the proposed widescale increase in FM allotments.

This action would cause degraded service, turmoil and interference for millions of existing listeners, contention and litigation among applicants and further administrative burdens on a Mass Media Bureau already overburdened with a huge backlog of AM-FM and low power TV applications.

I believe a wiser, more reasoned approach would be to present new FM allotments on a case-by-case basis through waiver requests. This would provide an opportunity to actually test the extent of interference and overall public acceptance before risking an untested, strongly contested, widescale increase and reallotment.

I lend considerable weight to the expert engineering study by A. D. Ring which indicates a net loss in service would result in the Commission's proposals. I agree with the logic in the study that any increase in FM availability would cause a significant detriment to present listening. Also, I believe it is a rule of physics, not of this Commission, that a new station causes interference far beyond the boundaries of new service.

I'm concerned that the value of a strong secondary service now enjoyed by millions of listeners is allotted a much lower priority than the undocumented need for a new, frequently substandard, FM service. I also believe FM stereo should be treated as a significant state of the art improvement in basic service, rather than as a mere expendable ancillary enhancement.

To the extent that the Commission has relied upon the "need" for vastly increased FM allotments, I believe it has been misled. I have seen nothing in the record which documents this alleged need beyond some "wish lists" prepared on a hypothetical basis and largely for purposes other than this *Rulemaking*.

The only rational public interest reason for embarking upon this massive change in the Table of Allotments is to provide for better, more diversified FM radio service to the American people. The fact is, however, this revised scheme of allocation will merely provide different service in many instances and reduced or deleted service in others. As suggested before, it is axiomatic that for each new service introduced, interference to existing service is also introduced. For some listeners, their present stereo service will become monaural. For others, their present monaural service will become further degraded or disappear.

SEPARATE STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Modification of FM Technical Rules to Increase the Availability of Broadcast Stations—BC Docket 80-90.

By this decision, the Commission has dramatically increased the potential for local FM radio service to the American public and the enhanced competition and diversity that increased service implies. The Commission's staff forecasts that many major cities, where additional outlets were previously foreclosed, will now be eligible for additional stations as a consequence of today's rule changes. Many communities in remote locations will now qualify for their first local service as well. All told, the Mass Media Bureau estimates that this decision will make it possible to satisfy as much as 57 percent of the expressed demand for additional FM radio stations; under the old allocation structure, just seven percent of this demand could have been accommodated. More specifically, of the 1000 communities studied, additional stations can now be assigned to approximately 49 percent which have daytime-only AM service and 31 percent of those which have no local service. This action will also serve the interests of 40 percent of the communities said to need additional minority-owned stations, as well as the interests of 26 percent of the locations desiring additional public radio stations.

The public interest benefits of our decision are clear and substantial. Still, because the paramount objective of this proceeding has been to secure *additional* service, it was imperative for the Commission to ensure that the proposed technical changes to allow additional FM stations would not significantly degrade the FM service overall. With one exception (the uniform protected contour proposal), the Commission has concluded that the addition of new FM stations will not detract materially from the technical integrity of existing FM service, and I believe our determinations in this regard are both responsible and consistent with sound engineering principles.

The Commission has decided that, rather than entertaining random requests for the new channels made possible by these rule changes, most of these new channels should be allotted in one omnibus proceeding. Our decision to amend the FM Table of Allotments accordingly is especially wise. The licensing of additional FM stations will now proceed in a smooth and orderly fashion, which will minimize potential delays and maximize the expeditious delivery of new FM service consistent with FCC resources.

While I would have preferred more expeditious consideration of these proposals, I am delighted that we have finally and affirmatively acted upon them. And, although I wish resource limitations did not require postponing the effective date of our action until Fiscal Year 1984, we will still be moving forward during the intervening four months with preparation of the rulemaking that is required for the public to apply for stations under the newly adopted technical rules.

In sum, this Report and Order marks a renewed Commission commitment to the principles of diversity and competition—principles which must be the basis for the integrity and credibility of our ongoing broadcast deregulatory efforts. The public interest is well-served by this decision in and of itself, and I am especially pleased to see this long-awaited action taken at last.

Intervention, Right To

Appellant listener groups had not met the participation requirements of Section 1.223(b). Nevertheless, because of their longstanding interest in the existing station, the Board will permit a supplemental showing of how their intervention as parties could illuminate the issues in the case.
–GAF B/cing Company, Inc.
BC Docket No. 82–371

FCC 83R–39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GAF BROADCASTING COMPANY, INC.	BC Docket No. 82–371 File No. BRH-810202G7
For Renewal of License of Station WNCN (FM) New York, New York	
CLASSICAL RADIO, INC. New York, New York	BC Docket No. 82–372 File No. BPH-810501AD
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: May 13, 1983; Released: May 19, 1983.)

BY THE REVIEW BOARD:

1. Before the Review Board for consideration is an appeal filed March 22, 1983 by WNCN Listeners' Guild, Inc. and Classical Radio for Connecticut, Inc. from the presiding Judge's Order (FCC 83M–565, released February 17, 1983) which denied appellants' petition for leave to intervene in this proceeding.[1] Appellants submit that, contrary to the ALJ's ruling, their participation will assist the Commission in resolving the issues in this case. Specifically, they state that neither of the party-applicants is likely to fully develop

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[1] Related pleadings before the Board are a petition to accept late-filed pleading, filed March 22, 1983, by appellants, and oppositions to appeal, filed April 1, 1983, by GAF Broadcasting Company, Inc. and the Mass Media Bureau. For good cause shown, we will grant appellants' petition and accept the late-filed appeal.

issues affecting the interests of the public; that, in fact, the litigation thus far has been characterized by personal attacks and accusations of bad faith; and that appellants, who are long-established non-profit representatives of listeners' rights, can aid the Commission because they have no financial stake in the outcome of the case but are concerned only with the development of a full record. In this regard, appellants also claim that serious questions regarding control of the corporate parent of GAF Broadcasting Company, Inc., the existing licensee, require determination on the basis of a complete record.

2. Appellants have not sought intervention under Section 1.223(a) of the Commission's Rules Section 1.223(b) requires, *inter alia*, that a person seeking party status in a hearing "must show how such petitioner's participation will assist the Commission in the determination of the issues in question." Although appellants claim to have met this requirement, the only issue originally designated in this case was the standard comparative issue, and appellants specifically declined to play a role in the hearing of that issue, stating that they "do not seek to participate for the purpose of taking sides on the question of the comparative merits of the licensee and the competing applicant." Petition for Leave to Intervene, filed August 9, 1982, at 3–4. Moreover, while the ALJ subsequently enlarged the issues to explore Classical Radio, Inc.'s technical and financial qualifications (FCC 83M–589, released February 18, 1983), appellants have not indicated that they are prepared to assist in the hearing of these issues, either.[2] Finally, the general public interest role to which appellants advert—assuring development of a full record despite alleged animosity between the applicants—can be and has traditionally been fulfilled by the ALJ and the Mass Media Bureau. *See Muncie Broadcasting Corp.*, 89 FCC 2d 123, 125 n. 1, 51 RR2d 46, 49 n. 1 (Rev. Bd. 1982) (citing *Pressly* v. *FCC*, 437 F.2d 716, 719 (D.C. Cir. 1970). And the Bureau, in its opposition pleading, affirms its intention to carry out this function here.

3. Appellants have presented us with a paradox. On the one hand, they are local listener groups and may, thus, have touched the standing threshold, *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*U.C.C.*), but, on the other hand, they have not proffered any "specific allegations of fact," required by *U.C.C.*, Section 309(d) of the Communications Act of

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[2] The appeal contains no allegations of fact whatever relating to the issues to be tried at the hearing; it contains only a cursory allusion to a claim that "there are serious uncertainties concerning control of GAF Corporation, parent of the present licensee." Appeal, at 3. Other assertions regarding GAF were apparently the subject of a petition to deny by appellants directed against GAF's renewal application. That petition has been twice rejected by the Bureau, pursuant to delegated authority. Letter dated June 21, 1982 by Chief, Broadcast Bureau, *recon. denied*, letter dated October 1, 1982. Pending before the full Commission is an application for review of these staff actions. We of course do not reach the questions raised therein.

1934, as amended, and implicit in Section 1.223(b), that they would pursue if permitted to intervene.[3] Indeed, their petition specifically recites that they "do not propose to raise any issues in addition to those already designated for hearing." Petition, *supra*, at 5. Nor do they claim to be in possession of "special knowledge or evidence" related to the issues. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1019 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*. 683 F.2d 503 (D.C. Cir. 1982). In sum, appellants appear ready to conduct a watching brief to "represent the interests of listeners *as they may appear*." Appeal, at 3–4 (emphasis added).

4. The Board does not believe that appellants' very limited scope of proposed participation meets the intervention requirements of Section 1.223(b). Nonetheless, because they have shown long-term interest in Station WNCN(FM), *see FCC* v. *WNCN Listeners' Guild*, *supra*, and in light of the thrust of the *U.C.C.* case, we are reluctant to take an action which could be perceived as summarily hostile to the interest of local citizens groups. Accordingly, we will permit appellants fifteen days to supplement their appeal to show that they have factual information or evidence relevant to the designated issues or to indicate how their intervention as parties could illuminate such issues in ways that they could not achieve as non-party public witnesses. See Section 1.225 of the Rules. As articulated in *U.C.C.*, any supplement should contain specific allegations of fact germane to the issues and the customary attestation to such facts so as "to assure that concrete adverseness" necessary to indicate a justiciable controversy. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). *See generally* K. Davis, *Administrative Law of the Seventies*, Chapter 22 ("Standing").

5. ACCORDINGLY, IT IS ORDERED, That the petition to accept late-filed pleading, filed March 22, 1983, by WNCN Listeners' Guild, Inc. and Classical Radio for Connecticut, Inc. IS GRANTED, that said appellants SHALL SUPPLEMENT their pending appeal, in accordance with this Memorandum Opinion and Order, within

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[3] Although the *U.C.C.* court held that "some 'audience participation' must be allowed in license renewal proceedings," 359 F.2d at 1005, it still required such would-be intervenors to proffer factual allegations necessary to establish a public interest issue. *Id.* As the Supreme Court has held: "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of . . . official conduct." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). Moreover, the *U.C.C.* court was aware that "private interests may sometimes cloak themselves with a semblance of public interest advocates." *Id.* at 1006. We do not intimate that the Guild's avid interest in promoting a classical music format, *see generally FCC* v. *WNCN Listeners' Guild*, 450 U.S. 582 (1981), is a "private interest." However, the Guild's preference for a particular entertainment format is not at this point germane to the public interest issues designated in this comparative licensing proceeding, and intervention would not be appropriate merely to inject its preference collaterally.

fifteen (15) days after the release hereof, and that replies to the supplement MAY BE FILED within ten (10) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

CATV Cross-Ownership
Divestitures
Tax Certificates

> Petition for tax certificate granted for the sale of a Multipoint Distribution System based upon a finding that its operations were technically as well as functionally integrated in large part with a cable system that was sold to promote the Commission's policy against the ownership of a co-located television station and cable system.
> –*Georgia Cablevision Corporation*

FCC 83–225

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of: GEORGIA CABLEVISION CORPORATION ATLANTA HOME THEATRE Atlanta, Fulton County and DeKalb County, Georgia Petition for Partial Reconsideration	CSR-1705

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983 Released: May 26, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULTS.

1. Georgia Cablevision Corporation (GCC) and Atlanta Home Theatre (AHT) have filed an unopposed "Petition for Partial Reconsideration" of the Commission's decision in *Georgia Cablevision Corporation and Atlanta Home Theatre* (Atlanta, Georgia), FCC 80–609, 83 FCC 2d 326 (1980). In this proceeding, AHT and GCC, both subsidiaries of Cox Broadcasting Corporation, requested tax certificates, pursuant to Section 1071 of the Internal Revenue Code of 1954, for their sale to Cable America, Inc. Prior to their sale, AHT was the operator of a Multipoint Distribution System serving Atlanta, Fulton County and DeKalb County, Georgia; and GCC was the owner of a cable system serving the same locations.

2. In *Georgia Cablevison Corporation* (Atlanta, Georgia), FCC 77–493, 65 FCC 2d 506 (1977), the Commission granted Cox Broadcasting

Corporation a waiver of Section 76.501(a)(2) of its cross-ownership rule for a two year period.[1] In granting the waiver, the Commission authorized Cox Broadcasting Corporation to increase its previously grand-fathered 56.1 percent ownership interest in GCC to 100 percent. However, at the end of the two year period, Cox Broadcasting Corporation was either to divest itself of GCC or its co-located Television Broadcast Station WSB-TV (NBC, Channel 2) Atlanta, Georgia.[2] The required divestiture was completed on February 7, 1980, when GCC was sold to Cable America, Inc. As part of that same transaction, Cable America, Inc. also acquired AHT. Subsequent to their sale, GCC and AHT filed requests for tax certificates before the Commission.

3. In *Georgia Cablevision Corporation and Atlanta Home Theatre, supra*, the Commission granted GCC a tax certificate after finding that its sale promoted the Commission's policy directed against the concentration of ownership interests between co-located television broadcast stations and cable television systems, as embodied in Section 76.501(a)(2) of the Commission's Rules. However in this same decision, the Commission denied AHT (the MDS operation) a tax certificate for its contemporaneous sale to Cable America, Inc. The Commission concluded that AHT was not entitled to a tax certificate because its sale did not promote any relevant Commission policy. Furthermore, the Commission found that the petitioners failed to demonstrate that AHT's sale was mandated by practical economic necessity which would have entitled it to a tax certificate. Lastly, since AHT and GCC operated alternative communications services in the same television market, the Commission concluded that AHT was not entitled to a tax certificate.

4. In support of their reconsideration petition, the petitioners maintain that the contemporaneous sale of AHT to Cable America, Inc., was mandated by practical economic necessity. The petitioners have submitted a financial analysis of AHT which purportedly demonstrates that it would have had little or no market value if it were separated from GCC. If AHT were operated as a separate entity, the petitioners contend that it would add $90,000 per year to

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[1] The Commission's cross-ownership rule provides in pertinent part:

> §76.501 Cross Ownership
>
> (a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:
>
> (2) A television broadcast station whose predicted Grade B contour, computed in accordance with §73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

[2] The two year period was subsequently extended by the Commission to April 12, 1980.

AHT's already substantial losses. Moreover they allege that the $90,000 of added losses would increase 10% each year due to inflation. These added costs would result from AHT having to rent its own office space, hire a separate general manager, office manager, engineer, and support staff. Presently, AHT shares the above costs with GCC. Additionally, the petitioners have submitted a *pro forma* financial statement for the years 1979–1984. The statement shows a loss of $202,000 for 1979 if AHT were to be operated separately. For the years 1980–1984, the *pro forma* statement projects losses of $227,000, $262,000, $373,000, $429,000 and $566,000, respectively. Faced with these projections, AHT and GCC submit that any prospective purchaser would consider AHT, by itself, an unattractive property. Consequently, they maintain that AHT could not have been sold separately. Buttressing this point, the petitioners have submitted a letter from Mr. Robert Holman, Vice President, Daniels and Associates, Inc., the broker for AHT's sale to Cable America, Inc. In his letter, Mr. Holman states that it is his belief ". . . that if the MDS business and the CATV system were sold separately the total price realized for both properties would most likely have been appreciably less than the lump sum price paid for both businesses which were sold together."

5. In response to the Commission's initial decision finding that AHT and GCC were alternative communications services and therefore may not reasonably be considered one operational entity, the petitioners contend that their MDS and cable operations were complementary rather than competitive services. In support of this contention, the petitioners cite the Commission's language in its pending *Notice of Inquiry and Proposed Rulemaking Order in Docket No. 80–112*, FCC 80–136, released May 2, 1980, wherein the Commission commented that:

> MDS is sometimes viewed alternatively as a CATV adjunct or competitor. Overall, it appears that MDS demand is greatest where CATV facilities do not exist or have not penetrated that relevant market. In some cases MDS serves as a conduit to provide programming to CATV systems, particularly in areas where there are multiple cable "headends". Thus, to some extent the two systems are complementary. However, should CATV develop as a broadband wired distribution system with access to most homes, the demand for MDS type services would likely substantially decrease. (At paragraph 27.)

They maintain that as cable service expands in the Atlanta market MDS subscribers will switch to cable thereby eliminating MDS service to all but the most sparsely populated areas. Consistent with this contention, the petitioners have based their financial *pro forma* projections for AHT on a decreasing MDS subscriber base. The petitioners estimate that AHT will lose almost 40 percent of its 1979 subscriber base to cable by the year 1984.

6. Lastly, the petitioners contend that because of the nature of their interrelationship, AHT and GCC are in effect one operational

entity. They point out, as mentioned above, that both companies are located in the same building, share the same office space, have one general manager, one office manager and one engineer for both companies. They also point out that GCC's total pay-TV subscribership receives its pay-TV signal from AHT. Moreover, six of the apartment complexes served by AHT take a feed off of GCC's cable. Consequently, the petitioners aver that GCC and AHT constitute a single entity and the sale of one mandated the sale of the other to one purchaser.

7. In our original decision, we concluded that the petitioners failed to establish that the sale of AHT to Cable America, Inc. was mandated by practical economic necessity. We found that the fact that AHT shared certain of its resources with GCC standing alone did not justify a finding that practical economic necessity mandated AHT's sale. However, in their petition for reconsideration, the petitioners have introduced new evidence which demonstrates that based upon the totality of circumstances here presented AHT's sale to Cable America, Inc. was mandated by practical economic necessity. Consequently, we find that AHT's sale falls within the ambit of the Commission's case law which permits the issuance of a tax certificate based upon a showing of economic necessity. In this vein, AHT has demonstrated that if it were to be operated apart from GCC its operating losses would substantially increase and these losses would likely accelerate with the growth in the cable system. Additionally, AHT has demonstrated that its operations are technically as well as functionally integrated in large part with GCC's. Furthermore, we note that since GCC and AHT operate within the same service area the economy of operating them together is apparent. In light of the above factors, we find that the petitioners have substantiated their assertion that the sale of GCC, which was directed by the Commission, operated as a practical matter to mandate the sale of AHT to the same purchaser. Consequently, the sale of AHT to Cable America, Inc. was necessary since practical economic necessity mandated its sale as a consequence of GCC's sale, which promoted the Commission's policy against the common ownership of co-located television broadcast stations and cable television systems. See *Kansas State Network*, FCC 82–82, 89 FCC 2d 392 (1982) *appeal filed*, No. 82–1319 (D.C. Cir. March 26, 1982); *Continental Telephone Corp.*, FCC 75–34, 51 FCC 2d 284 (1975); *King Video Company* (Elma, Washington), FCC 74–1339, 49 FCC 2d 1297 (1974); and *Cosmos Cablevision Corp., et al.* (Darlington, South Carolina), FCC 72–72, 33 FCC 2d 293 (1972). Finally, we wish to make it clear that our action today is consistent with the Commission's recent policy statement regarding tax certificates. *Policy Statement on Issuance of Tax Certificates*, 52 RR 2d 757 (1982). The contract for the sale of AHT was signed prior to the November 15, 1982, grandfathering cut off date contained in the policy statement.

Therefore, our decision today is not a modification of the policy annunciated therein. In view of the foregoing, we find that a grant of the petition for partial reconsideration filed by AHT and GCC would be in the public interest.

8. Accordingly, IT IS ORDERED, That the Petition for Partial Reconsideration filed by Georgia Cablevision Corporation and Atlanta Home Theatre (CSR-1705) IS GRANTED.

9. IT IS FURTHER ORDERED, That the tax certificate appended hereto will be issued to Atlanta Home Theatre.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Hearing
FM Station, Authorization
Minority Ownership
Nighttime Coverage
Review by Review Board

Review Board affirms ALJ's grant to FM broadcast applicant who has moderate comparative coverage preference for serving nighttime "white" area. Winning applicant's small attributable ownership interest in local broadcast production company is *de minimis*, and its 50% integration credit with minority ownership enhancement deemed equal to another's 52% credit.
–Golden State B/cing Corp.
BC Docket No. 79–56

FCC 83R–35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GOLDEN STATE BROADCASTING CORP. Tucson, Arizona	BC Docket No. 79–56 File No. BPH-10,041
TUCSON COMMUNITY BROADCASTING, INC. Tucson, Arizona	BC Docket No. 79–58 File No. BPH-10,345
TUCSON FM BROADCASTING CORPORATION Tucson, Arizona	BC Docket No. 79–59 File No. BPH-10,347
For Construction Permit for a New FM Broadcast Station	

Appearances

Marvin Diamond, *William S. Reyner, Jr.*, and *Peter A. Rohrbach*, on behalf of Golden State Broadcasting Corp.; *Carl J. Fielstra*, on behalf of Tucson Community Broadcasting, Inc.; *Richard A. Helmick*, on behalf of Tucson FM Broadcasting Corporation.

DECISION

(Adopted: May 2, 1983; Released: May 9, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. Three broadcast applicants are competing for the right to establish a new FM station in Tucson, Arizona: Golden State; Tucson Community; and Tucson FM. After a hearing conducted pursuant to the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), Administrative Law Judge Coufal concluded that Tucson FM, which received "a significant advantage because it would bring a first nighttime service to 5,564 more people," was the best comparative applicant. Initial Decision, FCC 82D-67, released September 22, 1982, paras. 39, 51. Briefs and exceptions were filed by Golden State and Tucson Community on November 22, 1982, and replies by Golden State and Tucson FM on December 21 and 17, 1982, respectively; oral argument was held on January 27, 1983. Based on our review of the record, as refined by the written and oral arguments, we adopt the ALJ's findings of fact, and affirm his conclusion that Commission policy and precedent justify a grant of Tucson FM's application. See paras. 14–15 below.

2. *Diversification of Control of the Media of Mass Communications.* Golden State argues that the diversification preference awarded Community and Tucson FM by the ALJ (I.D. paras. 8, 33) should be reduced from a "substantial" to a "minor" one, because its Station KHYT, South Tucson, is only a small 500 watt AM station situated in a market served by 5 television stations, over 30 radio stations, and eight newspapers and penetrated to some extent by cable and MDS systems. It contends that the "explosion in media outlets" since the Commission wrote its *Policy Statement on Comparative Broadcast Hearings, supra*, undercuts the importance of the preference and that the result of the I.D. is to "automatically disadvantage" Golden State as an existing licensee contrary to the holding in *Miner* v. *FCC*, 663 F.2d 152 (D.C. Cir. 1980). We disagree. Long-standing precedent teaches that an applicant with no attributable ownership interests in the mass media is entitled to a substantial comparative preference under the diversification criterion over a competing applicant that already owns a broadcast station in the proposed community of license—despite the abundance of other media in the market—because it will provide a "new voice." See cases discussed in *Communications Properties, Inc.*, 92 FCC 2d 45, 52 RR 2d 981, 983 (Rev. Bd. 1982). The existence of the other media diminishes somewhat the weight accorded the diversification preference, but does not reduce the magnitude of the preference to less than "substantial." *Id.*; *see also Van Buren Community Service*, 87 FCC 2d 1018 (Rev. Bd. 1981) (substantial preference awarded applicant with no interests over the licensee of 500 watt daytime station in community).

3. To the extent that Golden State argues that we should deviate from the *Policy Statement, supra,* which emphasizes the significance of diversification, only the Commission has the authority to change old policy. *See Horne Industries, Inc.,* FCC 82R-68, 52 RR 2d 1009 (Rev. Bd. 1982). Finally, Golden State's claim that it has been "automatically disadvantaged" as that term is used in *Miner, supra,* because it already owns an existing station is rejected because the *Miner* case did not involve an existing licensee's application for an additional station but the special situation where a licensee seeks to move its existing operation to a new frequency. *See Gilbert Group, Inc.,* 88 FCC 2d 401, 405–406 (Rev. Bd. 1981).

4. Community argues that it should be awarded a diversification preference over Tucson FM because Tucson's proposed public affairs director and 2% stockholder, Charles Simms, owns 100% of a local broadcast production company that produces the minority-oriented program "Looking Black." That program is broadcast on 21 Arizona radio stations. Although it concedes that Simms' production company ownership does not amount to a "concentration of control adverse to the public interest," Community nevertheless claims that Simms "has unusually wide access to the Arizona media." Br. at 11, n.8. In *Morris, Pierce and Pierce,* 88 FCC 2d 713, 723–4 (Rev. Bd. 1981), *review denied,* FCC 83–31, released January 25, 1983, we indicated that we would not elevate a production company to the level of a medium of mass communications for comparative purposes absent evidence that such an interest in a particular case would undermine the objectives of diversification, *i.e.,* maximizing program services and viewpoints and preventing undue concentrations of economic power. While Simms' radio and television programs—which he stipulates he will continue to produce and disseminate on other local and regional broadcast outlets (Tr. 1354; 1396)—and his concurrent position as Tucson FM's public affairs director do raise some concerns about a redundancy of viewpoints, particularly minority viewpoints, his ownership interest in Tucson FM (2%) is *de minimis.* Hence, any diversification preference awarded to Community would be correspondingly *de minimis* and the matter is therefore non-decisional in this case. Were Simms' interest in, and control over the station greater, our concern would, of course, rise proportionately. Accordingly, we affirm the ALJ's evaluation of the diversification factors in this case. See I.D., paras. 8, 33.

5. *Full-time Participation of Ownership in Management.* At the time of hearing, Robert H. Scholz was a 93.05% stockholder of Golden State and was proposed to be in charge of the day-to-day operation of the station. I.D., paras. 9–10, 34. He died after the hearing ended but before the I.D. was issued. *Id.,* para. 10 n.8. Because Golden State had not yet proposed a substitution of an integrated owner-manager for the deceased Mr. Scholz by the time the I.D. was issued, the ALJ awarded no integration credit to Golden

State. *Id.*, paras. 34–5. In its exceptions Golden State points to its originally-proposed 93.05% integration proposal involving Mr. Scholz and seeks a remand, arguing that Scholz' death should not diminish its quantitative integration credit and that the Board should grant its October 22, 1982 petition for leave to amend to reflect the transfer on September 10, 1982 of Scholz' stock equally to Messrs. Allen Barry Witz and Frank Cihak, who will both be integrated into station management on a part-time basis (20 hours per week). (Br. 3–16.)

6. Golden State's petition for leave to amend will be granted. Commission precedent allows an applicant to substitute another stockholder for a deceased stockholder who had been proposed as an integrated owner and to maintain, but not increase, its quantitative integration credit. *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248–50 (1978); *Peoples Broadcasting Corp.*, FCC 83R-5, 52 RR 2d 1617, 1632 (Rev. Bd. 1983). Where, as here, the applicant wishes to apply this principle to include persons not previously part of the application—Messrs. Witz and Cihak—we believe, upon acceptance of the amendment, that further hearing would be required to allow cross-examination of their qualifications if the death of Mr. Scholz were a decisionally significant factor. *See Alexander S. Klein*, 86 FCC 2d 423, 435 (1981). Remand would be superfluous in this case, however, because Golden State's part-time integration proposal places it a distant third compared with the 52% and 50% full-time proposals of Community and Tucson FM, respectively. Therefore, while we accept Golden State's amendment, and credit it with 93.05% part-time integration, we deny its request for remand because that action would serve no useful purpose.

7. When the case was designated for hearing, Community was owned by 52% stockholder Thomas S. Rockler and his wife, Mary Ellen Rockler, who was a 48% stockholder. I.D., para. 11. Mr. Rockler is the proposed full-time general manager, news director, and public affairs director of the station, has lived in Tucson since 1972, is a member of the Chamber of Commerce, and acquired a small amount of broadcast experience while a student at the University of Kansas. *Id.* Community offered no evidence that Mrs. Rockler would have any duties at the station; although its application describes her as secretary, receptionist, and traffic clerk. *Id.*, para. 12. The Rocklers were legally separated on November 29, 1979. On April 25, 1980, Mr. Rockler obtained Mrs. Rockler's stock because Mr. Rockler believed his wife's physical and mental health would not permit her to function at the station. *Id.* The ALJ awarded Community 52% quantitative integration credit based on the conclusions that Community offered no evidence that Mrs. Rockler was proposed for a managerial role at the station and that the transfer of her stock to her husband therefore could not improve Community's integration proposal. *Id.*, para. 36. Tucson FM was

credited with 50% quantitative integration because 48% stockholder John W. Teal is proposed as full-time general manager who will be responsible for overall operation and management of the station and 2% stockholder Charles G. Simms is proposed as full-time public affairs director. I.D., paras. 13–15, 38. Its integration proposal was qualitatively enhanced by Teal's local residence since 1975, his past audio production work and his experience as an audio engineer and by Simms' local residence since 1979, his experience in radio show production, announcing, and audio direction, and his status as a member of a minority group.

8. Community claims that it should have been credited with 100% rather than 52% full-time integration credit, because Mrs. Rockler had owned 48% of its stock and was to be involved full-time in station affairs and that the subsequent transfer of her stock to Mr. Rockler was an involuntary action accompanied by a good cause showing (Br. 11–22).

9. In its June 29, 1979 amendment Community specified that "Thomas Rockler will work as manager, news director, and public affairs director." It also unequivocally stated that "Mary Ellen Rockler will work as receptionist, secretary, and traffic clerk." Mrs. Rockler's proposed duties, especially when considered with Mr. Rockler's explicit role as a manager, were without question wholly non-managerial and therefore not entitled to be accorded quantitative integration credit. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 661 (Rev. Bd. 1982). As the ALJ correctly found, Mrs. Rockler was never proposed for any role in station affairs in the evidence submitted at hearing. We recognize that on October 19, 1979, Community reported that Mrs. Rockler was physically and mentally unable to fulfill her commitment to work at the station and had filed for dissolution of her marriage. The amendment was accepted subject to the condition that Community could not improve its previous position. FCC 79M-1305, released November 6, 1979.

10. Under well established comparative practice the ALJ's ruling was correct and the amendment may not serve to increase Mr. Rockler's integration proposal from 52% to 100%. First, he was entitled to no more than 52% credit before the amendment was filed (para. 9 above). To now recognize its claimed 100% credit would be to allow an impermissible comparative upgrading, *see Birmingham Family Television, Inc.*, FCC 82R-59, 52 RR 2d 525 (Rev. Bd. 1982). While substitution because of the death of a principal is permitted, Community has cited no case where an applicant's decision to withdraw a principal because of divorce, legal separation, or an

inability to effectuate an integration proposal has ever been considered an "involuntary" act. *Id.*[1]

11. As to Community's other arguments, the record shows that the ALJ did not in fact make any binding "on-the-record determination" that Community would receive 100% credit—he determined only that Community would be permitted to introduce in its Exh. 1 evidence concerning the transferred 48% interest and could press its claim for 100% credit in its proposed findings and conclusions. Tr. 475–500. The ALJ specifically stated that he disagreed with Community's legal position concerning the 48% interest, Tr. 483, and that the question of the "voluntariness or involuntariness" of the transfer was "irrelevant," Tr. 499. Also, Community is mistaken in its assertion that the ALJ (at Tr. 494–5) prevented Mr. Rockler from testifying on the 48% interest. Instead, he refused to let him supplement by direct oral testimony the description of his own managerial duties in Community Exh. 1. Mr. Rockler has been fully credited for his managerial role and for his own 52% interest in the applicant. In any event for the reasons set out above, as a matter of law Community would not be entitled to more than 52% credit even had it submitted additional oral testimony on its integration proposal. No purpose would be served by granting Community's request for a remand to present evidence on the remaining 48% interest. Community's assertion regarding unfair additional cross-examination is not decisional because the award to it of lesser integration credit was based on the legal insufficiency of its proposed amendment and not on the extent of cross-examination it underwent.

12. On quantitative integration grounds, Community, with positive control, 52% ownership participating full time in station management, is slightly ahead of Tucson FM with negative control, 50% credit. Tucson FM, however, has a qualitative edge because of its minority ownership (2%) will participate full time in station management and these applicants' other qualitative attributes (local residence, civic participation, and broadcast experience) are offsetting. Tucson FM's qualitative advantage is sufficient to offset Community's slight quantitative edge, which is less than a "clear" one, *Cannon's Point Broadcasting Co.*, FCC 83R-22, released March 29, 1983, para. 11; *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982). In sum, Community and Tucson FM are equal under the integration factor and each has a moderate preference over Golden State, which has 93.05% part-time (20-hour) credit.

13. *Comparative Coverage.* Tucson FM would bring a first service to 5,564 more persons who now receive no aural service at night and

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[1] Community does not rely on the Commission's doctrine of attribution of spousal interests (Tr. 3086–7). *See Absolutely Great Radio, Inc.*, FCC 83R-9, 53 RR 2d 97, 99–102 (Rev. Bd. 1983). Nor could it. *Id.*, n.13.

to 2,032 more square miles. On the other hand, the other applicants would provide a greater nighttime second service involving 709 more square miles and 2,600 more persons who currently receive only one nighttime aural service. Golden State and Community except to the significance of Tucson FM's preference, noting that the number of underserved persons who will receive additional service is small in relation to the entire population that will be served.

14. We affirm the ALJ's award to Tucson FM of a decisive comparative coverage preference that is characterized as moderate. Longstanding precedent establishes that the provision of a *first* service to a substantial number of people is a coverage factor entitled to great weight and is of a higher priority than the provision of a choice of services. *Radio Cincinnati, Inc.* v. *FCC*, 117 F.2d 93, 95, 5 RR 2035, 2039–2040 (D.C. Cir. 1949); *RAM Enterprises*, 57 FCC 2d 844, 853 (Rev. Bd. 1976). Tucson FM's preference is somewhat offset because its competitors provide a second service at night to a larger population, and because the number of persons receiving a first service from Tucson FM (5,564) is not as large as in *RAM*. Thus, Tucson FM's preference is moderate, not substantial. *Cf. Communications Properties, Inc., supra*, 52 RR 2d at 984; *Town and Country Radio, Inc.*, 70 FCC 2d 572, 575 (Rev. Bd. 1978). We do agree with the ALJ that the provision of a first nighttime service here to over 5,000 people remains the most significant distinction in this otherwise razorthin comparative contest between Tucson FM and Community and is therefore decisive.[2]

15. *Final Comparative Evaluation*. On the diversification and integration factors, Tucson FM and Community are clearly superior to Golden State, which therefore finishes last comparatively. Tucson FM has been awarded a moderate comparative coverage preference. Community has a slight auxiliary power preference (I.D., para. 40), and Tucson FM has a minor comparative demerit, as a result of faulty ascertainment and to which no exception has been taken (I.D. para. 45). In weighing these factors, as the ALJ noted, Tucson FM's coverage preference is by far the most important difference between the applicants because it will mean the inauguration of a first FM broadcast reception service to significant numbers of people. Thus, it easily overcomes Tucson FM's minor demerit and Community's slight preference for auxiliary power. We therefore affirm the ALJ's

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[2] We do not credit Community's argument that an intent to withhold relevant comparative information, an employment agreement, should have been inferred by the ALJ and a Section 1.65 demerit assessed against Tucson FM. (Br. 25–26). The information, which was favorable to the applicant, was voluntarily reported after a brief 30 day delay. The ALJ found no evidence of intent to deceive and correctly concluded that the short delay in reporting "is *de minimis* and no comparative demerit is assessed." I.D., para. 43. *See Washington Association for Television and Children* v. *FCC*, 665 F.2d 1264 (D.C. Cir. 1981); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, at para. 5, 50 RR 2d 1142 (Rev. Bd. 1982)

conclusion that a grant of Tucson FM's application will best serve the public interest.

16. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by Golden State Broadcasting Corp. on October 22, 1982, IS GRANTED, and the amendment IS ACCEPTED; and that its petition for leave to tender amendment, filed October 12, 1982, IS DISMISSED as moot; and

17. IT IS FURTHER ORDERED, That the application of Tucson FM Broadcasting Corporation (File No. BPH-10,347) IS GRANTED, and the applications to Golden State Broadcasting Corp. (File No. BPH-10,041) and Tucson Community Broadcasting, Inc. (File BPH-10,345) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 82D-67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GOLDEN STATE BROADCASTING CORP. Tucson, Arizona	BC Docket No. 79-56 File No. BPH-10,041
TUCSON COMMUNITY BROADCASTING, INC. Tucson, Arizona	BC Docket No. 79-58 File No. BPH-10,345
TUCSON FM BROADCASTING CORPORATION Tucson, Arizona	BC Docket No. 79-59 File No. BPH-10,347

Appearances

Maurice Barnes and *Michael Foudy* on behalf of Golden State Broadcasting Corp.; *Carl Fielstra*, *James Gammon*, and *Mark Amerman* on behalf of Tucson Community Broadcasting, Inc.; *Richard Helmick* and *Stanley Neustadt* on behalf of Tucson FM Broadcasting Corporation; and *Brian Kilbane* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

(Issued September 15, 1982; Released September 22, 1982)

Preliminary Statement

1. By memorandum opinion and order, FCC 79-186, 44 Fed. Reg. 21077, released April 3, 1979, the Commission designated the above-captioned mutually exclusive applications (and the applications of Great Southwest Communications, Inc. and Old Pueblo Broadcasting Corporation—both later dismissed pursuant to settlement agreements[1]) for hearing[2] upon the following issues:

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[1] FCC 81M-835, released March 23, 1981 and FCC 81M-2421, released August 5, 1981.

[2] Golden State Broadcasting Corp. will be referred to henceforth as Golden State, Tucson Community Broadcasting, Inc. as TCB, Tucson FM Broadcasting Corporation as Tucson FM, Great Southwest Communications, Inc. as GSW, and Old Pueblo Broadcasting Corporation as Old Pueblo.

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The order permitted evidence to be adduced relative to the areas and populations to be served by each applicant to determine whether a comparative preference should accrue to any of them.[3]

2. In an order (FCC 79M-1302) released November 5, 1979, the following issues were added:

(a) To determine, for comparative purposes, whether Tucson FM Broadcasting Corporation complied with Section 1.65 of the Commission's Rules in failing to report to the Commission any inability of Sarah S. Grace to fulfill her financial commitment to that applicant prior to its amendment filed April 2, 1979.

(b) To determine, for comparative purposes, whether and to what extent the circumstances leading to the Commission's Memorandum Opinion and Order released February 9, 1979 *In the Matter of Liability of Golden State Broadcasting Corp., Licensee of Radio Station KHYT, Tucson, Arizona,* reflect on Golden State Broadcasting Corp. as a Commission licensee.

(c) To determine, for comparative purposes, whether Golden State Broadcasting Corp. complied with Section 1.65 of the Commission's Rules with respect to its reporting of its loss of a transmitter site on land owned by the Anamax Mining Company.

(d) To determine, for comparative purposes, with respect to Old Pueblo Broadcasting Corporation during those parts of the years 1975 through 1978 in which Peter M. Marcus was the controlling stockholder and president of the licensee of station WWCO, whether that station complied with its obligation to document its ascertainment efforts.

(e) To determine with respect to Tucson Community Broadcasting, Inc., the source and availability of the funds that Tucson Community Broadcasting, Inc. will need to construct its proposed station and to operate it for three months; the changes, if any, in the estimate of operating costs occasioned by the possible loss of the services of Mary Ellen Rockler; and whether, in light of the evidence adduced under this issue, Tucson Community Broadcasting, Inc. is financially qualified.

(f)(i) To determine the location of the proposed 3.16 mV/m and 1.0 mV/m contours of the applicants in this proceeding.

(f)(ii) To determine, on a comparative basis, the areas and populations of the respective 3.16 mV/m and 1.0 mV/m contours which may be reasonably expected to receive actual service from the applicants' proposed operations.

(f)(iii) In the event that proof under issues (f)(i) and (f)(ii) establishes that an

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[3] The order (at footnote 3) also authorized the resolution of differences in the effective radiated power (ERP) specified by the applicants proposing transmitter sites in the Santa Catalina Mountains in order to conform to the requirements of the United States-Mexican Agreement. The Bureau proposed a resolution of the matter (Tr. 35) and the applicants with Santa Catalina sites changed their respective ERP's to conform to the Agreement. See the *letter from TCB dated October 4, 1979* and the June 8, 1979 amendment by Golden State which specified a new transmitter site.

> applicant will bring actual service to areas and populations not served by its competitors, to determine the number of services, if any, presently available to such areas and populations.

In an order (FCC 80M-632) released April 16, 1980, summary decision was granted in favor of TCB on the financial issue specified against it.

3. By order (FCC 80M-2146) released October 28, 1980, the following issue was added:

> To determine whether Peter Marcus violated Section 1.65 of the Commission's Rules by failing to report within 30 days understandings and agreements that he had reached with Alva B. Torres and Barbara Z. Marcus whereby they were to acquire interest in his application and to participate in the proposed station operations and if it is found that Peter Marcus did violate Section 1.65 to determine the effect of such violation on Old Pueblo Broadcasting Corporation's comparative qualifications.

4. An order (FCC 80M-2147) released October 28, 1980, added the following issues:

> To determine whether Great Southwest Communications, Inc. conducted an improper investigation of Mary Ellen Rockler and thereby harassed and Tucson Community Broadcasting Corporation.
>
> To determine whether, in light of the evidence adduced under the foregoing issue, Great Southwest Communications, Inc. possesses the requisite basic and comparative qualifications to serve as a Commission licensee.

Those issues were amended in an order (FCC 81M-1798) released June 11, 1981 to be as follows:

> To determine whether Great Southwest Communications, Inc., Tucson FM Broadcasting Corporation, and/or Old Pueblo Broadcasting Corporation conducted an improper investigation of Mary Ellen Rockler and thereby harassed her and Tucson Community Broadcasting Corporation.
>
> To determine whether, in light of the evidence adduced under the foregoing issue, whether Tucson FM Broadcasting Corporation and/or Old Pueblo Broadcasting Corporation possess the requisite basic and comparative qualifications to serve as a Commission licensee.

5. Hearing sessions were held on April 24, April 30, May 1, 5–8, 12–14, September 15, 22–23, and October 28, 1980; and June 17–19 and July 6, 1981. Tucson FM, the party with the burden of proceeding and of proof, elected to present no evidence relating to issues (f)(i), (f)(ii), and (f)(iii) (Tr. 2183). The hearing record was closed by order released September 14, 1982 (FCC 82M-2808).

Findings of Fact

Harassment Issue

6. Thomas S. Rockler, an officer, director, and stockholder of TCB, testified on May 1, 1980 (TCB Ex. 1; Tr. 486 *et seq.*). Mr. Rockler said that he had acquired his wife's 48% interest in TCB because she had been mentally ill for a long time, had been under psychiatric

care for a number of years, was then in a hospital, had made attempts at suicide, and was not then capable of holding a responsible position (Tr. 501–502).[4] Mr. Tillotson, counsel for GSW, heard Mr. Rockler and concluded that since it was to TCB's benefit respecting integration credit that Mrs. Rockler's disassociation from TCB be shown to be involuntary, the condition of Mrs. Rockler bore investigation (Tr. 2498).[5] Tillotson talked to GSW's Tucson counsel, Mr. Caldwell, about the interview. Caldwell recommended that his legal assistant, Ms. Mezzatesta, conduct the interview because she was a woman, a non-lawyer, and a competent interviewer (Tr. 2476–2477). Tillotson told Caldwell about the statements Rockler had made about his wife's health and instructed Caldwell to approach the matter with sensitivity and to drop the interview if Mrs. Rockler seemed unable to emotionally deal with the questioning (Tr. 2480). Before Caldwell was asked to proceed, Tillotson discussed the plan with counsel for Old Pueblo and for Tucson FM; the former helped plan the interview and the latter thought the approach "interesting" and asked to be advised of the result (Tr. 2474–2475; TCB Ex. 4). Neither Mrs. Rockler nor Mezzatesta testified and there is no competent direct evidence of a telephone call involving those two persons.[6] However the fact that there was a call from Mezzatesta to Mrs. Rockler on August 12, 1980, pursuant to Tillotson's direction, is undisputed (Tr. 2477).

7. At about 7 p.m. on the evening of the day of the call, Mr. Rockler saw Mrs. Rockler and found her to be troubled and emotionally unstable. This was a change in her condition. The recent weeks had been a time of improvement during which she had not shown signs of being troubled or of emotional instability. He left Mrs. Rockler and at about 9 p.m. she called him and asked him to come to her home. He did so and found her to be pale, distraught, agitated, and nervous. She had the appearance of being drugged and he discovered she had taken an overdose of sleeping and antidepressant medications and had drunk a bottle of wine and some beer. She had a bloody cut on her wrist and Mr. Rockler found some bloody glass which he believed had been used by her to cut her wrist. He took her to a hospital and told attending nurses what he thought she had taken and they induced vomiting (TCB Ex. 5). The wrist wound required no stitches (Tr. 2820). She was discharged the next day (Tr. 2712–2713). Mrs. Rockler has refused to give an affidavit relative to

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[4] TCB counsel had previously advised that Mrs. Rockler was, on April 24, 1980, in a mental institution (Tr. 247).

[5] Tillotson knew that Mr. Rockler purchased Mrs. Rockler's stock after designation (TCB Ex. 1) and that TCB claimed that integration credit should be given Mr. Rockler for that ownership because the transfer was involuntary (Tr. 486–499).

[6] GSW did file a pleading to which was attached Mezzatesta's account of the call (TCB Ex. 4).

the events of August 12, 1980 or to permit her doctor to testify. She is sensitive to inquiries about her condition (TCB Ex. 4).

Diversity

8. Golden State owns 100% of standard broadcast station KHYT, which is licensed to South Tucson, Arizona (Tr. 299). South Tucson is about 1 square mile in size, has a population of 7,000 to 8,000 people, and is completely encompassed by the city of Tucson, Arizona (Tr. 308). Neither TCB nor any of its principals has an interest in any mass communications medium (TCB Ex. 1). Tucson FM owns no interest in any medium of mass communications. Charles Simms, who owned 4% of Tucson FM's stock at the time this matter was designated, and who now owns 2% thereof (order, FCC 81M-2422),[7] owns Patronus Productions, a company which produces "Looking Black," a program series relating to the black community which is broadcast on 21 Arizona radio and several television stations. No other principal of Tucson FM owns any interest in any medium of mass communications (Tucson FM Ex. 19).

Integration

9. Golden State, at the time of designation, was organized as follows:

Stockholder	*Residence*	*Percentage of Shares*	*Director*	*Office*
Robert H. Scholz	Tucson	93.05	yes	President
Willie R. Adams*	Tucson	1.38	yes	Vice President
Johnny Bowens*	Tucson	1.38	yes	--
Richard N. Russell	Tucson	1.38	no	--
Walter T. Hopkins	Tucson	1.38	no	--
John T. Anderson	Tucson	1.38	no	--
Elka Cox	Tucson	--	yes	Secretary/ Treasurer
Laurie Fagin	Tucson	--	yes	Vice President
William A. Youdelman	Los Angeles	--	yes	Vice President
Robert W. Morgan	Los Angeles	--	yes	Vice President
J.R. Scholz	Anaheim	--	yes	Vice President
Geneva Scholz	Anaheim	--	yes	Vice President
Michael L. Foudy	Tucson	--	yes	--
John W. Emerson	Tucson	--	yes	--

*spouse is co-owner of stock

Golden State stock is 7% minority owned; 27% of the directors are female and 27% are members of a minority group; 29% of the officers are women and 27% are members of a minority group (Golden State Ex. 1).

10. Robert H. Scholz was the only stockholder proposed to be

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[7] Approving petition for leave to amend filed July 6, 1981.

integrated into management. He was to be in charge of the day-to-day operation of the station. Scholz lived in Tucson from 1966 until his death on July 19, 1981.[8] He operated and was majority stockholder in station KHYT-AM in South Tucson during that period. Scholz was a member of the Southside Optimist Club, a director of Tucson Desert Museum, and a member and officer of Tucson Broadcaster's Association. In 1976 Scholz assisted in the establishment of the Pima County Victim-Witness Advocate Program to provide assistance to victims of crime. He developed programming for that endeavor and solicited other broadcasters to help in the effort. Prior to coming to Tucson, Scholz worked in several radio stations in various capacities (Golden State Ex. 4).

11. When the designation order issued, Thomas S. Rockler was president, director, and 52% owner of the stock of TCB. His wife, Mary Ellen Rockler, was then owner of 48% of the stock. Mr. Rockler proposes to be full-time general manager, news director, and public affairs director of the station. He has lived in Tucson since 1972 and is a member of the Chamber of Commerce. Mr. Rockler broadcast news and had a music program on the University of Kansas station while he was a student of radio and television in 1964, 1970, and 1971 (TCB Ex. 1).

12. TCB offered no evidence as to what duties, if any, it was contemplated that Mrs. Rockler might have at the station.[9] Thomas Rockler acquired Mrs. Rockler's stock on April 25, 1980 because Mr. Rockler felt that his wife's physical and mental condition would not permit her to function at the station. Mr. and Mrs. Rockler had entered into a legal separation agreement on November 29, 1979 (TCB Ex. 1; Tr. 621-622).

13. At the time of the designation order, John W. Teal was 52% owner, president, and director of Tucson FM, and Charles G. Simms was a 4% owner, secretary/treasurer, and director of the corporation (Tr. 1077, 1350-1351). An order (FCC 81M-2421), released August 5, 1981, approved a settlement agreement between Tucson FM and Old Pueblo (and dismissed the Old Pueblo application), whereby Old Pueblo shareholders would acquire ownership rights to 50% of Tucson FM stock; a second order (FCC 81M-2422) of the same date accepted an amendment which reduced the ownership interests of Teal to 48% and of Simms from 4% to 2%.

14. Teal proposes to work 40 hours per week as general manager and to be responsible for the overall operation and management of the FM station. He has resided in Tucson since 1975 (Tucson FM Ex.

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[8] This occurred after the hearing ended and there is no direct evidence of it. However the fact is undisputed (Golden State Reply Findings, p. 2; Tucson FM Reply Findings, p. 7; TCB Findings, p. 14, fn. 10).

[9] The application indicates she was to be secretary, receptionist, and traffic clerk (amendment filed June 29, 1979, Ex. III-A, p. 2).

17, p. 5). He has no broadcast experience but has participated in production work for live audio recordings and studio productions for radio commercials and has done private consulting in audio engineering and audio production (Tucson FM Ex. 17, pp. 1–2; Tr. 1194–1196, 1199–1201, 1240).

15. Simms, a Black, proposes to work 40 hours per week as the public affairs director of the proposed station. Since 1976 Simms, under the name of Patronus Productions, has produced in Tucson the program series entitled "Looking Black" (Tucson FM Ex. 19, p. 2; Tr. 1394–1398). He has been a resident of Tucson since 1979 and is not an active member of any local organization. In connection with the production of "Looking Black" he has promoted and become familiar with the activities of many local Tucson civic, cultural, minority, and public welfare groups (Tucson FM Ex. 19, pp. 3–4; Tr. 1383). From 1971 to 1979 Simms had experience as an announcer and audio director for radio and television broadcast stations (Tucson FM Ex. 19, pp. 1–2).

Comparative Coverage

16. Golden State and TCB have specified essentially the same transmitter site on Mt. Bigelow. Tucson FM proposes to operate from another site (Joint Ex. 2, pp. 3–4). Tucson has ten existing full-time aural transmission facilities and one existing daytime aural transmission facility (Joint Ex. 2, pp. 5, 10–11). Since the two Mt. Bigelow applicants have essentially the same facilities, their coverage, tabulated below as Mt. Bigelow, is deemed identical. Tucson FM's coverage will differ as shown below (Joint Ex. 2, pp. 2–3, 7–10):

Applicant	*Primary Service Area (Square Miles)*	*Population*
Tucson FM	10,224	557,255
Mt. Bigelow	8,614	542,606

17. During the day there are five or more services available to almost the entire area proposed to be served by both Tucson FM and the Mt. Bigelow applicants. The exception is the town of Willcox (population 2,568), which receives only one FM and two AM services. The Mt. Bigelow applicants will provide a fourth daytime service to Willcox. Tucson FM will not (Joint Ex. 2, p. 6; Tr. 2200).

18. At night areas and populations to be served and existing services are as follows (Joint Ex. 2, pp. 7–9):

	Tucson FM		*Mt. Bigelow*	
Services	*Area (Square Miles)*	*Population*	*Area (Square Miles)*	*Population*
0	4,801	23,488	2,769	17,924
1	2,485	31,883	3,194	34,483
2	1,118	7,641	1,612	8,635

3	191	3,002	183	2,876

Sarah Grace-Tucson FM Reporting Issue

19. On March 20, 1978 Sarah Grace (sometimes Sarah Grace Langs) agreed to lend $342,058 to Tucson FM for construction and operation of the proposed station. The funds were to come to her as a loan from her broker secured by stocks in his possession owned by her (Old Pueblo Ex. 8). By late 1978, Grace had suffered some personal problems and financial reverses which caused her to decide to withdraw as financial backer; she wrote to John Teal asking that someone else be found to take her place (Tr. 2240–2241). In a December 12, 1978 letter from her attorney to the local attorney for Tucson FM the latter was advised, *inter alia*, that Grace then felt it in her interest to withdraw her financial support. The letter went on to say that the writer would advise Tucson FM's Washington counsel of the Grace decision and request that he advise FCC (Old Pueblo Ex. 9). The response by Tucson FM's local counsel was to the effect that Grace had no legal right to withdraw her loan commitment (Old Pueblo Ex. 10).

20. Grace testified that she had not read the December 12, 1978 letter before it was sent though she had discussed the matter with her counsel and the letter seemed "terribly tough." She did not intend to withdraw her support until a substitute had been found and that she would feel morally and legally obliged to advance the amount she had committed if a license had been granted to Tucson FM (Tr. 2258–2260). She had securities on deposit with her broker which would have enabled her to do so (Tucson FM Ex. 21; Tr. 2279–2280).

21. Tucson FM principals found a substitute for Grace on March 28, 1979 (Tr. 1221–1222). An amendment so showing was filed April 2, 1979 (order, FCC 79M-1051).

Old Pueblo Reporting Issue

22. The Old Pueblo application was, as originally filed, the application of Peter Marcus. On March 12, 1979 the application was amended to show that Old Pueblo had replaced Peter Marcus as applicant and that Peter Marcus, Barbara Marcus, and Alva Torres were the stockholders, directors, and officers of the new applicant (TCB Ex. 2).

23. Barbara Marcus, wife of Peter Marcus, had wanted an active role in the station since the application was filed in 1976 and had discussed it with him (Tr. 1417–1418). Mrs. Marcus helped with ascertainment surveys at times earlier than January 1979 and helped plan community leader surveys which began on January 11, 1979 (Tr. 1437). She conducted community leader surveys and believed she had to be a stockholder in order to do that (Tr. 1437, 1441–1443).

24. Alva Torres first met Peter Marcus when he was conducting ascertainment surveys in Tucson in January 1979 (Tr. 1648). A couple of days later Marcus spoke to her about joining the applicant (Tr. 1652). By January 31, 1979 Torres and Mr. Marcus had agreed that Torres would be an officer, director, and shareholder of the corporation (Tr. 1656). Torres' best recollection was that the agreement came in early January 1979 (Tr. 1659).

WWCO Ascertainment Documentation Issue

25. The parties stipulated that during 1976-1978 there were 28 interview reports which were completed and placed in the public file of WWCO which (a) were not signed by the interviewer, (b) did not have any indication as to the position of the interviewer, and (c) did not have any indication intelligible to the public that the report was reviewed by anyone in station management. It was also stipulated that there were 22 other reports completed during the same period that (a) were neither signed by the interviewer nor dated, (b) contained no indication of the position of the interviewer, and (c) contained no indication intelligible to the public that the report was reviewed by anyone in station management. During the same period, there were 30 further interview reports in the WWCO public file which were signed but not dated and did not contain any indication as to the interviewer's position or any indication that the report was reviewed by management (Tr. 1888). All of the interviews mentioned were taken after the effective date of *Primer on Ascertainment of Renewal Applicants*, released January 7, 1976 (Tr. 1889-1890).

KHYT Forfeiture Issue

26. On February 9, 1979, the Chief of the Broadcast Bureau assessed a $1,000 forfeiture against station KHYT. The fine concerned the station's failure to identify the person paying for certain broadcast announcements carried in November 1977 (Old Pueblo Ex. 17). At the time of the alleged violations, Robert H. Scholz, president of Golden State, controlled station KHYT (Tr. 431). Although Golden State paid the forfeiture, Scholz said he felt there had been no violation of the rules (Tr. 462). Golden State offered no further evidence on this issue.

Golden State Site Loss Reporting Issue

27. Golden State originally proposed as its transmitter site property owned by Anamax Mining Company (Anamax) (Tr. 343–344). Golden State's reliance upon use of the site was based upon a letter dated October 15, 1976 from Dale F. Kittel, director of land management, Anamax, to William A. Youdelman, a vice president of Golden State (Tucson FM Ex. 23). Kittel's letter said that "we believe that a reasonable arrangement can be made respecting fees charged as rentals, permission for access and other related matters."

28. By letter dated January 31, 1979, D. R. Russell of Anamax wrote Youdelman that Anamax had no sites available for either lease or purchase (Tucson FM Ex. 24). This letter came to Golden State and was forwarded unopened to Youdelman, who was no longer with Golden State, at his last known address in California. The letter was subsequently returned to Golden State as undelivered and was opened and shown to Scholz sometime in mid-March 1979 (Tr. 379–380, 403, 369, 384–385, 390–391).

29. Golden State attempted to negotiate with Anamax during March-April 1979 to effectuate a retraction of the January 31, 1979 letter (Old Pueblo Ex. 21, p. 4; Tr. 395–402). Golden State's counsel informed Scholz on May 1, 1979 that the negotiations with Anamax had been fruitless (Old Pueblo Ex. 21, p. 4). By letter dated May 7, 1979, Golden State notified the Commission and the parties that it had lost its proposed transmitter site (Old Pueblo Ex. 21, p. 5).

Emergency Power

30. Only TCB proposes an emergency power service at its transmitter site (Tr. 497).

Conclusions of Law

Harassment

31. With resolution of the financial issue designated against TCB in that applicant's favor, the only qualifying matter to be resolved is the harassment issue against GSW, Tucson FM, and Old Pueblo. At the outset, it is noted that Mr. Tillotson, counsel for then applicant GSW, discussed with counsel for then applicant Old Pueblo, Tillotson's inclination to ask questions of Mrs. Rockler respecting her relationship with and withdrawal from TCB and that counsel for Old Pueblo made suggestions as to how this should be accomplished. It is inferred that Old Pueblo was interested in and intended to share in any favorable outcome. Tillotson also advised counsel for Tucson FM of his intention. Counsel expressed an interest in hearing the outcome. It is inferred that Tucson FM also intended to share in a favorable result. These circumstances, and the fact that Old Pueblo's stockholders later gained a 50% interest in Tucson FM, require that there be imputed to Tucson FM a share of the responsibility for the interview.

32. At the time the call to Mrs. Rockler was made, Mr. Rockler had testified that he had acquired his wife's interest in TCB. It was apparent that since Mr. Rockler had increased his ownership in TCB from 52% to 100%, the circumstances surrounding Mrs. Rockler's withdrawal from the corporation might be important to the integration credit to be given TCB for Mr. Rockler's participation. Indeed, TCB had expressly claimed that the withdrawal was involuntary and that therefore Mr. Rockler should be credited with 100% integration

for comparative purposes. In addition, TCB had provided no testimony by Mrs. Rockler nor any medical evidence with respect to her condition. TCB's competitors were left with Mr. Rockler's unsupported lay testimony as to her condition. In those circumstances it was reasonable for any party to attempt to learn facts with respect to Mrs. Rockler's withdrawal. This was difficult because Mr. Rockler had said that Mrs. Rockler was mentally ill and had been suicidal. Because of this claim, Tillotson endeavored to arrange that the interview would be circumspectly handled and the interviewer was instructed to terminate the inquiry on any signs of distress. There is no evidence that the interviewer acted with insensitivity toward Mrs. Rockler or that Mrs. Rockler indicated any upset to the interviewer. The evidence respecting the interview and the succeeding matters concerning Mrs. Rockler is skimpy. While recognizing that TCB's position respecting proof may have been difficult, it, nonetheless, had the burden. The conduct of GSW in interviewing Mrs. Rockler was not shown to be such that any party which shares in the responsibility therefore should be disqualified.

Diversity

33. Under *Morris, Pierce & Pierce*, 88 FCC 2d 713, 50 RR 2d 959, a production company is not considered a medium of mass communications for the purpose of comparative evaluation.[10] Thus Tucson FM suffers no demerit for Simms' ownership of such a company. Neither TCB nor any principal thereof has an ownership interest in any medium of mass communications. Golden State owns an AM station in South Tucson, a city completely surrounded by the proposed city of license. Thus Tucson FM and TCB each have a substantial comparative preference over Golden State with respect to the diversification criterion.

Integration

34. At the time of the hearing, Robert H. Scholz the then 93.05% owner of Golden State, was proposed to be in charge of the day-to-day operation of the station. Scholz was a long-time resident of Tucson and a local broadcaster with many years' experience. There was no other person proposed for integration. It is Golden State's was no other person proposed for integration. It is Golden State's view that notwithstanding Scholz' death, it is entitled to integration credit for his proposed participation because the transfer of his stock from him was involuntary. Golden State relies on *Mid-Florida Television Corp.*, 76 FCC 2d 158, 46 RR 2d 1503, and other cases which are to the effect that an involuntary transfer of ownership after designation permits the applicant involved to maintain but not to improve its integration proposal.

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[10] Absent specific proof not developed here.

35. But those cases involve situations where the applicant's integration proposal was improved by reason of the involuntary transfer and not where the proposal was diminished or lost. No cases involving the latter situation have been cited. The whole matter of integration credit has to do with selection of the applicant which will best function in the public interest.[11] There is no benefit to the public in awarding a license to an applicant with a proposal rendered impossible by the death of a principal. Golden State, since the death of Scholz, has no integration proposal. the death of Scholz, has no integration proposal.

36. TCB, in its application, proposed that Thomas Rockler, its 52% stockholder, would be full-time general manager, news director, and public affairs director. After designation, but prior to hearing, Mr. Rockler acquired the 48% of TCB owned by his wife. The voluntariness of the transfer is argued by the parties as is the question of whether Mrs. Rockler's participation was ever significant enough to be worthy of integration credit. TCB offered no evidence as to any proposed participation in station affairs by Mrs. Rockler. Thus at designation there was a 52% integration proposal and any transfer of Mrs. Rockler's stock to her husband, whether voluntary or involuntary, could not improve TCB's integration proposal. See *Mid-Florida Television Corp., supra*, and cases there cited.

37. Mr. Rockler has been a Tucson resident since 1972 and is a member of the Chamber of Commerce of that city. He broadcast news and had a music program on the University of Kansas station while a student before 1972.

38. At desgination time, John W. Teal owned 52% of the stock of Tucson FM and Charles G. Simms owned 4%. The balance was owned by Sarah Grace who, after designation, sold her stock to Teal. Thereafter the settlement agreement between Tucson FM and Old Pueblo diminished Teal's stock ownership to 48% and Simms' to 2%. Teal proposes to work 40 hours per week as a general manager of the station and Simms proposes full-time work as the public affairs director. Credit for Teal is enhanced by local residence, some audio production work, and by his experience as an audio engineer. Simms' credit is enhanced because he is a member of a minority group, has experience in the production of radio shows, resides in Tucson, and has several years' experience as an announcer and audio director for broadcast stations.

Comparative Coverage

39. Tucson FM enjoys a significant advantage because it would bring a first nighttime service to 5,564 more people and to an area of

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[11] The rule against comparative improvement after designation considers another public interest aspect of the comparative process, that of the elimination of a scramble to improve position until the day the decision is final.

2,092 more square miles than will either TCB or Golden State. The advantage is clearly Tucson FM's even though TCB and Golden State would serve the town of Willcox (population 2,568) with a fourth daytime service and Tucson FM would not reach that community. See *RAM Enterprises, et al.*, 57 FCC 2d 844, 35 RR 2d 1507.

Miscellaneous Matters

40. TCB enjoys a minor comparative credit because it is the only applicant which proposes an emergency power generator.

41. Chargeable to Tucson FM are any comparative demerits by reason of any failure to report respecting Sarah Grace, any failure by Peter Marcus to report Old Pueblo's employment arrangements with Barbara Marcus and Alva Torres, any deficiencies in the ascertainment efforts of WWCO, and any demerits resulting from any harassment of Mrs. Rockler.

42. While it is clear that Grace formed the intent to withdraw her financial support from Tucson FM in the fall of 1977 and shortly thereafter so advised the other principals, she did not execute her intention until the latter part of March of 1978. She maintained the capacity to fulfill her commitment until then. The early April 1979 report of her withdrawal was well within the time constraints imposed by Section 1.65.

43. The evidence relating to the employment agreements reached by Peter Marcus with Alva Torres and with barbara Marcus indicates that by early January 1979, it had been settled that Alva Torres would be a part of the Old Pueblo operation and that by mid-January agreement had been reached with Barbara Marcus. Their employment was not reported until mid-March of the same year. It It is not shown that there was any intent to gain advantage by tardily reporting or that any could have been gained. Accordingly, the short delay is *de minimis* and no comparative demerit is assessed.

44. What has been previously said about the harassment matter is pertinent here. TCB, having the burden, has not shown conduct of such a nature as to provide support for a comparative demerit.

45. The records of WWCO clearly indicate wholesale deficiencies in at least recording ascertainment efforts. A minor comparative demerit is assessed against Tucson FM.

46. Golden State is chargeable for any demerit that may be appropriate by reason of the forfeiture paid by KHYT for violation of rule 73.1212 and for the alleged failure to timely report the loss of its FM transmitter site.

47. Golden State offered no evidence relative to the KHYT matter beyond a statement by Scholz that he did not believe there had been a violation of the rules. It does not appear that the same violation occurred over a long period of time or was one of a series of other violations. No demerit will be assessed.

48. The failure to report the loss of the transmitter site involves

a delay of a week or two beyond the 30 days prescribed in Section 1.65 after Golden State's counsel advised it of the finality of the Anamax position. The delay is not shown to have disadvantaged anyone or to have been designed to do so. The matter is *de minimis* and no demerit will be assessed.

Ultimate Conclusions

49. Golden State's diversity position and the unfortunate failure of its integration proposal place it clearly in last place in the comparative evaluation.

50. As between TCB and Tucson FM, the diversity criterion leaves no comparative difference because neither has an interest in any medium of mass communications. While the percentages of full-time integration of TCB and Tucson FM are close, 52% and 50%, respectively, and while there is authority that differences of an even greater amount are essential equality (52.63% and 60% in *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 777, 19 RR 2d 942), the particular percentages here mean the difference between positive and negative control. A small credit is therefore due TCB respecting quantitative integration. This credit is not, however, the clear quantitative difference referred to in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409, which may not be overcome by qualitative differences. Both applicants' integrated principals have Tucson residences and none have significant community involvement. But Tucson FM has a qualitative preference for the involvement of its 2% stockholder Simms, a Black, who is proposed to be full-time public affairs director, and for the greater broadcast experience of Simms than that of Rockler. There being only a small quantitative difference between Tucson FM and TCB, the qualitative difference gives Tucson FM a small integration preference.

51. The decisive factor is the Tucson FM preference for its superior coverage. It reaches an appreciably larger nighttime "white area" than does TCB. This comparative preference is easily sufficient to overcome Tucson FM's minor demerit for the WWCO ascertainment deficiencies and the small preference due TCB for its emergency generator.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the rules, the application of Tucson FM Broadcasting Corporation for a construction permit for an FM station in Tucson, Arizona IS GRANTED; the application of Golden State Broadcasting Corp. IS DENIED; and the application of Tucson

Community broadcasting, Inc. IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION
FREDERIC J. COUFAL, *Administrative Law Judge*

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[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Common Carrier, Mergers and Acquisitions

> Order adopted granting transfer of control of Southern Pacific Communications Company and Southern Pacific Satellite Company's licenses and authorization to GTE Corporation.
> –*GTE Corporation & Southern Pacific Co.*

FCC 83–269

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of GTE Corporation and Southern Pacific Company for Consent to Transfer Control of Southern Pacific Communications Company and Southern Pacific Satellite Company	File No. ENF-83–1

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released July 1, 1983)

BY THE COMMISSION: COMMISSIONERS FOGARTY AND SHARP NOT PARTICIPATING.

1. Before the Commission is an application filed by GTE Corporation (GTE) and Southern Pacific Company (SP) pursuant to Sections 212, 214 and 310(d) of the Communications Act[1] as well as Parts 21, 25, 62 and 90 of the Commission's Rules[2] seeking consent to

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[1] SP or its subsidiaries hold authorizations from this Commission to provide common carrier communications service regulated under Title II of the Communications Act as well as radio licenses granted pursuant to Title III of the Act. Section 310(d) provides generally that no radio construction permit or license shall be transferred without an application to the Commission and our finding that the public interest, convenience and necessity will be served. Section 212 makes it unlawful for any person to hold the position of officer or director of more than one carrier subject to the Act without Commission authorization. Finally, Section 214 provides in pertinent part that no carrier shall acquire or operate any line or engage in the transmission over such line unless it first obtains from the Commission a certificate that the present or future public convenience and necessity requires such construction or operation.

[2] 47 CFR Parts 21, 25, 62, and 90 concern, respectively, implementation of domestic public fixed radio service; satellite communications; interlocking directorates; and private land mobile radio services. Additionally, we note in passing that the Common Carrier Bureau, *inter alia*, requested the applicants to submit information pursuant to Section 63.71 of the Commision's Rules, which requires that a carrier planning to discontinue, reduce, or impair service notify all customers of the change. Applicants argue in response that such a notice procedure is unwarranted because SPCC customers would in any event continue to take service

transfer control of domestic and satellite radio licenses as well as the service authorizations of Southern Pacific Communications Company (SPCC) and Southern Pacific Satellite Company (SPSC) from SP to GTE.[3] The application provides that GTE will acquire all of the stock of SPCC and SPSC for approximately $737 million, and also assume at least $100 million of those companies' debts. GTE contends that through the infusion of capital into SPCC and SPSC, GTE can make both companies strong competitors in the nationwide interexchange voice telecommunications market. For the reasons discussed below, we conclude that transfer of the subject authorizations and licenses as conditioned will serve the public interest, convenience, and necessity, and, accordingly, we grant the application.

BACKGROUND AND CONTENTIONS

2. The acquiring entity, GTE Corporation is a holding company. Through subsidiaries, it engages in communications operations, the manufacturing of communication products, and the planning of network systems and operations. In 1982, GTE and its subsidiaries employed nearly 200,000 people and had total revenues and sales of over $11 billion. One subsidiary, GTE Service Corporation, offers consulting and advisory service to the other GTE companies. Still other subsidiaries provide services relating to financial, insurance and data processing activities.

3. GTE's business operations are divided into four groups. The Communications (Telephone Operating) Group is the largest and accounts for over 65% of total revenue and sales. Taken as a whole, GTE's landline telephone companies comprise the largest independent telephone system in the United States, serving approximately 16,085,000 telephones in 7,500 communities in portions of 31 states. Among these, the GTE Companies of California, Florida and the Southwest account for the largest portion of total telephone revenues. In addition, through its ownership of Anglo-Canadian Telephone Company, GTE, is involved in the furnishing of telephone service in Canada and the Dominican Republic. Also part of the communications group is GTE Satellite Corp. (GSAT) which in

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under existing tariffs. Alternatively, the applicants request a waiver of the rule, in part on the theory that notification to 500,000 customers would be a hardship. While there may be a technical discontinuance of service when one carrier transfers responsibilities for its operations to another, here it would be burdensome to notify 500,000 customers and it does not appear that customers will actually experience any discontinuance or impairment of service. Therefore, we find that a waiver of Section 63.71 is justified.

[3] Also before us are petitions to deny or comments filed by MCI Telecommunications, Inc. (MCI), the State of Hawaii (Hawaii), American Satellite (Amsat), Satellite Business Systems (SBS), and U.S. Telephone (U.S. Tel.). The applicants have opposed or answered these petitions, and all parties filed replies to the opposition. See Appendix A for a list of the pleadings filed.

addition to owning three earth stations for joint operations of a domestic satellite network with the American Telephone and Telegraph Company (AT&T), is authorized by this Commission to construct three satellites of its own and operate two of them in orbit.

4. The GTE Communications Products Group produces a wide range of communications systems equipment and service. This group sells various types of equipment to GTE telephone operating subsidiaries as well as to non-affiliated telephone companies, government agencies, industrial companies, railroads and electric utilities. Sales for 1982 were $2.5 billion.

5. The GTE Electrical Products Group manufactures lighting and electrical products for residential, commercial, industrial and photographic use. It also, through its Precision Materials unit, manufactures and markets custom parts, components and materials. Electrical Product sales totaled $1.6 billion for 1982.

6. The fourth and final operation, GTE Telecommunications Group, through GTE Telenet, develops and markets advanced data communications systems. GTE Telenet's "packet-switched" network is used by approximately 600 businesses and government organizations providing communications between a variety of computer and data terminals. In 1981, this group had sales of $105 million.

7. The transferor, Southern Pacific Company, is also a holding company. In addition to communications, it is engaged, through subsidiaries, in rail, truck, petroleum pipeline, and coal slurry pipeline transportation, land and natural resource development, and financial services.

8. SPCC, a wholly-owned subsidiary of Southern Pacific Company, is a domestic communications common carrier which provides transmission primarily in the form of switched intercity voice and data telecommunications. SPCC owns and operates a microwave network of over 46 million circuit miles extending into about 260 metropolitan areas in 45 states and the District of Columbia. In 1981, SPCC added over seven million circuit miles to its network with the completion of a new southwestern microwave route connecting Washington, D.C., Chicago, Atlanta, New Orleans and Houston. Service was also extended into Florida and the Pacific Northwest via leased facilities.

9. The company's principal business, Sprint, is a long-distance communications service accessed through regular local exchange telephone lines. As of the end of 1982, Sprint had more than 2,300 employees, and served 535,000 business and residential customers. SPCC has supplemented Sprint with a new service, Sprint Universal Service, which will allow customers to place calls to any telephone in the continental U.S. The remainder of SPCC's business is derived from the leasing of private circuits to about 1,100 corporate and government users, and from market and support services such as leasing of facsimile equipment. In 1982, SPCC had operating

revenues of $393.4 million, an increase of $161.9 million over 1981. Income from its operations was $104.0 million. The total assets of this company in 1982 were $477.1 million.

10. SPSC, a wholly-owned subsidiary of SP, is authorized by this Commission to provide domestic satellite communications service but is not yet operating. As matters now stand, under a contract awarded by SP in 1981, RCA Corporation is to build three satellites for SPSC at a cost of about $123 million. Under this arrangement, two of the satellites are scheduled for launch in 1984 with the third satellite being held as a ground spare. Approximately 20 percent of the satellites' capacity will be used for SPCC telecommunications requirements, to increase circuit capacity on heavily used routes, and to extend service into areas of the country not covered by SPCC's existing microwave network. The remaining capacity will be made available on both common carrier and non-common carrier bases to television program suppliers and other major users of communications. SPSC has already received Commission authorization to sell 10 transponders on Spacenet II, the second of its satellites. *In the Matter of SPSC*, FCC 82–512, released November 29, 1982.

11. Under the terms of the proposed transfer, the parties agree that GTE will acquire all of the stock of SPCC and SPSC. The prices for each is to be calculated in accordance with the terms of the Stock Purchase Agreement, dated October 15, 1982. See Exhibit I to the Application. The price to be paid for the SPCC stock is $700 million in cash, less a refinancing adjustment of approximately $22 million to be precisely fixed by an investment banking firm mutually agreeable to the applicants. The applicants further state that the price to be paid, in cash, for the SPSC stock is an amount equal to its stated value on the books of SPSC together with additional paid-in capital. The applicants estimate this price to be approximately $59 million. As a result, the estimated net price for the transfer would be $737 million.

12. The desire by SP to sell SPCC/SPSC appears to have been precipitated by the holding company's assessment of its overall capital requirements for the next several years. SP reasons that the imminent break up of the Bell System will result in intensified competition in interexchange telecommunications, and therefore require that SP infuse substantial additional capital into SPCC's microwave network if that carrier is to compete effectively. At the same time, SP estimates that it will require larger capital investment for other endeavors, particularly railroading. Apparently unable or unwilling to do both, SP has made a corporate decision to concentrate its efforts on railroading. GTE, in turn, states that it is in a position to provide the necessary capital for infusion into SPCC/SPSC to ensure its continuity as a vigorous and viable interexchange competitor. On this principal ground, the applicants

assert that the transfer is in the public interest and consistent with this Commission's pro-competitive policies.

13. The petitions to deny and comments challenge these assumptions on a number of grounds. Initially, MCI and SBS dispute GTE's financial ability and qualification to acquire and infuse necessary capital into SPCC/SPSC while at the same time adequately maintaining GTE's local service. Furthermore, even assuming financial viability, several petitioners foresee numerous anticompetitive effects resulting from GTE's acquisition of an interexchange carrier. Thus, on one level, they perceive a potential for GTE to favor SPCC over other interexchange carriers requiring access to GTE's local exchange facilities. They claim such favoritism could be in the form of discriminatory rates; unequal technical interconnection; or cross-subsidization by GTE's monopoly and competitive services. And, on another level, they fear that the addition of an interstate microwave network to GTE's existing telephone, manufacturing, and planning operations will discourage competition by creating a vertically integrated company which emulates the Bell System structurally prior to divestiture. Other petitioners take the view that the transfer would unduly concentrate GTE's market power in the satellite field. Finally, because GTE's subsidiary, the Hawaiian Telephone Company, is already the monopoly provider of local exchange service in the state as well as a provider of interexchange toll and private line services to the Mainland, the state of Hawaii asks that we impose conditions to ensure that the benefits of competition are not denied to its citizens. Before disposing of these issues, however, we need address several preliminary procedural matters.

14. MCI, SBS, and Hawaii argue that a full evidentiary hearing is warranted before the Commission may approve this transfer. Relying on the decision in *U.S. v. F.C.C. (SBS)*, 652 F.2d 72 (D.C. Cir. 1980), they contend that the requirements for a trial type hearing under Section 309(e) of the Act have been met because the petitions have raised genuine factual questions and further, because the Commission lacks sufficient information on which to make an informed judgment.[4] See 652 F.2d at 88–89.

15. As petitioners correctly imply, the determination of whether to have a full evidentiary hearing is by no means a mechanical process; rather, it is initially a matter of agency discretion in which we are required to evaluate the need for such a hearing under our public interest responsibility. *SBS*, *supra*, 652 F.2d at 90, n. 87. As that decision also prescribes, the Commission must exercise that judgment with great care, since further evidentiary inquiry may be a

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[4] Section 309(e) specifies that if "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding (of public convenience and necessity). . ., it shall formally designate the application for a hearing. . . ." The required hearing is described as a "full hearing in which the applicant and other parties in interest shall be permitted to participate."

"potent instrument for delay". *Id.* at 91. Indeed, the question of delay seems particularly pertinent here, since the stock purchase agreement provides that either GTE or SP may withdraw if this Commission does not act by July 1, 1983.[5] Moreover, in the interests of employee and customer certainty, the applicants have asked for expedited action. At the same time, it appears that action by the U.S. District Court for the District of Columbia on the proposed final judgment recently agreed to by GTE and the Department of Justice (DOJ)[6] awaits our resolution of this transfer to the extent that the comment period under the Tunney Act[7] will not end until 20 days after this Commission disposes of the application. In other words, if this Commission were to find reason to deny the application under the Communications Act, the antitrust proceeding would become moot.

16. The question, then, is whether the record now before us is sufficient to resolve the two essential legal issues before us, namely, whether GTE is financially qualified to acquire and capitalize SPCC/SPSC without harming local telephone service and, if so, whether the acquisition would substantially lessen competition to the detriment of the public interest.

17. We judge the record before us more than ample for these purposes. Already before us are extensive public comments on both the application and the additional detailed financial information requested by the Common Carrier Bureau. See para. 30, below. Moreover, with regard to the antitrust allegations, we have been able to draw upon a number of sources, including, but not limited to, our own studies of the marketplace in recent Commission proceedings (*e.g.* the *Competitive Carrier Rulemaking Proceeding*, Docket No. 79–252[8] and the *MTS/WATS Market Structure Proceeding*, Docket No. 78–72); submissions by the parties after examining the Hart-

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[5] *See* Appendix A to Application, Art. XIII, para. 13.02.

[6] Civil Action No. 83–1298. The primary conditions of the proposed final judgment bearing on the issues in this case may be summarized as follows:

1. GTE shall maintain complete corporate and operational separation between the GTE operating companies and SPCC and SPSC. It further provides that GTE/SPCC/SPSC shall not maintain common directors other than the Chief Executive Officer and President of GTE Corporation.

2. GTE telephone operating companies will provide equal local exchange and information access to interexchange carriers and information services providers on a phased-in schedule.

3. The GTE telephone operating companies may provide not only basic exchange telephone services and customer premises equipment but also, through a separate operating division or subsidiary, more sophisticated, enhanced information services.

[7] Antitrust Procedures and Penalities Act, 15 U.S.C. §§ 16(b)-(h).

[8] 85 FCC 2d 1 (1980).

Scott-Rodino materials released by the Federal Trade Commission (FTC) and DOJ[9]; the competitive impact statement and the proposed final judgment negoitated by GTE and DOJ[10]; and, finally, the fruits of the independent negotiations between the state of Hawaii and GTE to resolve the special problems in the islands.[11] As will become apparent below, these submissions and data as a whole form a sound bedrock upon which this Commission can make reasonable and fully supportable findings under applicable principles of law. Moreover, petitioners have not demonstrated that there are any material facts which require further development through an oral evidentiary hearing.

18. The Hart-Scott-Rodino materials just mentioned have also posed other procedural issues which remain to be resolved. At the time of the filing, GTE and SP jointly requested that certain of the documents attached to their application (hereafter "Category I" documents) as well as those documents entitled "Hart-Scott-Rodino materials" (hereafter "Category II") which were submitted to the FTC and DOJ pursuant to 15 U.S.C. § 18a(h) be granted confidential treatment and exempted from public disclosure pursuant to Section 0.457 of our rules. The Common Carrier Bureau ruled that the Category I documents were confidential under 47 CFR § 0.459 of the Rules and thus exempt from disclosure pursuant to 47 CFR § 0.457(d) and Section 554(b)(4) of the Freedom of Information Act. This action was affirmed by the Commission. *GTE Corporation*, FCC 83-72, released February 18, 1983. In doing so, however, the Commission agreed to make the Category I confidential information available for inspection subject to a protective order.

19. With regard to the Category II materials, however, the Commission perceived immense practical and procedural problems in dealing with such a vast number of documents (approximately 160,000 pages.) It therefore ordered that those materials be returned to the applicants, and urged them to reach an agreement with other parties on availability. Subsequently, GTE/SP entered such a protective agreement with MCI, under which the latter was permitted to inspect, *inter alia*, the Category II documents.[12] MCI thereaf-

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[9] The Hart-Scott-Rodino Antitrust Act is an amendment to the Clayton Act providing for pre-merger notification and review by the FTC and DOJ. It enables those agencies to enforce the Clayton Act by means of injunctions before a merger has occurred rather than waiting to institute antitrust proceedings against a newly merged entity. The Act further states that any information or documentary material filed with the DOJ or the FTC pursuant to this section shall be exempt from disclosure except where such material "may be relevant to any administrative or judicial action or proceeding."

[10] *See* footnote 6.

[11] *See* para. 62, *infra*.

[12] We have no knowledge whether the other parties either sought or received access to the Category II documents by means of an agreement.

ter filed additional comments "under seal," that is, on a confidential basis, which purported to analyze further these Category II documents within the scope of the issues originally raised in its petition to deny. As part of this confidential filing, MCI supplied an appendix of the portions of these Category II documents upon which it relied.[13] The applicants have filed a confidential responsive pleading to the contentions in MCI's supplemental analysis, and MCI has replied.

20. In light of the above, we believe a question is raised as to whether the relevant information for which the applicants originally requested confidential treatment should be included in the public record in this proceeding. As noted, the applicants ask that we return them if confidentiality cannot be granted.

21. Under Section 0.459(e) of our Rules, where materials are submitted voluntarily with a request that they be returned without consideration if confidentiality cannot be granted, the Commission may nonetheless make these materials available for public inspection if it finds the public interest so requires. Even assuming *arguendo* that some of these documents might otherwise qualify as confidential commercial and financial information under 5 USC § 553(b)(4), we think the public interest nonetheless lies with making available for public inspection these relatively few documents which have been relied on by MCI or GTE in addressing the issues in this case. GTE may be correct that if these documents are made public, it will be competitively disadvantaged. However, after reviewing the documents carefully we do not think the disadvantage to be so great as to outweigh the benefits of making them public.[14] As explained, this transfer raises important questions of GTE's financial ability to continue to provide adequate local service after acquiring SPCC/SPSC as well as the effects of the acquisition on the burgeoning competitive interexchange marketplace. In these circumstances, we believe the public and the purposes of the Act are better served by making available all materials which have been considered in disposing of those issues.

22. This leaves an outstanding motion by MCI requesting that the Commission, under Section 4 of its protective order released February 18, 1983 (see para. 18 above), permit MCI to submit the Category I and Category II documents in a California Public Utilities Commission (CPUC) proceeding. It would also have us ask for the discovery materials produced in the California proceeding. In their reply, the applicants offer to make available to this Commission upon request all the California documents covered by the protective

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[13] MCI's appendix also contained portions of transcripts in a California proceeding which involves, *inter alia*, the impact of this transfer on GTE service in that state. MCI has filed a motion requesting us to consider this material. We discuss this motion in paras. 22-23, below.

[14] *See* note 9 above.

agreement between GTE/SP and MCI, but object to allowing both the Category I and the Category II documents to be submitted in the California proceeding.

23. Initially, as to inspection of the Category I documents, we find no basis to modify our protective order because the CPUC has made no formal request for modification of our protective order to accord similar treatment for Category II materials does not lie because they are outside the scope of that order. To repeat, our February 18 protective order covers Category I materials but not Category II. Moreover, these latter materials are not in any case within the Commission's control, having been returned to GTE/SP in their entirety. In these circumstances, MCI's proper remedy is to negotiate with the applicants an amendment to their own protective order agreement as to the Category II documents.

24. Furthermore, we see no basis to take applicants up on their offer to make the documents produced in discovery in the California proceeding available to the Commission. As just explained (para. 17), we believe the record already before us is more than ample for disposing of the issues in this case.

DISCUSSION

25. As noted, the proposed transfer of certificates of common carriage and radio licenses calls into play essentially similar responsibilities imposed on us by Sections 214 and 310(d) of the Act to insure that the public interest, convenience, and necessity will not be adversely affected.[15] Subsumed in this is the requirement that we review, as may be appropriate, the citizenship, character, and technical and other qualifications of the transfer applicant. See 47 U.S.C. §§ 310(d) and 308(b). In this case, only the ability of GTE to finance the acquisition and infuse additional capital into SPCC/SPSC is challenged and it appears that GTE, a long term Commission licensee and communications carrier, satisfies the other threshold qualifications.[16] Moreover, even if we find GTE qualified, we must then also ascertain, as part of our Title II and Title III analysis, whether the transfer holds promise for benefiting the public interest, for example by rate and service improvements stimulated by competition. Accordingly, we address first the issue of

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[15] Section 214(a) provides in pertinent part that no carrier shall "acquire or operate any line" unless and until obtaining from this Commission a certificate that the "present or future public convenience and necessity requires or will require the . . . operation of such additional or extended line . . ." Section 310(d) permits a transfer of a radio license upon a finding that the "public interest, convenience, and necessity will be served thereby."

[16] No contention is raised that GTE lacks the expertise to provide service consistent with the public convenience and necessity. Given the company's broad experience in interexchange and satellite communications, we have no reason to believe otherwise.

whether the transferee (GTE) has the financial resources to acquire and finance SPCC and SPSC without adversely impacting its ability to reasonably maintain and, if necessary, expand its present local telephone network.[17]

26. *Financial Qualification.* As mentioned, GTE asserts that the acquisition will result in a significant increase in competition in interexchange telecommunications and a marked expansion of the range of services available to the public. The underlying assumption is that GTE possesses both the financial capability and the motivation to infuse the necessary capital into SPCC/SPSC to make these companies viable competitors of AT&T.

27. At the outset, MCI strenuously questioned GTE's professed financial capability and motivation to finance SPCC and SPSC. In support, MCI submitted with its reply to applicants' opposition a financial analysis which suggested that it was unlikely that GTE could both acquire and foster the growth of SPCC and SPSC without having an adverse impact on its local telephone operations and ratepayers. MCI began by calculating that GTE's total capital requirements in 1983, including the cost of the acquisition, would be approximately $4.05 billion. According to MCI, $2.7 billion of GTE's total 1983 capital requirements would be invested in GTE's current telephone operations, with the remaining $1.35 billion committed to financing the acquisition and capitalization of SPCC and SPSC. In evaluating GTE's ability to generate funds internally, the analysis stated that for the period 1979–1981, GTE's internal capital generation averaged approximately 66%, well below the industry average of 95%. MCI further pointed out that for 1981, SPCC's internally generated funds represented only 40% of its total capital requirements. Based on this performance in generating capital in 1979–1981, MCI estimated that GTE and SPCC could only generate $2.13 billion of the required $4.05 billion internally, and would be forced to raise the $1.92 billion shortfall externally.

28. The analysis then turned to GTE's ability to raise capital externally either through debt or equity. In this regard it emphasized that for the previous five operating years (1977–1981) GTE had raised an annual average of only $760 million externally. Accepting this as roughly the limit of GTE's ability to attract outside capital, MCI contended that it was unlikely that GTE would easily succeed in

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[17] We recognize that the Act does not confer upon this Commission traditional regulatory authority over the provision of intrastate communications service. Rather our responsibilities here flow from the Congressional mandate expressed in Section 1 of the Act to make available, so far as possible to all the people of the United States, "a rapid, efficient nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. Self evidently, were we to permit an acquisition which on its face seemed likely to harm the viability of local service, an adverse impact on interstate and foreign communications would surely not be far behind. *Cf.* MTS and WATS Market Structure, FCC 83-579, released February 28, 1983.

generating the necessary $1.92 billion externally. Alternatively, even assuming that GTE could raise the required $1.92 billion externally, MCI estimated that GTE's present long-term debt ratio of 59% would increase to over 60%, a figure significantly higher than AT&T's 45% or the 52% average for the five next largest independent telephone companies.

29. Given these circumstances, MCI concluded that it was unlikely that GTE could raise sufficient funds to acquire SPSC and SPCC for $750 million, infuse capital into the two companies, and still maintain its current operations. In order to acquire and foster the growth of SPCC and SPSC, MCI contended that GTE would have to divert monies from its local telephone operations and/or raise additional funds externally. MCI perceived that either scenario was likely to be detrimental to GTE's local subscribers. Thus, if needed capital for local telephone operations were diverted to finance the acquisition, MCI stated that the quality of local service would invariably suffer. Alternatively, if GTE were forced to borrow more heavily at higher interests rates to make up the shortfall between its internal fundraising capability and the capital required to acquire and finance SPCC and SPSC, the local ratepayer might have to bear indirectly the cost of the acquisition in the form of higher rates. In short, MCI asserted that without further information, the Commission could not make a reasoned analysis of GTE's financial qualifications to acquire and capitalize SPCC and SPSC.

30. In apparent agreement that neither the application nor GTE/SP's opposition provided sufficient data necessary to make a determination of GTE's financial capability to acquire and capitalize SPCC and SPSC, the Common carrier Bureau solicited further information from the applicants in order to complete its analysis of the application and address the concerns raised by MCI.[18] GTE responded to the Bureau's request on March 17, 1983 and MCI submitted comments on March 24, 1983. The Bureau then followed

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[18] *See*, letter of Chief, Common Carrier Bureau to GTE dated March 11, 1983. There the Bureau requested that GTE provide the following information:

(1) The full purchase price of the acquisition and the source of funds to finance the purchase.

(2) The amount and source of capital GTE plans to infuse into SPCC and SPSC in 1983–87.

(3) A description of the financial and operational impact the acquisition will have on GTE and its telephone operating subsidiaries.

(4) A description of the corporate and operational relationships between GTE and SPCC/SPSC and between GTE's present subsidiaries and SPCC/SPSC.

with a second information request seeking clarification of GT
initial response.[19]

31. The latest information submitted by GTE discloses t
absent the acquisition, GTE's projected consolidated capital requ
ments over the 1983–1987 period are $19.9 billion.[20] Of this amou
91% would be generated internally, while the remaining amo
($1.9 billion) would be obtained externally, with primary reliance
equity. When adjusted to include its investment in SPCC and SP
GTE's consolidated capital requirements over the 1983–1987 pe
would increase from 19.9 billion to $23.1 billion.[21] In other wo
GTE estimates that $3.2 billion would be required to finance
acquisitions and support the growth of SPCC and SPSC over
1983–1987 period. GTE projects raising 86% of this amount inter
ly, and the remaining 14% externally through both debt and equ
financing.

32. MCI, in its supplemental pleadings, essentially takes is
with the reliability of GTE's estimates submitted in response to
Bureau's request. Specifically, it questions the consistency of th
figures with some of GTE's earlier projections. For example, M
notes that GTE's 1983–87 strategic plan projected that, assuming
acquisition, $4.3 billion in external financing would be required
contrasts this with the most recent figure of $3.15 billion submit
by GTE in its April 1 response. These changes in GTE's financ
projections, however, strike us as reasonable. For one thing, we m
take notice that the rate of inflation and the level of interest ra
have decreased in recent months.[22] Moreover, GTE's latest pro
tions address for the first time other factors not mentioned in earl
projections. For example, one such factor is the new Accelerated C
Recovery System[23] which substantially reduces the depreciable
for tax purposes of major categories of capital equipment and ha

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[19] *See*, letter dated March 31, 1983 from Chief, Common Carrier Bureau to Vin
Gallogly, GTE. GTE responded to the second request by letter dated April 8, 1
and MCI filed comments on April 13, 1983.

[20] Appendix B, Table I.

[21] Appendix B, Tables I and IV.

[22] As some evidence that there are decreased capital requirements at the local le
we may take notice that GTE has recently reduced its pending rate incr
request in California from $475 million to $369 million. See General Telephon
California Notice of Intent to File Application for General Rate Incre
tendered August 31, 1982, resubmitted March 31, 1983, before the Public Util
Commission of the State of California.

[23] Economic Recovery Tax Act of 1981, § 201, 26 USC § 168 (1981). Acting ou
concern that the existing rules for determining depreciation allowances did
provide adequate investment stimulus essential for economic expansion, the 9
Congress replaced that system of depreciation with the Accelerated Cost Reco
System (ACRS). Enacted as Section 201 of the Economic Recovery Tax Ac
1981, ACRS permits recovery of capital costs for most tangible deprecia
property using accelerated methods of cost recovery over predetermined reco
periods. Under ACRS the entire cost or other basis of eligible propert

positive impact on the internal generation of funds. GTE letter of April 8, 1983, *supra*. Also, the Commission has recently authorized accounting rule changes which are likely to enhance GTE's cash flow.[24] Under these circumstances, we see no basis not to consider GTE's latest figures for purposes of our financial qualifications analysis.

33. GTE has provided the Commission with the following information: detailed estimates of the cost of the proposed acquisition; evidence of its ability to finance the acquisition; and five-year projections of the financial impact that the acquisition will have on its existing operations. In reviewing this latest submission, our intention is to determine whether GTE has the financial resources necessary to acquire SPCC and SPSC, and whether its resources are also sufficient to avoid any future adverse impact on its local telephone operations. Thus, on one level, we must look to the five year projections to ascertain whether there is reason to believe that the local companies would suffer over time as result of the acquisition. And, as a separate matter, we must ascertain whether GTE will have sufficient resources immediately to purchase SPCC/SPSC at the stated price while meeting other financial commitments.

34. GTE estimates its capital funding obligations for 1983 through 1987, including the cost of acquiring and financing SPCC and SPSC, to be $23.1 billion. Of this amount, GTE asserts that it will be capable of generating approximately $20.0 billion internally. While GTE's historic performance in generating capital externally does not reflect this alleged capability, we are nonetheless confident that GTE can generate this amount in the future. As mentioned, the new Accelerated Cost Recovery System and the Commission's accounting system revisions can be expected to contribute significantly to GTE's ability to generate funds internally.[25] In addition, the profitability of GTE's existing operations has increased over the

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recovered, eliminating the salvage value limitation under previous law. ACRS is expected to stimulate capital formation and increase productivity. See, S. Rep. No. 144, 97th Cong, 1st. Sess. (1981).

[24] See, Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) ("Property Depreciation") and, Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, 85 FCC 2d 818 (1981) ("Uniform System of Accounts"). In Property Depreciation the Commission amended its accounting regulations to permit depreciable property to be placed in groups comprised of units with expected equal life for depreciation under the straight line method so as to "calibrate more closely the flow of revenues with the recovery of capital." 83 FCC 2d at 281. In Uniform System of Accounts, the Commission amended its accounting regulations to provide for expensing rather than capitalization of the inside wiring portion of station connection costs. Also amended were rules related to accounting for sale of carrier provided terminal equipment. See also note 25 below.

[25] GTE estimates that over the 1982-1987 period, ACRS will increase its internal generation of funds by approximately $1.6 billion while the Commission's

years and we have no reason to doubt that this trend will not continue.[26] Furthermore, the cash-flow from SPCC/SPSC is expected to contribute positively to GTE's consolidated cash flow by 1987. GTE letter of April 8, 1983, *supra*, at p. 7. Given SPCC's past pattern of growth we have no reason to question this expectation either.[27]

35. GTE plans to raise externally the remaining $3.15 billion of its total projected capital requirements for 1983–1987. Of this amount approximately $1.479 billion is obligated in 1983, due primarily to the one-time acquisition cost.[28] GTE will raise the necessary $3.15 billion from employee and shareholder investment plans, through public sales of debt and equity and through borrowing from commercial banks. In regard to the latter, GTE has secured the commitment of a consortium of twenty banks to provide the required credit lines to finance the stock purchase.[29] Moreover, given its enhanced capability to generate funds internally, GTE projects that the amount of external resources required for all GTE operations will decrease to zero by 1987. Consequently, GTE projects that this will lead to a long term decrease in its debt/equity ratio from 56.3% in 1982 to 49.6% in 1987.

36. In short, GTE contends that the projected capital requirements of SPCC/SPSC for the 1983–1987 period will have no adverse impact on its telephone operating companies.[30] This assertion seems reasonable. The projected annual growth rate for GTE telco plant additions for the 1983–1987 time period averages 11% compounded. This would seem to be an ample growth rate by industry standards[31] and, in addition, would imply that GTE does not plan to constrain the growth rate of its telephone companies in order to finance the acquisition. Moreover, under the terms of the conditions we impose as well as the proposed final judgment negotiated by GTE and DOJ, GTE is obligated to operate SPCC separately from its local exchange operations, thereby helping to assure that funds infused into SPCC will not be at the expense of the local telephone companies. This

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accounting rule changes are expected to enhance this amount by an additional $1.7 billion.

[26] In the period 1977–1982, GTE's income from continuing operations, applicable to common stock, increased at a annual rate of 9.4%. Source: *GTE Corporation Annual Report*, 1982.

[27] In 1982 SPCC's income from continuing operations totaled $104.0 million, a $65.1 million increase from its 1981 total of $38.9 million. Source: *Southern Pacific Company Annual Report*, 1982.

[28] *See* Appendix B, Table I.

[29] *See*, letter dated April 29, 1983 from Vincent Gallogly, GTE to Chief, Enforcement Division, Common Carrier Bureau. There, GTE has provided the Bureau with the names of the banks which have agreed to furnish to GTE credit lines, aggregating $775 million, for purposes of the acquisition.

[30] *See* Appendix B, Tables II and IV.

[31] Annual growth rate in book cost of telephone plant for all carriers filing with the Commission was 9.5% for the 5-year period 1977–1981. (Source: *Statistics of Common Carriers* year end 12/31/81; FCC). We also observe in passing that GTE's telco growth for 1977–1982 was 10.8% (1982 GTE Annual Report).

latter safeguard should make it easier for regulatory bodies and customers alike to monitor the situation.

37. *Competitive Impact.* Having determined that GTE is qualified to acquire and foster the growth of SPCC and SPSC, we may now examine the alleged anticompetitive aspects of the proposed transfer.

38. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country," the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[32] Under Section 11 of the Act, moreover, this Commission is obliged to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[33] The courts have construed this to mean that "the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[34] In other words we are required to consider anticompetitive consequences as one part of our public interest calculus.[35]

39. The applicable judicial precedents direct that the Section 7 analysis begin with a determination of the relevant market in which competition may be threatened.[36] In turn, to ascertain the market affected for purposes of Section 7, we must delineate both the relevant "product" market (i.e. the "line of commerce") as well as the relevant "geographic" market (i.e. "section of the country").[37] To assist us in this endeavor, we have employed the most recent Department of Justice *Merger Guidelines (Guidelines).*[38] In particular, we have found them useful in defining the relevant product and geographic markets; ascertaining the type of merger involved (i.e. horizontal or non-horizontal); and, finally, evaluating the impact of the proposed merger on competition in those markets.

40. As explained above, our initial task is ascertainment of the

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[32] 15 U.S.C. § 18.

[33] 15 U.S.C. § 21.

[34] U.S. v. FCC (SBS), *supra*, 652 F.2d at 88.

[35] Id. at 87, citing Denver and Rio Grande Western Railroad v. U.S., 387 U.S. 485 (1967).

[36] U.S. v. E. I. DuPont de Nemours and Co., 353 U.S. 586 (1957); United States v. Continental Can Co., 378 U.S. 441 (1964); Standard Oil Co. v. United States, 337 U.S. 293, 299–300 n. 5 (1949); U.S. Department of Justice, *Merger Guidelines-1982*, 2 Trade Reg. Rpts. (CCH) para. 4500, at para. 4502 (Guidelines).

[37] Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

[38] While the standards set forth in the *Guidelines* do not have the force of law and are not binding on either DOJ or the judiciary, a number of courts have nevertheless accepted them as a useful tool in analyzing mergers. U.S. v. Hammermill Paper Co., 429 F. Supp. 1271, 1280 (1977).

relevant "product" market. For the narrow purposes of this proceeding, we define the relevant market of products competing with the interexchange services of GTE/SP as all interexchange telecommunications services, as most parties have argued.[39]

41. There is some controversy among the parties, however, as to the relevant geographic market. GTE would define this market as nationwide, while MCI would confine it to only those parts of the U.S. from which users of GTE facilities can make long distance calls.

42. We find MCI's assessment unduly narrow. The geographic aspect of the market is traditionally defined as the area in which sellers of the particular product operate. *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970). Moreover, the geographic aspect of the relevant market must reflect considerations of supply and demand substitutability. *See Guidelines*. In this case, supply substitutability shows that the relevant geographic market of interexchange telecommunications suppliers is nationwide. Several interexchange suppliers have nationwide networks with the capability to provide alternate geographic routings. For example, SPCC's network extends into about 260 metropolitan areas in 45 states and the District of Columbia. At present, approximately 76 million telephone main stations and equivalent main stations or 91% of the total national main stations and equivalent main stations have the capability to originate Sprint services.[40] Also, satellite and microwave interexchange suppliers have the ability rapidly to enter new geographic areas or to supplement their capacity in areas they already serve by diverting capacity from other areas or employing unused capacity. As for demand substitutability, many customers consider an interexchange carrier's ability to serve multiple points and its prices for service to those geographic points when choosing a supplier. Consequently, we do not agree that the geographic market can properly be limited to only particular areas of the country served by GTE; to the contrary, as we see it, the relevant geographic area of competition facing the proposed GTE/SPCC entity would be national in scope.[41]

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[39] In opposing GTE's acquisition of SPSC, U.S. Tel. would apparently carve out domestic satellite service as a submarket. We have previously found, however, that satellite and terrestrial communications systems are reasonably interchangeable, and thus that satellite communications do not constitute a distinct submarket. See, Satellite Business Systems, Inc., 62 FCC 2d 997 (1977), *recon. denied*, 64 FCC 2d 872 (1977), *affirmed sub nom.* U.S. v. FCC, 652 F.2d 72 (1980).

[40] *See* letter of SPCC to Chief, Enforcement Division, Common Carrier Bureau dated May 6, 1983.

[41] For its part, Hawaii contends that although the relevant geographic market is national in scope, the state of Hawaii is nonetheless a readily definable and separate telecommunications market and as such constitutes a relevant geographic market for the purpose of reviewing this acquisition. Hawaii argues that for commercial and regulatory purposes it is generally treated as separate and distinct from the Mainland, and stresses that telecommunications services are provided to Hawaii on a rate schedule different from that applicable in the

43. Having determined the relevant product and geographic markets, we may now ascertain the type of merger involved here. In this connection, the *Guidelines* provide for two separate and distinct categories of mergers, namely, horizontal, i.e. between firms in the same market, and non-horizontal, that is, between firms that do not operate in the same market. There are both horizontal and non-horizontal elements here, but, as we discuss below, neither would appear to threaten competition.

44. In addition to local exchange access for interexchange traffic, subsidiaries of GTE provide some interstate services: Hawaiian Telephone Co. provides interexchange message toll, private line, and ancillary services between Hawaii and the Mainland; GSAT participates in the provision of interstate communications;[42] and Telenet provides packet-switched data service. Since SPCC also provides interexchange telecommunications services, the acquisition may be said to have some horizontal characteristics. Nonetheless, available data show that the respective market shares of GTE and SPCC in the relevant market are very small, and will be so even after launches of their authorized satellites. In addition, there have been many recent successful entrants in that market. In these circumstances, we find that this acquisition will not increase substantially concentration in the relevant market or, given the presence of AT&T, allow GTE/SPCC to obtain market power.[43]

45. GTE also can be viewed as primarily a local exchange carrier

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Mainland. By eliminating SPCC as an independent carrier, Hawaii asserts, GTE will further solidify its monopoly position in Hawaii and use that power to foreclose the market to future potential competitors. We see no need, however, to ascertain whether Hawaii is a distinct geographic submarket for purposes of our Clayton Act analysis. Reduced to essentials, Hawaii's real concern in this proceeding is that approval of that acquisition would restrict the state's access to the benefit of increased competition in the telecommunications marketplace. We agree that to the extent GTE, through its subsidiary Hawaiian Telephone Company, is in the unique position to provide both local exchange and interexchange services to the state, some safeguards are warranted. Indeed, we construe GTE's offer to accept certain conditions in this regard as conceding in effect that the unique circumstances in Hawaii justify special remedial treatment. *See*, discussion at paras. 61 and 62, below.

[42] *See* GTE Satellite Corporation, 84 FCC 2d 562 (1981), and para. 3 above.

[43] We have already determined in the Competitive Carrier Rulemaking Proceeding, *supra*, that the nationwide interexchange telecommunications market is comprised of AT&T, the domestic record carriers, the specialized common carriers (including SPCC), the domestic satellite carriers, resale carriers, and the miscellaneous common carriers. AT&T is by far the largest participant in this market with over 80.7% of the toll service revenues generated in 1980. For the same period, GTE had approximately 10%. However, this figure greatly overstates GTE's presence as a supplier of interexchange services because most of these revenues are for the provision of exchange access for toll services provided by AT&T. SPCC and MCI together accounted for a little over 1%. Source: S.REP. 170, 160–161, (97th Cong., 1st Sess., 1981) and GTE Statistical Supplement to 1981 Annual Report.

which now seeks to merge with an interexchange carrier. As such, the acquisition has characteristics of a non-horizontal merger. It is this potential vertical integration of GTE, the largest independent telephone company, and SPCC, a national interexchange carrier, which has engendered the greatest controversy in this matter. In the case of non-horizontal mergers, the *Guidelines* describe two primary areas of concern: (1) the possible elimination of an entrant who might otherwise be poised to enter the market on its own as a new competitor, but instead agrees to merge with a firm already in the market; and (2) potential competitive harm which might result after the merger, such as the facilitation of collusion, the evasion of rate regulation through discrimination or cross subsidy, and the creation of future barriers to entry.[44]

46. Even in the context of a concentrated market, the concern about elimination of potential competition through a non-horizontal merger arises solely when the acquiring firm (1) is the only, or practically the only, likely entrant, and (2) the firm could have entered on its own or by acquiring a small (toehold) firm rather than entering as a major competitor.[45] The first criterion is not satisfied here since there are numerous other potential entrants into interexchange telecommunications services. Moreover, several independent telephone companies have recently moved toward providing interexchange sevices outside their partnership arrangements with AT&T.[46] There would thus seem to be no barriers to future entry into the provision of interexchange services through resale; to the contrary, it seems reasonable to expect substantial entry and expansion through new satellite and terrestrial facilities.[47]

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[44] *See Guidelines* at para. 4503.

[45] *See, e.g.*, United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Falstaff Brewing Co., 410 U.S. 526 (1973); Tenneco v. Federal Trade Commission, 689 F.2d 346, 352–358 (2d Cir. 1982); Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System, 638 F.2d 1255, 1264–72 (5th Cir. 1981); BOC International v. Federal Trade Commission, 557 F.2d 24 (2d Cir. 1977); Federal Trade Commission v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977); Kennecott Copper Corp. V. Federal Trade Commission, 467 F.2d 67 (19th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); United States v. Phillips Petroleum Co., 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974); *Guidelines* at para. 4504.

[46] As examples, Rochester Telephone and Southland Telephone resell WATS through their affiliates; United Telephone has a controlling interest in ISA Communications, a resale carrier offering satellite digital communications services; Continental Telephone owns fifty percent of American Satellite; and Centel is participating in planning a network to connect cable companies in major metropolitan areas (Videopath).

[47] See, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, 60 FCC 261 (1976), *recon.* 62 FCC 2d 588 (1977), *aff'd* AT&T v. FCC, 572 F.2d 17 (2d Cir.) *cert. denied*, 439 U.S. 875 (1978); Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82–122, 91 FCC 2d 483 (1982); Report and

47. As for the companion concerns of *de novo* entry and toehold acquisition, entry into a market by acquiring a small firm in the market and expanding it into a substantial competitive force may have a procompetitive effect comparable to new entry. When the acquired firm has a market share of five percent or less, the Department of Justice has said it is unlikely to challenge the acquisition.[48] Here, as noted, SPCC has a *de minimis* share of the relevant market.[49] Therefore, when viewing this acquisition as non-horizontal, we do not see a substantial threat to competition.

48. This brings us to the remaining potential competitive problems arising from vertical mergers, such as the facilitation of collusion, the creation of barriers to entry, and the evasion of rate regulation.

49. Unquestionably, the proposed transfer of control would result in a GTE whose vertical structure resembles that of the current Bell System to the extent that the provision of domestic interexchange service would now be added to the local exchange, manufacturing and planning operations already offered by the holding company. Both MCI and SBS assert that this vertical configuration would be, on its face, anti-competitive and inimical to the public interest. Initially, petitioners claim the acquisition would allow GTE and its affiliates to favor SPCC in acessing the local network. Furthermore, according to MCI, GTE's proposed vertically integrated structure would allow it to discriminate against other intercity carriers seeking interconnection in its area of operations just as the Bell System operating companies were able to discriminate in the past against specialized carriers. Stated another way, MCI argues that allowing GTE to emulate the Bell System structure just struck down by the *Modified Final Judgment* (MFJ)[50] invites an obstruction to new potential entrants in the interexchange market. In addition, MCI fears that federal regulatory authorities will have as difficult a time closely monitoring GTE's activities for compliance with antitrust laws in the future as they have had in the past with AT&T.

50. Moreover, both MCI and SBS express concern that the acquisition would undermine this Commission's policies favoring equal local interconnection to all intercity carriers. In addition to

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Order, CC Docket No. 81-704, FCC 83-184, adopted April 27, 1983; Domestic Fixed-Satellite Transponder Sales, CC Docket No. 82-45, 90 FCC 2d 1238 (1982); Orbital Deployment Plan, 84 FCC 2d 584 (1981).

[48] *Guidelines* at para. 4504.

[49] *See* note 43 *supra*. Also, while GTE has entered and is expanding its satellite system, GTE has estimated that it would take at least three to four years to plan, construct, and make operational a nationwide microwave network. Our review of the applicable Hart-Scott-Rodino materials and experience with specialized carriers tends to confirm this assertion.

[50] U.S. v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), *affirmed sub nom.*, Maryland v. U.S., ___ U.S. ___, 151 U.S. L.W. 3628 (U.S. Feb. 28, 1983).

requiring cost based, unbundled, and non-discriminatory tariffs, SBS would have the Commission require that joint billing, co-location or sharing of facilities, and any special access or access-related services be made available to SPCC only if it is made equally available to all other carriers. In a related argument, MCI also alleges that the proposed acquisition will promote cross-subsidization and evasion of rate regulation. It contends that GTE can artificially lower its interconnection charges to SPCC, thereby shifting monopoly profits from its regulated local carriers to its competitive long-distance carrier. Moreover, MCI is concerned that GTE will vary its allocation of the costs of local plant and interexchange plant as a means to impose SPCC's costs onto local ratepayers.

51. Finally, MCI alleges that the acquisition will facilitate collusion with AT&T and increase barriers to entry because of GTE's ownership of local operating companies. According to MCI, the ultimate aim of this acquisition is not competition, but leverage. Assertedly, the acquisition will enable GTE to use SPCC as a "bargaining chip" with AT&T regarding settlement revenues. Since GTE's portion of settlement revenues is quite large, MCI questions GTE's representation that SPCC will actually compete with AT&T. Instead it believes that GTE views MCI as its principal competitor and will accommodate AT&T so that it can preserve its "highly lucrative settlement arrangements." (Petition to Deny, at 4–6, 23–26, 93–99; Supplement to Petition to Deny, at 6–14).

52. We initially find no merit to the claim that the acquisition is anticompetitive on its face simply because GTE's proposed new structure would resemble that of the Bell System. As we see it, the critical question is not merely one of structure, but rather includes GTE's relative market share, and whether that share is likely to be used for anti-competitive ends. Significantly, there is a substantial difference in size between the current Bell System and the proposed combined GTE/SPCC. For the year 1981, AT&T's operating revenues were $58.1 billion while GTE/SPCC's combined revenues were $7.1 billion. *See*, Appendix C. AT&T provides nationwide service to all 50 states and the District of Columbia. By contrast, GTE offers local exchange services in portions of only 31 states and SPCC does not yet provide interexchange service to all 50 states. Moreover, as we construe the ***MFJ***, it was AT&T's market power and exercise of that power rather than its structure standing alone which was dispositive. Thus, the Court emphasized that AT&T possesses great size and power and that it has used this in conjunction with its control over local operations as a leverage against its competitors. (***MFJ***, at 151–152, 161–165, 222–223). Additionally, the Court found that the American telecommunications industry is presently dominated by one company — AT&T — and that its domination is substantial (*Id.*, at 222, 163). For this reason, we cannot agree that the result in the

MFJ requires us to find that GTE's proposed vertical structure standing alone is unlawful.

53. MCI's alternative concerns about GTE's relative size in the local exchange market are also unpersuasive. MCI perceives that GTE will be comparable in size to the regional holding companies (RHCs) which will be established to provide, through subsidiaries, local exchange service after the break-up of AT&T. Assertedly, GTE's assets (gross plant) of more than $21 billion in 1981 almost double that of the smallest RHC and exceed by $3 billion the assets of the largest RHC. In fact, the RHCs are projected to have assets ranging from $16 billion to approximately $22 billion. *See* Appendix D. Clearly, therefore, MCI's claim that GTE will be the largest telecommunications company offering exchange services is not borne out by the record. Moreover, even if it were, we find the comparisons of little value. In operative effect, MCI has compared GTE's cumulative operations on a total *nationwide* scale with the RHCs' *regional* geographic operations. No showing is made, however, that any single area of GTE concentration would be comparable in size with that of any new RHC. Accordingly, we find these comparisons to be of little significance in evaluating the competitive effect of the proposed acquisition.

54. We also do not find reason for concern that the transfer is likely to give SPCC/SPSC a preference over other interexchange carriers. Under the proposed final judgment, GTE has agreed that its telephone operating companies will provide equal local exchange and information access to interexchange carriers on a schedule to be worked out with the Justice Department. See note 6 above. And, even if that proposed condition is not approved by the court, we believe certain other Commission policies will protect interexchange carriers vis-a-vis SPCC.

55. The potential for unequal treatment will be greatly diminished, if not eliminated, with the implementation of our recent access charge plan. *MTS and WATS Market Structure*, FCC 82-579, released February 28, 1983 (*Access Charge Order*). There, the Commission has set forth a plan to prescribe the compensation that exchange carriers should receive for origination or termination of all interstate and international services. Under the terms of that plan, GTE as well as other exchange carriers are required to file tariffs utilizing the same rate structure for like access service. We fully intend as part of our tariff review process to examine whether each carrier has complied with the anti-discrimination provisions of the Communications Act, 47 U.S.C. § 202(a). In addition, interested persons will have the right to petition against these tariff filings and bring to our attention any proposed tariffs they believe likely to result in an unjust discrimination or preference.[51]

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[51] The access charge order also calls for a creation of an Exchange Carrier

56. We recognize that this plan standing alone will not eliminate all the current inequities with respect to interconnection arrangements. For example, our order does not specifically require that independents provide equal quality access as the *MFJ* requires of the RHCs. We have, however, instituted a rulemaking to address equal interconnection and we think that it is the appropriate forum to resolve this industry-wide problem. *MTS and WATS Market Structure*, Phase III, FCC 83-178, released May 31, 1983. In the meantime, recognizing that quality differences in interconnection arrangements would give a substantial advantage to the traditional interexchange partnership (predominantly, AT&T), we have ordered that access pricing for these services provided by AT&T and the independents be "adjusted to account for quality differences until equal interconnection is available to all interexchange carriers". *Access Charge Order* 82-579 *supra*, para. 151. At the same time, the *Access Charge Order* takes strong measures to eliminate the potential for cross-subsidization. In addition to requiring equal prices for identical access, the order requires local exchange carriers to offer billing services to all interexchange carriers if they offer billing services to any (*Id.* at para. 191). Furthermore, with regard to cross-subsidization, GTE has represented in this proceeding that it intends to maintain a "basic organizational separation between SPCC/SPSC and the GTE Telephone Operating Companies." GTE letter of April 8, 1983. To this end, GTE and SPCC/SPSC will maintain their own separate books of accounts, and will not jointly offer services with the operating telephone companies. Nor will GTE provide to SPCC/SPSC the use of facilities on any basis other than that provided to any OCC. This seems reasonable and we will impose it as a condition to enable us to monitor for potential cross-subsidization. For all these reasons, we believe there will be adequate safeguards in place to ensure that GTE does not favor SPCC/SPSC over any other carrier for like access services.

57. We also fail to see how approval of this transfer will create barriers to entry. We find no support for MCI's assertion that a carrier's inability to obtain authorizations to offer local exchange service in GTE's *local exchange* areas is an inhibiting factor on potential entrants to the interexchange market. Our experience over the past decade seems to show just the opposite. Over this period of time, there have been a large number of new entrants providing interexchange service on a national scale even though AT&T has

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Association (ECA) to compute charges and prepare and justify the tariffs on behalf of all participating carriers. MCI claims that a conflict of interest exists for GTE because it will be a participant in the ECA and also operate as an interexchange carrier. To repeat, however, GTE has represented to the FCC and has signed an agreement with DOJ that it will maintain SPCC/SPSC separately from the operating companies. In any event, no officer of GTE's interexchange subsidiary would be selected as an ECA director. *See also*, MTS and WATS Market Structure, CC Docket 78072, Phase I, FCC 83-252, released May 31, 1983.

had local monopolies in many more areas than GTE. In addition, as explained, we expect the adoption of access charges applied uniformly to all interexchange carriers will further reduce preexisting barriers to entry because new interexchange carriers will be treated on the same basis as the existing OCCs.[52]

58. Finally, MCI stresses GTE's involvement in several anticompetitive activities[53] as a basis for denying the transfer. MCI maintains that GTE has discriminated, and will continue to discriminate, against MCI and other interexchange carriers in its attempt to preserve the present GTE/AT&T relationship. Also MCI notes that in *GTE-Telenet Merger*, 72 FCC 2d 111 *recon.*, 72 FCC 2d 516, *recon. denied*, 84 FCC 2d 18 (1979) the Commission recognized GTE's potential for anticompetitive conduct and initially imposed ten conditions to help insure that Telenet would continue to operate in the public interest. Although acknowledging that the Commission eventually removed the conditions, MCI is not persuaded that anticompetitive harm will not recur.

59. We initially considered GTE's potential for misconduct in *GTE-Telenet Merger, supra*, and attached several conditions to our approval as a means to prevent harm to the public. Recently, however, we removed the merger conditions. *GTE-Telenet Monitoring*, 91 FCC 2d 215 (1982). We found sufficient record evidence that GTE is no longer motivated to accommodate AT&T in enhanced service markets or satellite services, two areas of potential competition between GTE and AT&T. 91 FCC 2d at 220. Also, we removed the structural separations requirements regarding GTE's offering of enhanced services, after carefully considering GTE's relative size, its dependence on AT&T's interexchange facilities, the disproportionate costs of separation for small companies and the public interest in promoting GTE's ability to compete with AT&T in data communications services. *Second Computer Inquiry* (reconsideration), 84 FCC 2d 50, 72-75 (1980).[54]

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[52] As to MCI's related collusion argument, GTE asserts that it would not be willing to make such a large investment in SPCC if it did not intend to compete with AT&T as well as MCI. Furthermore, the new access charge rules will reduce substantially the amount of revenues that GTE will receive from AT&T for its participation in the provision of MTS/WATS services. Thus, there appears to be no advantage for GTE to discriminate against other carriers in favor of AT&T. *See also* discussion in paras. 55-56 above.

[53] ITT v. GTE, 449 F. Supp. 1158 (1978) (GTE found to be in violation of Section 1 of the Sherman Act by its unreasonable restraint of trade in the telecommunications equipment market); In re Tele-Cable, 19 FCC 2d 574 (1969) (GTE found to have misused monopoly position in a particular geographic area to engage in anticompetitive conduct in the provision of communications services); American Satellite Corp., 73 FCC 2d 317 (1979), Docket No. 20201 (Hawaiian Telephone Company found to have discriminated against American Satellite in favor of AT&T).

[54] MCI also asserts that cellular systems are another area where AT&T and GTE are colluding. This assertion is not well-taken. As we noted in GTE-Telenet

60. The question, therefore, is whether MCI has raised any new evidence of anticompetitive pattern of conduct beyond that already considered by the Commission or the courts. As best we can ascertain, the only pending issues against GTE yet to be resolved are those allegations which MCI is pressing in its antitrust suit against AT&T and GTE.[55] The issues raised there have not yet been adjudicated. In these circumstances, to deny the transfer or impose additional conditions merely on the strength of the pleadings in that case would be premature.

61. We may now address the special situation in the state of Hawaii. By way of background, in its original petition to deny, Hawaii expressed the fear that the acquisition would have the same anticompetitive effects in the state of Hawaii as others claimed it would have in the continental United States. Hawaii stressed that presently GTE is the only carrier serving what it denotes as the "Hawaii-Mainland interexchange private line services and satellite marketh' and that the only other carriers planning to enter this market are SPCC and SPSC. The proposed acquisition, it contended, would therefore eliminate the independence of SPCC and SPSC, and any promise of effective competition, increased service offerings and lower rates in the Hawaiian market. Consequently, the state requested that the application be denied unless certain conditions were imposed.[56]

Monitoring, *supra*, we have strongly urged wireline carriers to reach agreements to avoid mutually exclusive situations as a means to speed service to their communities. *See also*, Advanced Mobile Service, Inc., FCC 83-124, released April 26, 1983.

[55] See, MCI Communications Corporation v. AT&T (No. 79-1182 D.D.C.). There MCI claims that GTE conspired with the other independents and AT&T to monopolize the intercity telecommunication services market in violation of Section 2 of the Sherman Act, and to unreasonably restrain trade in that market in violation of Section 1 and 3 of the Sherman Act. In particular, MCI has alleged that GTE participated with the other defendants in meetings, discussions, and conversations in which they agreed, *inter alia*: (1) to allocate to AT&T substantially all segments of the intercity telecommunications market; (2) to distribute illegal profits by means of the settlement procedure whereby AT&T significantly overpaid GTE and the other independents for local interconnections at a rate far exceeding their costs; (3) to exclude MCI and other potential competitors from substantial segments of the intercity market by concerted refusals to deal; (4) to deny or restrict local interconnections requested by MCI and thereby discriminate against MCI and in favor of AT&T; and (5) to set charges for certain types of local interconnections at unreasonable and discriminatory levels.

[56] Specifically, Hawaii has requested that the following three conditions be imposed upon GTE:

> (1) SPCC, SPSC, GTE, shall each include Hawaii in any interexchange telecommunications service offering that is available on the United States Mainland under the same rate structure which applies on the United States Mainland.
>
> (2) SPCC shall extend to Hawaii, as quickly as feasible, all the services it provides in the United States Mainland at the date of the acquisition.

62. In response, GTE averred that if the application were approved SPCC would extend all of its services to Hawaii as represented in SPCC's recent 214 authorization. Subsequently, applicants and the state on their own initiative began discussions to consider possible revisions to the conditions proposed by Hawaii. As a result, GTE notified Hawaii and the Commission of its willingness to accept as a condition of the acquisition a revised version of the conditions submitted by Hawaii. GTE's proposed conditions would, among other things, guarantee that SPCC/SPSC would provide service to the state under the same rate structure applicable on the mainland and that SPCC/SPSC, would, as quickly as possible, provide all its services to Hawaii. However, by letter dated March 31, 1983, Hawaii has informed GTE and the Commission that the proposed revisions are not in fact acceptable to the state. Among the principal reasons given is that the proposed conditions apply only to SPCC and SPSC and are not applicable to GTE and its affiliates. Hawaii maintains that this limitation provides GTE with an opportunity to circumvent the conditions by simply causing services to be offered by GTE and its existing affiliates (e.g. Hawaiian Telephone or GTE Satellite Corp.) rather than SPCC and SPSC.

63. As stated, the central reason behind Hawaii's request that conditions be imposed is to assure competition is fostered in that state. Initially, in this regard, we observe that there no longer appear to be any regulatory barriers to prevent any entity from entering the Hawaiian-Mainland area to offer various communications services. Currently, eight authorized satellite carriers are capable of providing service to Hawaii.[57] Although many of these carriers serve Hawaii with only a limited number of transponders, undersea cables also serve the state. Moreover, the Commission has lifted restrictions on the international record carriers to permit them to offer voice services to Hawaii.

64. Against this background, we think the revised conditions submitted by GTE will be adequate to assure that the benefits of competition reach the state of Hawaii. Moreover, in order for GTE to later circumvent its proposed conditions by offering service presently

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including, but not to limited to SPRINT services and point-to-point private line service under the same rate structure that applies on the United States Mainland.

(3) GTE and SPCC shall make available to Hawaii regulatory authorities any and all (1) agreements, (2) cost and revenue accounting data and (3) all other relevant information requested by these governmental authorities necessary for state regulatory purpose that relates to telecommunications or to any transaction with affiliates that provide regulated telecommunications.

[57] These include large carriers such as RCA, Western Union Westar, AT&T and GTE, and smaller ones such as Hughes, American Satellite Company, Advanced Business Communications and United States Satellite Systems, Inc. *See* Appendix E for a list of other carriers, including resellers, whose services may be used to and/or from Hawaii.

offered by SPCC through another subsidiary, GTE would be require to obtain a discontinuance from the Commission under Section 21 of the Act. Should that occur, Hawaii at that time would be free t show that the state's needs would be harmed. In the meantime however, we are satisfied that these conditions, as set out in th ordering clauses, will adequately meet Hawaii's immediate concern by assuring that SPCC/SPSC will provide new services to Hawai without unnecessarily constraining GTE's ability to react to th competitive marketplace in the future. Furthermore, these conditions will continue to foster the Commission's policy of integratin Hawaii into the mainland rate structure.[58]

65. *Effect on satellite authorization policy.* Several parties contend that the acquisition of SPSC by GTE will result in the inefficient utilization of limited orbital and spectrum resources. In this regard they believe the acquisition would result in a concentration of limited resources controlled by a vertically integrated corporate entity which possesses monopoly power in many local service areas. They allege further that the acquisition will violate current Commission policy which limits new satellite carriers to a maximum of two operational satellites until the carrier can demonstrate the need for more capacity based on actual operating experience. *See, Orbital Deployment Plan*, 84 FCC 2d 584, 603 (1981). Specifically, the parties asserts that the acquisition will allow the newly merged entity to have between 9 and 11 assigned orbital locations, or approximately 40% of the available Ku-band orbital positions at 12/14 GHz. The parties stress that at present there are 16 domestic satellites at 14 orbital locations owned by only 4 licensees.

66. We find no basis for concern that the transfer will result in impermissible concentration. To repeat, we have already determined that satellite and terrestrial communications do not constitute a distinct submarket. As a separate matter, we have recently had an opportunity to review thoroughly our domestic fixed satellite policies and act on pending applications. In the *1983 Orbital Assignment Order, supra*, the Commission has expanded the number of available orbital locations in both the 4/6 GHz band and the 12/14 GHz band by reducing spacing between satellites.[59] Furthermore, in another order adopted the same day, the Commission, among other things,

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[58] See Ordering Clauses, 69(4) to 69(5). We have ordered, as conditions to the acquisition, the first of two of the three conditions set out in note 57 above the substance of which have been accepted by GTE. It is our opinion that the third condition offered by GTE regarding submission of certain information to Hawaiian regulatory authorities involves issues that would be best resolved by the proper state authorities. Accordingly, even if it is assumed we could properly order GTE to make submissions to state regulatory agencies, we will not impose this condition upon GTE.

[59] See, Orbital Deployment Plan, 84 FCC FCC 2d 584, 603 (1981) and Report and Order in CC Docket 81-704, FCC 83-187, adopted April 27, 1983, at paras. 83-84.

has approved an application authorizing SPSC to launch its on-ground spare and to construct one additional satellite.[60] Thus, GTE and SPSC will collectively operate only 5 of the 38 satellites whose launches have been approved. This figure would represent less than 13.27% of the total number of satellites currently authorized. Indeed, this figure is not unusual when compared to the number of satellites authorized to other independent operators. Additionally, as a result of the recent authorization orders, four new entities have been authorized to build their own satellites. Consequently, even with this acquisition we expect the recent authorizations will increase the number of competing systems in this field to ten. Even if it were assumed the separate subsidiary structure were not effective and GTE was controlling and operating five satellites, we do not believe that would be a *prima facie* anticompetitive concentration.[61]

67. Nor are we persuaded that the proposed transfer will lead to inefficient use of orbital locations and therefore violate Commission policies. The Commission's policies against the "warehousing" of orbital locations apply to established, as well as new, entities. They are designed to prevent an entity from acquiring, or retaining, orbital spectrum on the basis of speculative demand at the expense of other potential users. In approving a third orbital location for SPSC, we noted its representations that all of the transponders on its first two satellites are essentially committed. We expressly conditioned launch of the third on the satellite being constructed by December 3, 1984, and launched by March 1, 1985. Further, the Commission stated in the accompanying *Report and Order* in Docket 81–704, FCC 83–184, at paras. 83–84, that a licensee's failure to satisfy prescribed traffic fill requirements could lead to relocation of a launched satellite and termination of the orbital assignment. Simply put, GTE and SPSC will continue to be subject to these requirements.

68. In a related argument covering spectrum utilization, SBS points out in its comments that GTE and SPCC have filed applications to construct extended network Digital Electronic Message Service systems (DEMS) and that the proposed networks contain 15 cities in which both propose to construct facilities. It urges that if the proposed acquisition is approved, GTE would be in violation of the Commission's *DTS* decision, Digital Termination Systems, 86 FCC 2d 360 (1981), to the extent that that order prohibits carriers from

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[60] Southern Pacific Satellite Co., FCC 83–186, adopted April 27, 1983.

[61] GTE has pending an application to launch a third in-orbit satellite. Because this application was filed subsequent to our 1982 Processing Order in Domestic Fixed Satellite Service, 90 FCC 2d 1 (1982), *recon. denied*, FCC 83–183, adopted April 27, 1983, it is not presently clear whether they will receive an additional orbit assignment. *See* Report and Order, in CC Docket 81–704, FCC 83–184, adopted April 27, 1983 at paras. 73–78 and Memorandum Opinion and Order, FCC 83–185, adopted April 27, 1983.

obtaining a second channel (SPCC's in this case) until they ha
demonstrated they are operating their first pair of channels (GTE
at or near capacity. In its opposition, GTE acknowledges th
potential conflict and implies that upon consummation of t
proposed acquisition, it will take the necessary steps to remain
compliance with the Commission's *DTS* order. Accordingly, we w
order GTE to take necessary action on its pending DEMS applic
tions within 60 days of the release of our decision on the transfe

69. One final matter remains. As noted, the applicants seek
general authorization under Section 212 of the Act to perm
interlocking directorates between GTE and SPCC/SPSC. No specifi
are provided as to which officers or directors of GTE would
affected. In any case, in view of the provision in the proposed fin
judgment which limits interlocking directorates to the Chief Exec
tive Officer and the President of GTE Corp. respectively (note
above) we see no purpose in approving any further interlockin
directorates at this time.

CONCLUSION AND ORDERING CLAUSES

70. In sum, we find that GTE is qualified to acquire, and infus
new capital into SPCC/SPSC without harm to its other telephon
operations. Additionally, we find that transfer of SPCC/SPSC'
common carrier authorizations and radio licenses to GTE, a
conditioned below, would likely promote competition and thu
benefit the public in terms of potentially more service choices a
lower rates. GTE/SPCC/SPSC will have the structure, resource
and market position to plan, implement, and maintain improve
facilities, interconnection arrangements, and services more efficient
ly than each would as separate entities. The result may be mor
efficient use of facilities, including scarce spectrum and satellit
resources. Therefore, we conclude that the public interest, conve
nience, and necessity would be served by grant of the application

71. Accordingly, having found this transfer is in the publi
interest, IT IS ORDERED, pursuant to 47 U.S.C. §§ 151(i) 212, 214
308, 309, and 310 that the application of GTE Corporation an
Southern Pacific Company for consent to transfer the radio an
microwave licenses and common carrier authorizations of Southern
Pacific Company IS GRANTED, subject to the following terms and
conditions:

(1) All existing terms and conditions applicable to the authorizations held by
SPCC and SPCC shall remain in full force and effect.

(2) The GTE Corp. IS AUTHORIZED pursuant to Section 214 of the Communications Act to acquire and operate the domestic channels of communication currently operated by SPCC and SPSC as described in the application.

(3) SPCC and SPSC shall maintain their accounting records separate from those
of other GTE companies and affiliates. These books and records of account shall be
maintained in accordance with FCC accounting requirements and shall fully disclose

the actual costs and revenues attributable to the communications services provided by SPCC and SPSC. Further, SPCC and SPSC shall obtain services, facilities and equipment from other GTE companies or affiliates on the basis of an arms length relationship which reflects the terms, prices and conditions which would be available to any non-affiliated common carrier.

(4) GTE will cause SPCC, SPSC or any present or future subsidiary of SPCC or SPSC, and any successor organization, to include the state of Hawaii in any interexchange telecommunications service offering that is available on the United States Mainland to metropolitan areas equivalent in size to the Honolulu metropolitan area, and such offering shall be included in the same rate structure which applies on the United States Mainland.

(5) GTE will cause SPCC or any successor organization to extend to Hawaii as quickly or as soon as operationally feasible under the same rate structure that applies on the United States Mainland, all the SPRINT services SPCC provides on the United States Mainland at the date of the acquisition. GTE will also cause SPCC or any successor organization to extend to Hawaii as soon as operationally feasible point-to-point private line service under the same rate structure that applies on the United States Mainland. SPCC and any successor organization shall continue to provide all such services under the same rate structure that applies on the United States Mainland as long as such service is available from SPCC or any successor organization to metropolitan areas equivalent in size to Honolulu on the United States Mainland.

72. IT IS FURTHER ORDERED That, pursuant to § 212 of the Communications Act, 47 USC § 212, GTE, SPCC, and SPSC may have the Chief Executive Officer and the President of GTE Corp. as interlocking directors, subject to the provisions of Section 62.21 of the Commission's Rules, 47 CFR § 62.21.

73. IT IS FURTHER ORDERED That the Motion for Reciprocal Treatment of Discovery Material filed by MCI Telecommunications, Inc. is DENIED.

74. IT IS FURTHER ORDERED, That GTE will amend its applications, discussed in paragraph 68 above, within 60 days of the release of this decision.

75. IT IS CERTIFIED, That the transfer of facilities approved in this order, subject to the conditions specified, WILL SERVE the public interest, convenience, and necessity.

76. This order shall be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A

Application for Consent to Transfer Control

-GTE Corporation and Southern Pacific Company

Comments and Petition to Deny

-MCI Telecommunications Corporation: Petition to Deny
-State of Hawaii: Petition to Deny Unless Conditioned
-American Satellite Company: Comments

-Satellite Business Systems: Comments
-U.S. Telephone Communications, Inc.: Opposition

Opposition

-GTE Corporation and Southern Pacific Company

Replies

-MCI Telecommunications Corporation
-State of Hawaii
-American Satellite Company
-Satellite Business Systems
-U.S. Telephone Communications, Inc.

Supplemental Pleadings/Filings

-MCI Telecommunications Corporation: Supplement to Petition to Deny
-GTE Corporation and Southern Pacific Company: Opposition to MCI's Supplement to Petition to Deny
-GTE Corporation: Supplement to Application in Response to Commission Request; March 17, 1983
-MCI Telecommunications Corporation: Comments on Supplemental Information Supplied by GTE Corporation on March 17, 1983
-GTE Corporation: Submission of Proposed Conditions
-State of Hawaii: Response to Proposed Conditions Submitted by GTE Corporation
-GTE Corporation: Supplement to Application in Response to Common Carrier Bureau's Request for Additional Information; April 8, 1983
-MCI Telecommunications Corporation: Comments on Supplemental Information Supplied by GTE Corporation on April 8, 1983
-GTE Corporation: Submission of Additional Information Regarding Banks Providing GTE Corporation with Credit Lines

Appendix B

Summary of GTE Capital Spending Projections
(\$ billion)

I. *Sources of Financing*

	1983			*1983–1987*		
	Without SPCC/SPSC	*With SPCC/SPSC*	*Change*	*Without SPCC/SPSC*	*With SPCC/SPSC*	*Change*
Total	\$3.219	\$4.128	+\$0.909	\$19.87	\$23.16	+\$3.29
Internal	\$2.581	\$2,649	+\$0.068	\$18.02	\$20.01	+\$1.99
External	\$0.638	\$1.479	+ 0.841	\$ 1.85	\$ 3.15	+\$1.30

II. *Telco Operations Only—1983–1987*

Gross Additions	
1983	\$ 2.3
1987	3.5
1983-1987	15.0

Net Additions[1]	
1983	\$ 2.2
1987	3.3
1983-1987	14.3

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[1] Includes removal costs, salvage, etc.

Average Annual Increase 1983-1987

Gross Additions	11.0%
Net Additions	10.5%

III. *GTE Consolidated Operations (without SPCC/SPSC)—1983-1987*

Total Capital Requirements

Telcos	$14.3
Other GTE	5.6
Total GTE	19.9
Ratio - Telco/Total GTE	72%

Percent External Required

1983	20.0%
1987	0.7%
1983-1987	9.0%

IV. *GTE Consolidated Operations (with SPCC/SPSC)—1983-1987*

Total Capital Requirements

Telcos		$14.3
SPCC/SPSC	2.4	
SPCC/SPSC Acquisition	0.7	
Total SPCC/SPSC		3.1
Other GTE		5.7
Total GTE		$23.1

Ratios

Telco Spending to Total GTE	62%
SPCC/SPSC to Total GTE	13%
SPCC/SPSC to Telco	23%

Percent External Required

1983	36%
1987[2]	0%
1983-1987	14%

Debt-Equity, Ratio

1982	56.3%
1983	57.8%
1987	49.0%

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[2] Overall GTE operations projected to generate positive cash flow in 1987.

Appendix C

AT&T - GTE COMPARISON[1]

Category	*AT&T in 1981*	*GTE or SPCC in 1981*[2]
Plant (less depreciation)	$121.3 billion (Bell System)	$17 billion
Local Operating Revenues	$26.3 billion (Bell System)	$2.6 billion
Toll Operating Revenues	$30.9 billion (Bell System)	$4.1 billion (GTE thru settlements and SPCC combined)
Interstate Operating Revenues	$4.1 billion (Long Lines) (after settlements and division of revenues)	SPCC - $235 million
Distances covered	725 million miles of telephone Channel Carrier for Long Lines	SPCC - 46 million circuit miles microwave network
Net Income	$6.8 billion excl Long Lines) $.67 billion (Long Lines)	GTE - $722 million SPCC - $167.7 million
Long Distance Messages	87.7 million per day (Bell System)	5.9 million per day

Appendix D

Total Company Assets' Comparison

*Regional Holding Companies** *(as of December 31, 1981, prior to BOC reconfiguration in accordance with the Decree)*	*Total Assets in millions*
Northeast	$17,778.6
Mid Atlantic	17,267.3
Southeast	21,800.4
Midwest	17,038.4
Southwest	15,949.3
Mountains and Great Plains	16,109.1

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[1] In its Petition to Deny, MCI submitted a table comparing AT&T in 1960 with GTE in 1981. However, MCI provided no sources for the information included in the table. The source of the information contained in this table on AT&T is FCC Statistics of Common Carriers for 1981 and Long Lines Statistics.

[2] Source: MCI's petition to deny, with the exception of Net Income. In GTE's 1981 Annual Report net income was reported to be $722 mil. MCI reported GTE and SPCC combined net income to be $722 mil. For purposes of this chart, we have employed GTE's Annual Report.

Far West	16,573.4
General Telephone and Electronics Corp. **	
Telephone Operations	17,411
Electrical Products	1,348
Communications Products	1,769
Telenet Communications	138
Parent Company and Other	447
TOTAL	21,113

[*] Information obtained from Plan of Reorganization, page 460, filed in connection with *U.S. v. W.E. and AT&T*, Civil Action No. 82-0192.

[**] Information obtained from GTE's 1981 Annual Report.

Appendix E

Carriers Providing Communications Service To and/or From Hawaii

American Telephone and Telegraph Company
Hawaiian Telephone Company
ITT Worldcom
RCA Americom
RCA Globcom
Western Union International
Western Union Telegraph Company

American Interstate Communications, Inc.
Compusulants, Inc.
Comtel Industries, Inc.
DHL Communications, Inc.
Energy Communications Corporation
GTE Telenet Communitations-Packet Switched Data
Hilton Hotels Corporation
Industry Hills Visitor Accommodation Partnership
JSL/Toll Management Systems, Inc.
Long Distance/USA, Inc.
Pacnet Communications Corporation
Rotelcom Incorporated
Telecommunications Facilities Management, Inc.
Telephone Warehouse, Inc.
Tel Systems Management Corporation
U.S. Telephone
U.S. Telephone of the Midwest
U.S. Tel of the West
U.S. Tel of the Northeast

Reconsideration, Petition for, Denial of

> Petition for reconsideration of *Henry C. Armstrong*, III, FCC 83R-16, 53 RR2d 474 (Rev. Bd. 1983) denied. Petitioner essentially reargues the points previously made before the Board.
> –*Henry C. Armstrong, III*
> PR Docket No. 81-826

FCC 83R-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of HENRY C. ARMSTRONG, III 15640 Larkspur Sylamr, California 91342 Licensee of Station WA6CGI in the Amateur Radio Service	PR Docket No. 81-826
Suspension of License of HENRY C. ARMSTRONG, III 15640 Larkspur Sylmar, California 91342 Amateur Advanced Class Operator License	PR Docket No. 81-827

MEMORANDUM OPINION AND ORDER

(Adopted: May 11, 1983; Released: May 13, 1983.)

BY THE REVIEW BOARD:

1. In a Decision, 53 FCC 2d 485, 53 RR 2d 474 (Rev. Bd. 1983), the Review Board affirmed the Initial Decision of Assistant Chief Administrative Law Judge Thomas B. Fitzpatrick (ALJ), which revoked the license of Henry C. Armstrong, III for Radio Station WA6CGI in the Amateur Radio Service and suspended his Advanced Class Operator license for the remainder of its term. Now before the Board are a petition for reconsideration of that Decision filed April 11, 1983, by Armstrong and an opposition by the Chief, Private Radio Bureau.

2. In his *pro se* petition Armstrong requests an informal oral argument or "talk" to "resolve any misunderstandings" between himself and the Commission and urges that the Board immediately dismiss the proceedings against him or, alternatively, extend his

operating privileges past their present expiration date of June 9, 1983, pending the outcome of this proceeding, or grant him an outright renewal of his licenses. On the merits, Armstrong continues to dispute the conclusions of the ALJ (and now the Board) that he caused wilful interference to an Amateur repeater operated by the Southern California DX Club in December 1980. He maintains that he is being victimized by the DX Club, that testimony presented against him by Club members was inaccurate and biased, that his program logs would substantiate his testimony and should have been admitted into evidence at the hearing or reviewed by the Board, and that a videotape that was not admitted into evidence would prove that his interfering RAMAR computer system exists and is a viable communications concept.

3. The Board will deny Armstrong's petition. The granting of oral argument in Commission proceedings is discretionary, not a matter of right, *e.g.*, Section 1.277(c) of the Commission's Rules, 47 CFR 1.277(c), and no formal request for an argument has hitherto been made in this forum. This is a formal adjudicatory proceeding charged with the solemn responsibility of deciding whether Armstrong's Amateur licenses should be revoked or suspended. There is no place at the appellate level for the informal chit-chat that Armstrong seems to envision, and the Board does not believe that an oral argument will contribute to the further elucidation of the matters at issue. To extend his operating privileges, Armstrong must file timely renewal applications for his licenses, in accordance with Sections 97.13 and 97.47 of the Rules, 47 CFR 97.13 and 97.47, which will then be processed in the context of this proceeding by other offices of the Commission. The requested relief cannot be granted by the Board. As to Armstrong's substantive arguments, they are essentially rehashes of his exceptions or new and conclusory snipes at the record evidence. We need not grant reconsideration merely to reargue matters previously considered and resolved. *WWIZ, Inc.* 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). And Armstrong's sniping observations concerning the DX Club and its witnesses' testimony are untimely and insufficiently elaborated to call into question the findings and conclusions related to that testimony. *See Initial Decision*, *supra*, Conclusions at paras. 4–5, in which the ALJ specifically credited the challenged testimony; *KFPW Broadcasting Co.*, 44 FCC 2d 310, 28 RR2d 1644 (1973).

4. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Henry C. Armstrong, III on April 11, 1983, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

NOTE: Pursuant to Section 1.102(a) of the Rules, 47 CFR 1.102(a), the revocation and suspension affirmed herein become effective 40 days after the release date of this Memorandum Opinion and Order, unless an application for review is filed within 30 days, in which case the effective date will be suspended pending further order of the Commission. Immediately upon the effective date of this Memorandum Opinion and Order, the licensee shall forward to the Commission the licenses revoked and suspended. Operation of the Amateur Radio Station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Memorandum Opinion and Order shall be served by Certified Mail, Return Receipt Requested, on Henry C. Armstrong, III at his last known address, 15640 Larkspur, Sylmar, California 91342.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Application to construct and launch an additional space station in Domestic Fixed Satellite Service granted to meet licensees current traffic projections. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Hughes Communications, Inc.*

FCC 83–190

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of HUGHES COMMUNICATIONS, INC. For Authority to Launch and Operate a Space Station in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis	File Nos. 2115-DSS-LA-81 995-DSS-MP/ML-(3)-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned application submitted by Hughes Communications, Inc. (HCI) to launch and operate its third in-orbit domestic communications satellite. Public notice of this application was given on October 7, 1981. A petition to deny was filed by Western Union Telegraph Company (Western Union). American Satellite Corporation (ASC), RCA American Communications (RCA Americom), Southern Pacific Communications Company (SPCC) and Satellite Syndicated Systems (SSS) also filed comments.[1] For the reasons discussed below, we deny this petition and grant HCI's application.

2. HCI is a wholly-owned subsidiary of Hughes Aircraft Compa-

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[1] We are also considering the applicant's previously deferred request to sell transponders on its third in-orbit satellite on a noncommon carrier basis. *See* Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982). Petitions to

ny which is experienced in the construction of satellite space and earth stations. In 1980, the Commission authorized HCI to construct three domestic communications satellites and launch two of them.[2] Each of these three satellites contains 24 transponders, each with a bandwidth of 36 MHz. They are designed to operate in the 4/6 GHz frequency bands. The first of HCI's satellites (Galaxy I) is scheduled for launch in June 1983 and the second (Galaxy II) is scheduled for launch in September 1983. Construction of the third satellite (Galaxy III) is to be completed by January 1984. HCI proposes to launch this satellite in July 1984 and states that it will have a mission lifetime of 9 years. HCI requests an assignment of a second 50 state coverage orbital location for its third satellite. The investment costs, including launch, for Galaxy III are $87,706,000. HCI indicates that the necessary financing will be provided by Hughes Aircraft.[3]

3. In support of its application, HCI contends that demand for transponders on its satellites has been sufficiently strong as to warrant the need for the launch and operation of HCI's third satellite. HCI argues that it has sufficient customer orders and requests to fill transponder capacity on all three satellites. According to the applicant, all transponders on Galaxy I have been dedicated to transmission of video services and will be occupied fully.[4] Moreover, at the time that this application was filed HCI claimed to have a considerable backlog of requests for additional transponders which exceeds the capacity of Galaxy II. HCI has also requested authority to sell all the transponders on Galaxy III on a noncommon carrier basis. In fact, HCI recently announced plans to sell 24 transponders on the Galaxy II and III satellites to MCI.[5]

4. In their pleadings, Western Union and SPCC question whether HCI has provided the Commission with sufficient demand projections to warrant the assignment of an additional orbital position. Also, RCA Americom and SPCC question HCI's need for an orbital position capable of serving all of 50 states. Other issues raised with respect to the processing of HCI's launch application are fully resolved in the *Report and Order* om CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[6]

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deny HCI's request to sell these transponders in File No. 995-DSS-MP/ML-(3)-82 were filed by Wold Communications, Inc., Hughes Television Network and Satellite Syndicated Systems.

[2] Hughes Communications, Inc., 84 FCC 2d 578 (1981).

[3] Hughes Aircraft's qualifications to finance the construction of a domestic satellite are a matter of record before the Commission and are not at issue in this proceeding. *See also* National Satellite Services, 43 FCC 2d 1141 (1973), Hughes Communications Services, Inc., FCC 79-809, released December 10, 1979.

[4] HCI previously received authority to sell transponders on Galaxy I and II. *See* Domestic Fixed Satellite Transponder Sales, *supra* note 1.

[5] *See* letter from HCI, February 15, 1983.

5. In related action taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz bands in response to the increased demand for satellite service. *See Report and Order, supra*. Under our new spacing criteria, we were able to provide orbit positions to all applications in the current processing group under our open entry domestic satellite licensing policies. Therefore, we are now able to assign HCI a third orbit position without the need to resort to a comparative hearing. Since HCI's qualifications are not questioned, the only remaining issue is whether the demand for HCI transponders warrants the award of a third orbit location. It has sold almost all the transponders on GALAXY I and at least 24 of the transponders on GALAXY II and III. Therefore, we believe that the representations of HCI provide adequate public interest demonstration for a third orbital assignment at this time. Moreover, we reserve the authority to require colocation of GALAXY satellites to reduce or eliminate excess spare capacity if these service requirements do not materialize. Also, for the reasons set forth in our *Report and Order, supra*, and in *Domestic Fixed Satellite Transponder Sales, supra* note 1, we are providing HCI with authority to sell up to 24 transponders on GALAXY III on a noncommon carrier basis.

6. Accordingly, IT IS ORDERED that Application File No. 2115-DSS-LA-81 IS GRANTED, and Hughes Communications, Inc. IS AUTHORIZED to launch and operate a third in-orbit satellite in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

7. IT IS FURTHER ORDERED that Hughes Communications, Inc. shall comply with all the requirements of the *Report and Order*, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

8. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed by January 31, 1984, or is not launched and successfully placed into operation by July 31, 1984, in accordance with the technical parameters and terms and conditions of this authorization.

9. IT IS FURTHER ORDERED that Hughes Communications, Inc. IS AUTHORIZED to sell up to 24 transponders on its GALAXY

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[8] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

III satellite as proposed in its application and in accordance with the Commission's policies articulated in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

10. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Hughes Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

11. IT IS FURTHER ORDERED that the Petitions to Deny filed by Hughes Television Network, Satellite Syndicated Systems, Wold Communications, Inc. and Western Union Telegraph Company ARE DENIED.

12. Hughes Communications, Inc. is afforded thirty days from the date of release of our *Report and Order* to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Employment, Equal Employment Opportunity Rule, Compliance Ordered
Petition to Deny

> Petition to deny certain license renewal applications dismissed and/or denied. Where minorities or women are not present on a licensee's staff in a percentage bearing a reasonable relationship to their presence in the local labor force and the licensee has not made a reasonable effort to recruit and hire minorities and women, appropriate remedial sanctions will be ordered.
> –*Louisianna/Mississippi B/c Stations*

FCC 83–228

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Certain Broadcast
Stations Serving Communities in the
States of Louisiana and Mississippi

MEMORANDUM OPINION ORDER

(Adopted: May 12, 1983 Released: May 24, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (i) a "Petition to Deny and to Intervene" filed May 3, 1982, by the National Black Media Coalition and others (hereinafter "Petitioners") against the license renewal applications of 19 broadcast stations serving various communities in the States of Louisiana and Mississippi;[1] (ii) a second

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[1] The challenged license renewal applications include: in Alexandria, KDBS (File No. BR-820125YF) and KRRV (FM) (File No. BRH-820125YG), licensed to KDBS, Inc.,; in Baton Rouge, WLCS (File No. BR-8230125YA) and WQXY-FM (File No. BRH-820125XZ), licensed to Air Waves, Inc., and WYNK (File No. BR-820202VJ) and WYNK-FM (File No. BRH-820202VI), licensed to Miss-Lou Broadcasting Corp; in Golden Meadow, KLEB (File No. BR-820201E8) and KZZQ-FM (File Nos. BRH-790201XN, as supplemented, BRH-820201E9), licensed to KLEB Broadcasting, Inc.; in Houma, KJIN (File No. BR-820201J2) and KCIL (FM) (File No. BRH-820201I9), licensed to Southern Louisiana Broadcasters, Inc.; in Lake Charles, KLOU (File No. BR-82021I2), licensed to Dixie Broadcasters, Inc.; in New Orleans, WYES-TV (File No. BRET-820201UN), licensed to the Greater New Orleans Educational Television Foundation, and WSMB (File No. BR-82021L5), licensed to Norad, Inc; and in Shreveport, KEEL (File No. BR-820201ZW) and KMBQ (FM) (File No. BRH-820201ZU), licensed to Multimedia Radio, Inc. In addition, NBMC challenged the license renewal applications of Stations WSLI and WXLY (FM) (File No. BRH-820201UP), Jackson, licensed to Capitol Broadcasting Company,

petition to deny, filed May 3, 1982, by Robert M. Walker, the Mississippi NAACP, and the Black Mississippi Council on Higher Education against the license renewal applications of WSLI and WXLY (FM), Jackson, Mississippi, and WROA and WZKX (FM), Gulfport, Mississippi;[2] (iii) opposition pleadings from all stations;[3] (iv) a reply by petitioners; (v) a motion to intervene and an opposition filed by the American Legal Foundation (ALF); and (vi) various related pleadings.

2. *Procedural Matters*. Both petitioners and the licensees present arguments with respect to the standing of the petitioners. Review of the affidavits[4] submitted by the petitioners reveals that none of them is a listener or a resident of the service area of Stations KDBS/KRRV (FM), KLEB/KZZQ-FM, KJIN/KCIL (FM), KLOU, KEEL/KMBQ (FM), or WROA/WZKX (FM). Accordingly, the renewal challenge against those stations will be treated as an informal objection.[5] Nevertheless, these stations' applications are before us because of their employment profiles. Section 0.283(b)(1) of the Commission's Rules.

3. With regard to the remaining stations, we have affidavits

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and WROA (File No. BR-820202VB) and WZKX (FM) (File No. BRH-820202VD), Gulfport, Mississippi, licensed to Gulf Coast Broadcasting Company. Finally, we note that NBMC's petition was dismissed pursuant to its own request with respect to the license renewal applications of Stations WSHO, WBYU (FM), and WGNO-TV, all in New Orleans, and Station KLRA, Little Rock, Arkansas.

[2] These stations are included in the NBMC petition and the issues raised are identical to those raised therein. Consequently, we have opted to address both petitions in this Order.

[3] Although no opposition was filed originally by the licensee of KDBS/KRRV(FM), it subsequently stated that the opposition filed by the American Legal Foundation was intended to serve as its opposition.

[4] Petitioner NBMC supported its assertions initially only by the affidavit of Pluria Marshall, a resident of Washington, D.C., while petitioner NAACP submitted the affidavit of Mr. Walker, who stated he was a listener of WSLI and WXLY(FM). On May 13, 1982, NBMC submitted the affidavit of G. Washington Eames, the President of the NAACP in Baton Rouge, and it explained that the filing was late because of delays in mail delivery. In addition, it requested that the Shreveport and the Alexandria branches of the NAACP be added as petitioners, but it did not file any additional affidavits. Finally, on July 12, 1982, NBMC submitted the affidavit of Shirley Porter, President of the New Orleans NAACP, and it explained that the untimely filing resulted from the unexpected withdrawal of the local NBMC member.

[5] Similarly, the ALF opposition is not supported by the affidavit of anyone who has demonstrated party in interest status. Accordingly, ALF has not established that it has standing. In addition, we note that both NBMC and ALF seek "to intervene." As the Commission has pointed out, our procedures do not envision consideration of such a petition unless and until an application has been designated for hearing. Section 1.223 of the Commission's Rules; *District of Columbia Renewals*, 77 FCC 2d 899, 900, *recon. den.*, 82 FCC 2d 276 (1980). Since none of the challenged applications is being set for hearing by this Order, there is no basis for allowing any petitioner or ALF to intervene at this stage of the proceedings. Accordingly, ALF's motion to intervene is denied and its opposition dismissed except with respect to Stations KDBS and KRRV(FM), for which ALF is counsel.

from local residents. Although two of these affidavits were not timely, the circumstances surrounding their filing indicate that the petitioners did not intend to abuse the processes of the Commission. Accordingly, we shall accept the late-filed affidavits and consider the NBMC/Baton Rouge NAACP/New Orleans NAACP pleading as a petition to deny the applications of WLCS/WQXY-FM, WYNK/WYNK-FM, WYES-TV and WSMB, and we shall consider the Walker pleading as a petition to deny the renewal applications of Stations WSLI/WXLY(FM).

4. *Preliminary Matters*. All petitioners allege that the employment practices of the challenged stations evidence a failure to comply with the Commission's EEO rule (Section 73.2080 of the Commission's Rules) and policies with respect to Blacks, and they refer to the licensees' Annual Employment Reports and EEO programs to support their arguments. In addition, NBMC alleges that the programming practices of KLEB and KZZQ-FM discriminate against local Black listeners. Petitioners therefore request that the Commission investigate the EEO practices of the challenged stations as well as the programming practices of KLEB and KZZQ-FM; designate the challenged applications for hearing; permit them to intervene; (*see* n.5, *supra*) and deny each of the applications.

5. Section 73.2080 of the Commission's Rules requires broadcast licensees to refrain from employment discrimination and to establish an affirmative action program which results in positive and continuing efforts to recruit, employ and promote qualified women and minorities. In evaluating a licensee's EEO performance, the Commission first compares a licensee's employment profile to the available labor force. When that comparison reveals that a reasonable relationship exists between the presence of minorities and women on the licensee's staff and their availability in the local labor force, our practice is to review the licensee's EEO program to determine whether it is complete. However, if the statistical comparison indicates that the licensee's employment of minorities or women does not bear a reasonable relationship to their presence in the available labor force, or if the employment practices of a broadcast licensee are challenged, we thoroughly review the licensee's EEO program in conjunction with the licensee's employment reports.[6] When the information available is sufficient to permit a determina-

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[6] By Public Notice No. 14932, dated March 10, 1977, the Commission established processing guidelines for routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose minority or female employment did not reflect at least 50% of their percentage in the available labor force overall and 25% in the upper-four job categories. By Public Notice, FCC 80-61, dated February 13, 1980, this processing criteria was extended to stations with 5 to 10 full-time employees. Further, the Commission revised the processing criteria for the upper-four job categories to 50% for stations with 11 or more full-time employees.

tion that the licensee is adhering to our EEO rule and policies, we deny the petition and grant the pending application if otherwise appropriate. However, when the information suggests that minorities or females are not being afforded equal opportunities in employment and that the cause therefor is a faulty EEO program or an insufficient effort to implement an EEO program, appropriate remedial sanctions are ordered. *Provident Broadcasting Company*, FCC 82-473, 52 RR 2d 766 (1982). Further, when the cause cannot be determined, the Commission will conduct an inquiry or an investigation. *Mississippi Authority for Educational Television*, 71 FCC 2d 1296, 1316 (1979). Finally, of course, when our analysis indicates that a substantial and material question of fact exists, we will designate the application for an evidentiary hearing. 47 U.S.C. § 309; *Federal Broadcasting System, Inc.*, 59 FCC 2d 356, 363-66 (1976); *Rust Communications Group*, 53 FCC 2d 355 (1975). Thus, as the foregoing demonstrates and as we have repeatedly emphasized, the determinative factors in our evaluation of a licensee's employment practices are not the licensee's employment statistics but the thoroughness of the licensee's EEO program and its good faith efforts to make that program work. *Chicago Metropolitan Broadcast Stations*, 89 FCC 2d 1031 (1982).

6. Applying the foregoing principles, we have evaluated the stations' submissions in light of the petitioners' arguments and the local labor force data for women and minorities, and we find that the following stations' EEO performances warrant no further inquiry or administrative sanction:[7]

(a) WLCS/WQXY-FM, Baton Rouge.[8]

> Comparing the most recent license term employment report of the stations–27 full-time employees, including four (14.8%) minorities, and 25 employees in upper-four jobs, including three (12.0%) minorities–with the Baton Rouge SMSA labor force figures for minorities (25.2%)–we find that the stations' overall full-time employment of minorities is within our processing guidelines while their employment of minorities in the upper-four jobs is slightly outside of the guidelines. However, as petitioners have noted, the stations' three license term Annual Employment Reports (*see* Appendix) show that minority employment both overall and in the upper-four job categories was consistently less than 50% of labor force parity.[9] Nonetheless, it appears that the stations had a positive

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[7] The licensees' employment profiles and practices concerning women were not put in issue by any of the petitioners. Nevertheless, we have examined them and we find that they are in compliance with our EEO policies, except as noted herein.

[8] Labor force figures referred to herein were obtained from the Louisiana Department of Labor's "Manpower Information for Affirmative Action Programs" May 1981 edition. According to the Louisiana Department of Labor as well as available census data, Blacks are the only statistically significant minority group in all the Louisiana markets examined, except in the New Orleans SMSA, and in southern Lafourche Parish.

[9] However, the employment reports also show that in 1980, the stations employed six professionals part-time, including one Black, while in 1981 and 1982, they

continuing EEO program. In this regard, we note that the stations monitor the statistical results of their EEO program every six months; that 49 referrals were obtained from a variety of sources during 1981; and that two of the nine hires during 1981 were minorities. Although petitioners observe and the licensee admits that the stations have not utilized the local Black newspaper as a source of referrals, the stations have participated in many minority outreach and training programs resulting in the filling of some announcing positions with Blacks.

(b) WYES-TV, New Orleans.

The New Orleans SMSA labor force includes 27.2% minorities. The most recent license term employment report for the station dated March 29, 1982, reveals a staff of 61 full-time employees, including 14 (23.0%) minorities, and 52 persons in the upper-three job categories,[10] including eight (15.4%) minorities.[11] However, the station's three license term Annual Employment Reports show that the percentages of minority employment fluctuated from 17.6% overall and 7.5% for upper-three jobs in 1980 to 18.7% overall and 5.9% for upper-three jobs in 1981 to 17.5% overall and 8.7% for upper-three jobs in 1982.[12] Thus, for the majority of the license term under review, the station's level of minority employment in the upper-three job categories was below the Commission's processing guidelines. Review of the station's EEO program shows that contacts with both minority and female organizations, the state employment service and three local universities, as well as advertisements in the local paper, resulted in more than 1,200 referrals in 1981. The station also provided on-the-job training to a Black for the position of master control engineer, and it conducted intern programs with four local universities. Consistent with these efforts, the station's 25 hires in 1981 included seven minorities, while one of the two promotions which occurred during 1981 went to a Black. Moreover, upon its own examination of its employment of minorities, WYES subsequently collaborated with the local cable franchisee for training minorities in its upper-level positions. Finally, we note that the licensee hired a Black as a transmitter engineer on March 31, 1982.

(c) KJIN/KCIL(FM), Houma.

Statistics for Terrebonne Parish, of which Houma is the principal city, show that the labor force includes 16.1% minorities. The licensee's 1982 Annual Employment Report reveals that the stations employed 16 persons overall on a full-time basis, including two (12.5%) minorities, and 14 persons in the upper-four job categories, including one (7.1%) minority, while the licensee's 1981 and 1980 Annual Employment Reports reveal that the licensee employeed 16 persons in 1981, including one minority in the office and clerical category, and 19 persons in 1980, including two minorities, both in the upper-four job categories. The stations' EEO program shows that applicant referrals were received from various sources and that on-the-job training is provided for all employees. In addition, the licensee states that although there are no Black organizations, colleges, or press

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employed ten and eight professionals part-time respectively, two of whom were Black. According to the licensee, one of the Black employees listed as part-time occasionally works full-time and has declined offers of full-time status.

[10] As a noncommercial station, WYES-TV employed no sales personnel.

[11] Although the licensee lists a ninth minority (a Black female) as an upper-three (professional) employee, her title, "Executive Secretary," indicates that she is more properly classified in the Office and Clerical category. Accordingly, we have not viewed her as a professional in our evaluation of the station's employment practices.

[12] The pay period represented in the licensee's 1982 Annual Employment Report is January 3, 1982, while the pay period represented in the licensee's March 29, 1982 amendment is March 15, 1982.

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within the stations' service/recruitment area, it did ask individual leaders of the local Black community to refer potential job applicants, and it also states that it had a cooperative training program with a local high school. As a result of these efforts, the stations hired five persons during 1981, including two minorities, while during the license term, it hired four Blacks, including two for full-time work.

(d) KEEL/KMBQ(FM), Shreveport.

Figures for the Shreveport SMSA indicate that the labor force includes 29.1% minorities. The stations' profile, gleaned from its most recent license term report, reveals a full-time staff of 31 employees, seven (22.6%) of whom are minorities, and 28 employees in the upper-four job catagories, five (17.9%) of whom are minorities. Review of the licensee's EEO program indicates that the stations obtained referrals from a number of sources; that on-the-job training was provided to four Blacks employed in upper-four positions; and that a minority advanced from receptionist to traffic manager to salesperson. Further, data supplied by the licensee show that from June 1, 1979 to January 1, 1982, the stations hired 33 persons for full-time work, including twelve minorities, and that two minorities were hired between January 1, 1982 and May 10, 1982, both for upper-four positions. Thus, although the license term employment reports reveal that the percentage of Black employment in the upper-four job categories did not come within the Commission's processing guidelines until subsequent to the filing of the renewal application, it appears that the stations' present profile is a direct result of the stations' EEO program.

(e) WROA/WZKX(FM), Gulfport.

Figures for the Biloxi-Gulfport SMSA reveal that the labor force includes 17.2% minorities.[13] The stations' three license term employment reports show that full-time employment fluctuated from 20 in 1980, to 11 in 1981 and 15 in 1982, while the number of minority employees fluctuated from three (15.0%) in 1980 to none in 1981 and one (6.7%) in 1982. Similar variations occurred in the number of employees in the upper-four job categories, while the number of minorities declined from two (11.8%) in 1980 to none in 1981 and 1982. *See* Appendix. According to the stations' EEO program, referrals were sought from the Mississippi State Employment Office, Jeff Davis Junior College, Phillips Business College, and Keesler Air Force Base, and that "several," including a Black female, were obtained. Further, the stations' EEO program states that of four persons hired in 1981, one was a minority, but that there was no change in the stations' employment profile since the filing of their most recent report. However, that report (1981) did not list any full-time employee as being a minority.

Both petitioners argue that the stations' 1982 profile is the result of an "absolutely neutral" EEO program, and they cite as support the absence of Black organizations, schools, or newspapers, as well as the absence of any training or internship program. However, neither NBMC nor Mr. Walker refers to any specific recruitment source which the licensee could have used but did not use. Further, petitioner NBMC notes that there is an inconsistency between the stations' EEO program hiring data (one minority), its employment profile according to its EEO program (no change), and its 1981 Annual Employment Report (no minorities). According to NBMC, the inconsistency constitutes a

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[13] Mississippi figures were obtained from the "Labor Market Information for Affirmative Action Programs" March 1981 edition, which was prepared by the Mississippi Employment Security Commission. As with the majority of the Louisiana markets examined, Blacks are the only statistically significant minority in both Gulfport and Jackson.

> misrepresentation and is the result of the stations having copied their 1979 EEO program.
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> In its opposition, the licensee supplied information concerning all personnel actions involving minority employees during the 1979–1982 license term. A Black woman, with no previous experience in radio, was hired in the summer 1979 and trained as FM traffic manager. She remained in that position until December 1980 when she moved with her husband to St. Louis, Missouri. With respect to the other two minorities listed on the stations' 1980 Annual Employment Report, one, an announcer, was promoted in July 1980 to the licensee's co-owned station in Dublin, Georgia (WLMT), while the other resigned in August 1980 after having been employed in excess of nine years in both the news and sales departments. During 1981, the stations' six hires included three minorities. The first hired in April as an announcer, left in June for another job. The second, hired in June (also as an announcer), left in October for work in Birmingham, Alabama, while the third was hired and trained as FM traffic manager. Finally, the licensee conceded that some of the data in the stations' 1982 EEO program was erroneous; however, it explained that the licensee's Annual Employment Report for the pay period ending January 15, 1982 had been prepared and it was this report which it meant to reference in responding to the "Current Employment Survey" position of the EEO program.[14] The 1982 Annual Employment Report did show an increase of 4 employees, including 1 minority. In addition, the licensee failed to include in its statement of 1981 hires two minority employees who were hired in 1981 but who had resigned prior to preparation of the stations' renewal applications.
>
> Given the foregoing we believe that the information submitted by the licensee not only dispels any inference of discrimination or misrepresentation but also indicates that the stations' EEO program is sufficiently affirmative. However, we admonish the licensee for the factual errors contained in its EEO program, and we caution it to include, in the future, all of the information specified in the renewal application and accompanying instructions irrespective of the EEO program format used.

7. The following stations either have only recently begun to implement their EEO programs or have not pursued affirmative action throughout the license term. Accordingly, we believe that further Commission monitoring is necessary to ensure full compliance with our EEO policies, and we have imposed appropriate remedial sanctions. An analysis of each station's EEO performance follows:

(a) KLOU, Lake Charles.

> The Lake Charles SMSA labor force includes 18.6% minorities. The employment report filed with the licensee's renewal application shows that it employed 13 persons overall full-time, including two (15.4%) minorities, and ten persons in the upper-four job categories, including one (10%) minority. Detailed reports[15] filed by the licensee, viewed in conjunction with the licensee's EEO program, reveal that from October 1, 1980 to January 1, 1982, referrals were sought from minority organizations, employment agencies, and colleges, and that various

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[14] At the time of the filing of the renewal applications (February 2), the Annual Employment Report had not been filed with the Commission.

[15] By letter dated October 25, 1979, the Commission required KLOU to submit data regarding job hires, details concerning recruiting efforts, and a list of all employees as of October 1, 1980, and January 1, 1982.

print media were used to advertise job openings. Following these efforts, the licensee interviewed 134 persons, including 47 Blacks, and hired 34 persons, including nine Blacks, three of whom as announcers. The licensee also offered on-the-job training, with the result that one of the licensee's Black announcer/trainees was promoted to a full-time position in March 1982. Although NBMC notes that this employee is the lowest paid professional on the station's staff and it argues that he is being discriminated against, it submits no evidence rebutting the licensee's explanation that the level of compensation reflected his initial status as a part-time announcer. Finally, as of June 25, 1982, the licensee's employment profile reflected twelve persons employed full-time, including three (25%) minorities, and ten persons in the upper-four job categories, including two (20%) minorities. However, because this increase in upper-level minority employment occurred only recently and is not reflected in earlier reports filed by the station, reporting conditions will be continued in order to assure ourselves that the station's efforts to seek out and employ minorities will continue.

(b) WSMB, New Orleans.

The licensee's 1982 Annual Employment Report reveals a full-time staff of 19 persons, including two (10.5%) minorities, and 17 persons in the upper-four job categories, including one (5.9%) minority. These figures are not within our processing guidelines in view of the minority presence in the New Orleans SMSA labor force (27.2%). Similarly, the station's three other license term employment reports reveal only three minority employees employed full-time and only one minority in an upper-level job. Petitioners charge that the licensee's failure to increase the number of minority employees on its staff is the direct result of an EEO program which "is at times insufficient and at times hostile to minority employment." Specifically, petitioners claim that the licensee's failure to include a pledge of nondiscrimination in its EEO program, its omission of the number of referrals received from recruitment sources, and its decision not to hire two Black men on the ground that they wanted "too much money" evidence a state of mind "bent on avoiding the rules."

Review of the licensee's EEO program shows that the station's professed policy is to provide equal opportunities in employment to all qualified individuals without regard to their race or color, and this pledge is printed conspicuously on the station's job application form. Concerning recruitment, the licensee reports that there have been only a small number of hiring opportunities and that because of financial difficulties, positions have not been filled. In this regard, we note that the number of total employees decreased from 31 in 1980 to 19 in 1982. When positions were filled, the station's EEO program lists the local NAACP, the local Urban League, a minority women's organization, a state employment service, and several local universities as recruitment sources, but the number of referrals from each source is not indicated. Nonetheless, some minorities were apparently recruited since one of five hires during 1981 was a minority while two Blacks were interviewed for an announcer's position.[16] Further, although no formal training program exists, a Black hired as a receptionist was promoted to the position of traffic manager while another Black was promoted to assistant office manager and then to office manager. Although we do not believe that the station is discriminating against minorities, we are concerned that the station's inability to increase the percentage of minorities on its staff may be due, in part, to an ineffective EEO program. Accordingly, reporting conditions will be imposed. In addition, we admonish the licensee to provide, in the future, all the information called for in the instructions to the station's renewal application.

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[16] The licensee states that they were not hired because the station could not meet their salary requirements.

(c) **WYNK/WYNK-FM**, Baton Rouge.[17]

Comparison of the stations' staff with the Baton Rouge SMSA labor force—35.9% women and 25.2% minorities—discloses that the stations' employment of women (in the upper-four job categories) and minorities is slightly outside the Commission's processing guidelines. Specifically, the 1982 Annual Employment Report shows 26 full-time employees, including six (23.1%) women and three (11.5%) minorities, and 22 persons in upper-four jobs, including two (9.1%) women and two (9.1%) minorities. Review of the stations' 1981 and 1980 employment reports reflects similar or lower levels of female and minority employment. *See* Appendix. Petitioners contend that the stations' license term employment profiles are the result of an "absolutely neutral" EEO program since the licensee did not list any Black organization, newspaper or college as a recruitment source. In addition, they point to the licensee's assertion in its EEO program that few Black men want to work for a country and western station as evidence that the licensee does not understand or intend to comply with our EEO policies.

Review of the written EEO program indicates that the licensee employed several methods of attracting job applicants. During 1981, however, the stations received only six referrals as well as twelve "off-the street" applications and hired 13 persons primarily in the lower job categories, including four women, but only one minority.[18] On the other hand, the licensee's on-the-job training resulted in one Black woman and two white women being promoted from secretary to assistant bookkeeper, traffic manager, and account executive respectively. In view of the licensee's apparent willingness to hire, train, and promote women and minorities, we do not believe that the stations' levels of female and minority employment are the result of intentional discrimination. However, as petitioners have noted, the stations have not regularly sought referrals from likely sources of minority applicants, nor have they utilized the local minority paper for job advertisements. Thus, although the relative stability of the stations' upper-four job categories may explain the continued small percentages of minorities and females therein, we find that the licensee's apparent reliance on "off-the-street" applications is inconsistent with an effective affirmative action program. In addition, we wish to point out that a station's format cannot, in most instances, justify a questionable EEO performance. Accordingly, we shall require that the licensee submit an amended EEO program which sets forth its proposals for seeking out minority and female applicants, and we shall impose reporting conditions to monitor the licensee's efforts.

(d) KDBS/KRRV(FM), Alexandria.[19]

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[17] Because the stations' employment of women in the upper-four job categories is outside our processing criteria, the licensee's employment practices with respect to women are also being discussed herein.

[18] The licensee's EEO program shows twelve hires but no minorities. However, in its opposition, the licensee states that it did hire one minority during 1981 but that she left after having received two weeks of computer training to work at another radio station. In addition, the licensee states that in previous years, it regularly contacted Southern University, Louisiana State University, and the former president of the local NAACP, but that no referrals resulted.

[19] We note, initially, that the licensee argues that we should not consider its employment practices absent a showing that its programming was discriminatory. However, it is precisely because we do not wish to involve ourselves on a routine basis with questions concerning a licensee's programming judgments that we have opted to address discrimination against women and minorities in ways which are less likely to implicate the First Amendment. Indeed, the judiciary has observed that our consideration of broadcast licensees' employment practices enables us to fulfill our public interest responsibilities. *See NAACP* v. *FPC*, 425

The Alexandria SMSA labor force includes 25% minorities. The licensee's most recent profile, taken from its 1982 Annual Employment Report, shows that the licensee employed on a full-time basis 17 persons overall and 15 persons in the upper-four job categories, none of whom was a minority. It also shows two Black part-time laborers. Similarly, review of the other employment reports filed during the 1979–1982 license term reveals no full-time minority employees. *See* Appendix. According to the licensee, the stations employed only one minority on a full-time basis during the license term but that he left in order to take a job with a local all-Black station, and it cites the presence of that station to explain the absence of minority employees from its stations. Review of the stations' EEO program indicates that the licensee contacted various conventional applicant referral sources and that it placed advertisements in both Alexandria's daily newspaper and its Black weekly newspaper. However, the licensee then notes that during the period February 15, 1981 to January 15, 1982, it hired 20 persons, none of whom was a minority. Nevertheless, it states that a sufficient number of qualified minorities are applying for available positions.

Although the licensee's EEO program with respect to women appears exemplary, we are concerned that the licensee apparently believes that the mere presence of a local station with a Black format absolves it of any further responsibility to seek out minority job applicants. Nonetheless, we do not believe that a hearing is warranted at this time, in view of the absence of any allegation or proof of intentional discrimination. At the same time, however, we believe that grant of a full seven year term is not appropriate and that imposition of the full range of remedial sanctions is necessary to ensure that the licensee will be responsive to the affirmative action component of our rules. Accordingly, we shall defer grant of the licensee's application pending receipt of a revised EEO program which lists specific sources and methods it will utilize to seek out minority job applicants for each opening at the stations in accordance with our policy concerning affirmative action. In addition, the licensee's revised EEO program is to set forth goals and timetables for minority hiring for the next two years. These goals are to be numerical objectives fixed realistically, stating the number of job opportunities anticipated between now and April 1, 1985. The projected hiring goals should be the maximum that can be achieved by taking positive steps to attract as many minority applicants for each opening as possible. Finally, upon our approval of the goals submitted by the licensee, we shall grant renewal for a short-term to August 1, 1985, and shall require progress reports so that we can review fully at an early date this licensee's EEO performance.

(e) KLEB/KZZQ-FM, Golden Meadow.

By way of background, we note that the Commission previously imposed reporting conditions on the licensee as a result of a deficient EEO program during the 1976–1979 license term. In so doing, the Commission observed that although the labor force of the licensee's parish of license (Lafourche) contained 10.7% minorities, the stations' profile revealed no full-time minority employees; their EEO program indicated that only one minority organization in an adjacent parish had been contacted during the twelve month period preceding the filing of the renewal application; and their 16 most recent job hires did not include a minority. By Direction letter, dated October 25, 1979.

Minorities continue to comprise 10.7% of the Lafourche Parish labor force. The 1982 Annual Employment Report shows 14 full-time employees including ten in

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U.S. 662, 670 n.7 (1976); *Bilingual Bicultural Coalition* v. *F.C.C.*, 193 U.S. App. D.C. 236, 595 F.2d 621, 628 (1978). Accordingly, we believe that our present practices regarding review of our licensees' employment practices are proper and fully justified.

the upper-four job categories, and eleven part-time employees, but no minorities. The stations' other license term Annual Employment Reports also show an absence of minority full-time employees, while the detailed periodic "EEO Progress Reports" show three of 66 new hires were minorities. Specifically, the initial report discloses that between October 25, 1979 and October 1, 1980, none of the persons hired for the ten full-time and 17 part-time job openings was a minority. The second report, submitted on May 17, 1982, although it was due on or before February 1, 1982, shows 21 full-time and 18 part-time new hires. Of these, three were minorities, namely a Black woman hired on October 15, 1980 as a sales person and rehired as a part-time receptionist on January 9, 1981, and a second Black hired as a part-time "news stringer" on October 16, 1980. With regard to recruitment, the licensee's first report indicates that the stations contacted minority organizations for 16 of the 27 positions filled, while in the second report the licensee documents efforts to fill three positions and claims the same efforts were utilized to fill 19 other jobs. In this regard, copies of radio and newspaper advertisements and letters to various organizations were furnished. We note, however, that this procedure was not followed for 17 of the 39 positions described in the second report. The licensee explains that five were filled by former consultants or employees, two by spouses of station employees, five by local high school students, three by local French language announcers, one by a stockholder of the stations, and another by a "walk-in". However, the licensee also claims that it offered a full-time position to an American Indian, a Hispanic and its Black part-time receptionist, but that the offers were declined. Finally, the licensee argues that its actual recruitment area is only the southern portion of the parish,[20] and it contends that its EEO performance should be compared with the minority population of South Lafourche (6.7%). In this regard, the licensee notes that 47 of the 66 persons hired between October 25, 1979 and January 1, 1982, lived in South Lafourche at the time of their hiring, while only three resided in some other portion of the parish. Thus, the licensee contends that its minority hiring record is reasonable in view of the percentage of minorities residing in South Lafourche.

As a general rule, broadcast licensees not located within a Standard Metropolitan Statistical Area (SMSA) are to use labor force statistics of their county of license as an initial frame of reference to assess their EEO program. *Provident Broadcasting Company, supra.* Where, as in this case, such data is available, a party seeking to use alternative data must provide substantial justification for doing so. *Id.* Here, the licensee has alleged no specific facts, other than its location within the parish and the residence of 70% of its new hires. Because this hiring data appears to be a product of the licensee's faulty recruiting procedures,[21] we find that the licensee has not provided substantial justification for use of South Lafourche population figures and that continued use of Lafourche

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[20] The licensee supplies a detailed map of the parish which reveals that Golden Meadow is located in the center of Ward 10, the largest and most southern of Lafourche Parish's 11 wards, and that the parish is approximately 75 miles in length while South Lafourche (Ward 10) is approximately 20 miles in length.

[21] In this regard, we find that one unspecific letter does not constitute a diligent continuing recruitment effort with regard to four or five positions filled during the following three to five months. Similarly, the licensee's rehiring of former employees and its hiring of station employee spouses or family members are practices unlikely to expand the pool of potential applicants. In any event, the figure proposed by the licensee (6.7%) is not so different from the labor force figure for the parish (10.7%) as to be significant since the addition of one full-time upper-four minority employee to the licensee's staff would bring the licensee within the Commission's processing guidelines.

Parish labor force data for the initial assessment of the stations' EEO performance is appropriate.

In view of the information before us, we do not believe that the licensee's minority employment profile is the result of intentional discrimination;[22] however, we are concerned that the licensee did not consistently utilize or periodically evaluate the effectiveness of its minority recruitment sources during the 1979–1982 license term. Accordingly, we believe it necessary to continue the reporting conditions and in order to review the progress at an early date we shall grant renewal for less than the full term.[23]

(f) WSLI/WXLY(FM), Jackson.[24]

The Jackson SMSA labor force includes 30.8% minorities. Review of the licensee's three Annual Employment Reports for the radio stations reveals an increase in overall full-time employment from 28 to 30 employees but a decline in the number of minorities from five (17.9%) to four (13.3%). For the upper-four job categories, the reports show an increase from 26 to 28, with three minority employees. Hence, the stations' minority profile is outside our processing criteria for 1982 and below the criteria for 1981 and 1980 for upper-four employment. Review of the licensee's EEO program indicates that the stations obtained referrals from the state employment commission (one referral), two private agencies (six referrals), and two local universities, one of which was Jackson State University (no referrals noted), for 32 total vacancies. In the area of training, the stations provided on-the-job training with the following results: a Black hired as a receptionist for the radio stations became traffic director; a Black, hired as a janitor, was assisted in obtaining an FCC engineering license and then promoted to radio, studio engineer; and a white female, hired as a copywriter trainee for the radio stations became an on-the-air newsperson and then transferred to television news. In addition, although disputed by petitioners, the licensee claims to have had an internship program with Jackson State and other local colleges and that it provided tuition assistance for any employee who desired to take job related courses at local colleges.[25] However, during 1981, the

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[22] On March 4, 1983, the licensee informed us that it hired an American Indian as a sales trainee on November 1, 1982. Although we believe that this hiring supports our conclusion that the licensee did not discriminate against minorities, we are not persuaded to alter our determination that the stations' license term EEO efforts were deficient.

[23] We also note that NBMC argues that the licensee's programming is deficient because the stations allegedly did not broadcast "any material directed to Black audiences." Further, NBMC contends that since the stations are the only stations in southern Lafourche Parish, market failure exists with regard to the interests of Black listeners. However, NBMC's charges are not supported by any listeners of the stations, nor do they include any issue of importance to local Blacks which the licensee unreasonably ignored. Accordingly, we find that NBMC's charges warrant no further inquiry since they are not supported by specific allegations of fact which, if true, would establish that the licensee's overall programming could not reasonably have met the needs and interests of the people within its service area. *American Broadcasting Companies, Inc.*, 83 FCC 2d 302, 306 (1980).

[24] The licensee also operated WJTV(TV) Jackson during the 1979–1982 license term. That renewal application was not challenged and it was granted by delegated authority. Because all three stations were co-located, an identical EEO program was filed with each station's renewal application; however, it seems to relate primarily to the TV station.

[25] The other examples of training noted by the licensee appear to relate entirely to the operation of the licensee's television station, while in subsequent pleadings

> licensee's 32 hires for all three stations included only three minorities, while of ten promotions given by the licensee, three went to Blacks.[26]
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> In our view, the information provided by the licensee in its program and pleadings indicates that during the majority of the license term, the affirmative action program of WSLI/WXLY(FM) was not aggressively implemented. In this regard, we note the following: the licensee has failed to provide any specific facts supporting its contentions regarding the effect of WXLY(FM)'s country format on its EEO efforts to attract Blacks, no specific information with respect to WSLI, and only vague arguments concerning the preferences of its Black interns for television work. When viewed in conjunction with the Annual Employment Reports and hiring data, the information suggests that the licensee's "contacts" resulted in few, if any, minority referrals for openings at the radio stations. Accordingly, although we believe that the licensee's overall training efforts and record of promotions of minorities warrant a finding of nondiscrimination, we also believe it necessary to monitor the stations' minority recruitment efforts, and we shall therefore impose reporting conditions.[27]

8. Accordingly, IT IS ORDERED, That the petitions to deny filed y the National Black Media Coalition, the Mississippi NAACP, and thers ARE DENIED AND/OR DISMISSED; and when considered as n informal objection ARE DENIED.

9. IT IS FURTHER ORDERED, That the renewal applications or Stations WLCS, WQXY-FM, WYES-TV(ed), KJIN, KCIL(FM), EEL, KMBQ(FM), WROA and WZKX(FM), ARE GRANTED.

10. IT IS FURTHER ORDERED, That the license renewal pplications for Stations WYNK and WYNK-FM ARE GRANTED, ubject to EEO conditions specified herein. In this regard, the icensee of WYNK/WYNK-FM is directed to file an amended EEO rogram within 30 days of the release of this Order in accordance ith paragraph 7 of this Order, as well as comply with reporting onditions set forth herein.

11. IT IS FURTHER ORDERED, That the license renewal pplications for Stations KDBS and KRRV(FM) ARE DEFERRED ending receipt, within 30 days of the release of this Order, of an mended EEO program which includes prospective hiring goals, long with a detailed statement explaining why the goals are

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the licensee says that information regarding its internship program at the radio stations was omitted because of the manager's death in mid-1981. However, the licensee also states that the majority of its interns preferred television work and that the country format of WXLY(FM) made it difficult to attract "qualified" Black announcers.

[26] The licensee also reported that during the license term five persons filed complaints alleging discrimination in employment. Of those complaints, two apparently are unresolved and are the subject of pending civil litigation, while the others were settled or resolved in favor of the licensee.

[27] We note that applications to assign the stations' licenses were filed subsequent to the filing of the petition to deny (File Nos. BAL-830228ET and BALH-830228HN). Given this situation we intend that the conditions imposed apply to the assignee should the sales be consummated. However, if the initial report submitted subsequent to such a consummation reveals that the stations have established a continuing, positive affirmative action program, the reporting conditions can be terminated.

reasonable, as well as a timetable to achieve them. Upon receipt of acceptable employment goals, the license renewal applications shall be granted for a short-term, ending August 1, 1985.

12. IT IS FURTHER ORDERED, That the license renewal applications for Stations KLEB and KZZQ-FM ARE GRANTED FOR A SHORT-TERM ending August 1, 1985, subject to reporting conditions specified herein.

13. IT IS FURTHER ORDERED, That the license renewal applications for Stations KLOU, WSMB, WSLI and WXLY(FM) ARE GRANTED, subject to reporting conditions specified herein.

14. IT IS FURTHER ORDERED, That the licensees of Stations KLOU, WSMB, WYNK/WYNK-FM, KLEB/KZZQ-FM, KDBS/KRRV(FM), and WSLI/WXLY(FM) are directed to submit the following information on an annual basis commencing on June 1, 1983 and continuing for two years thereafter with the final report being filed on June 1, 1985:[28]

(a) a list of all persons hired during the preceding year indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex and race or national origin;

(b) a list of employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), date of hire, sex and race or national origin;

(c) a list of all job vacancies during the year by job title with full or part-time status indicated, showing the race or national origin, sex and referral source for the applicants for each job; and

(d) a narrative statement detailing the stations' efforts to recruit for each position filled during the specified periods, including the identification of sources used for the purpose of increasing the stations' pool of minority applicants.[29]

15. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail-Return Receipt Requested a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[28] Upon submission of the third report for Stations KLOU, WYNK/WYNK-FM and WSLI/WXLY(FM), the Commission shall review the licensees' EEO performance, and if we determine that the licensee has developed an effective EEO program, no further reports will be required. The 1985 progress for KLEB and KZZQ-FM should be filed with its application for renewal of license on or before April 1, 1985.

[29] The affected licensees may contact Mr. Glenn Wolfe (202-632-7069) of the EEO Branch of the Mass Media Bureau's Enforcement Division for information on the amended EEO programs, the formulation of hiring goals, and employment reports.

APPENDIX

		Overall			*Top Four Categories*	
Station	*Total*	*Women*	*Minorities*	*Total*	*Women*	*Minorities*
WLCS/WQXY-FM						
1982	26	10 (38.5)	3 (11.5)	24	8 (33.3)	2 (8.3)
1981	25	10 (40.0)	3 (12.0)	22	7 (31.8)	2 (9.1)
1980	26	10 (38.5)	3 (11.5)	23	7 (30.4)	2 (8.7)
50% and 50% of SMSA parity		18.0%	12.6%		18.0%	12.0%
WYES-TV[1]						
1982	61	24 (39.3)	14 (23.0)	52	15 (28.8)	8 (15.4)[2]
Ren. App.	57	23 (40.0)	10 (17.5)	46	13 (28.3)	4 (8.7)
1981	64	25 (39.1)	9 (14.1)	51	14 (27.5)	3 (5.9)
1980	68	30 (44.1)	12 (17.6)	53	17 (32.1)	4 (7.5)
50% and 50% of SMSA parity		18.7%	13.6%		18.7%	13.6%
KJIN/KCIL(FM)						
1982	16	5 (31.3)	2 (12.5)	14	2 (21.4)	1 (7.1)
1981	16	6 (37.5)	1 (6.3)	12	2 (16.7)	0 (0)
1980	19	8 (42.1)	2 (10.5)	17	6 (35.3)	2 (11.8)
50% and 50% of parish parity		13.5%	8.1%		13.5%	8.1%
KEEL/KMBQ(FM)						
May 1982	31	12 (38.7)	7 (22.6)	28	9 (32.1)	5 (17.9)
April 1982	32	12 (37.5)	6 (18.8)	29	10 (34.5)	4 (13.8)
1982	32	13 (40.6)	5 (15.6)	29	10 (34.5)	3 (10.3)
Ren. App.	31	13 (41.9)	5 (16.1)	28	10 (35.7)	3 (10.7)
1981	32	13 (40.6)	5 (15.6)	28	9 (32.1)	2 (7.1)
1980	35	12 (34.3)	5 (14.1)	30	8 (26.7)	1 (3.3)
50% and 50% of SMSA parity		20.3%	14.6%		20.3%	14.6%
WROA/WZKX						
1982	15	5 (33.3)	1 (6.7)	13	3 (23.1)	0 (0)
1981	11	4 (36.4)	0 (0)	10	3 (30.0)	0 (0)
1980	20	7 (35.0)	3 (15.0)	17	5 (29.4)	2 (11.8)[3]
50% and 50% of SMSA parity		19.1%	8.6%		19.1%	8.6%
KLOU						
June 1982	12	3 (25.0)	3 (25.0)	10	2 (20.0)	2 (20.0)
1982	13	4 (30.8)	2 (15.4)	10	2 (20.0)	1 (10.0)
1981	18	7 (38.9)	2 (11.1)	14	4 (28.6)	0 (0)

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[1] Five of the station's employees overall and four of its employees in the top three categories are Hispanic.

[2] *See* n.11 of text, *supra*.

[3] One of the stations' minority employees was Hispanic.

		Overall			*Top Four Categories*	
Station	*Total*	*Women*	*Minorities*	*Total*	*Women*	*Minorities*
1980	16	6 (37.5)	2 (12.5)	12	3 (25.0)	0 (0)
50% and 50% of SMSA parity		16.5%	9.3%		16.5%	9.3%
WSMB						
1982	19	5 (26.3)	2 (10.5)	17	4 (23.5)	1 (5.9)
Ren. App.	19	5 (26.3)	3 (15.8)	17	4 (23.5)	1 (5.9)
1981	21	6 (28.6)	3 (14.3)	18	4 (22.2)	1 (5.6)
1980	31	9 (29.0)	3 (9.7)	26	5 (19.2)	1 (3.8)
50% and 50% of SMSA		12.7%	13.6%		12.7%	13.6%
WYNK/WYNK-FM[4]						
1982	26	6 (23.1)	3 (11.5)	22	2 (9.1)	2 (9.1)
1981	25	6 (24.0)	3 (12.0)	22	3 (13.6)	2 (9.1)
1980	23	4 (17.4)	2 (8.7)	20	1 (5.0)	1 (5.0)
50% and 50% of SMSA parity		18.0%	12.6%		18.0%	12.6%
KDBS/KRRV(FM)						
1982	17	5 (29.4)	0 (0)	15	3 (20.0)	0 (0)
Ren. App.	18	6 (33.3)	0 (0)	16	4 (25.0)	0 (0)
1981	17	6 (35.3)	0 (0)	15	4 (26.7)	0 (0)
1980	18	6 (33.3)	0 (0)	18	6 (33.3)	0 (0)
50% and 50% of SMSA parity		17.5%	12.5%		17.5%	12.5%
KLEB/KZZQ-FM						
1982	14	7 (50.0)	0 (0)	10	3 (30.0)	0 (0)
Ren. App.	19	9 (47.4)	0 (0)	13	4 (30.8)	0 (0)
1981	22	10 (45.5)	0 (0)	18	6 (33.3)	0 (0)
1980	19	6 (31.6)	0 (0)	16	3 (18.8)	0 (0)
50% and 50% of parish parity		18.7%	5.4%		18.7%	5.4%
WSLI/WXLY(FM)						
1982	30	9 (30.0)	4 (13.3)	28	8 (28.6)	3 (10.7)
1981	30	9 (30.0)	5 (16.7)	27	7 (25.9)	3 (11.1)
1980	28	7 (25.0)	5 (17.9)	26	6 (23.1)	3 (11.5)
50% and 50% of SMSA parity		21.3%	15.4%		21.3%	15.4%

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[4] One of WYNK's minority employees is an American Indian.

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Petition to deny certain Louisiana and Mississippi license renewal applications.

I dissent to the majority's decision to renew unconditionally the application of non-commercail Station WYES-TV. While I appreciate that public broadcasting generally is experiencing funding cutbacks, I am unconvinced, unlike the majority, that this general condition should allow the application of less exacting equal employment obligations on public broadcasters. Nor am I persuaded that this station's last minute improvement provides sufficient assurance that it will faithfully adhere to our EEO policies.

WYES documented no special financial hardship, so the majority's solicitude in bench colloquy on that score is without justification. In addition, throughout the license term, the station's employment profile showed that minorities were substantially underrepresented in upper-three jobs, despite its continued filling of several vacancies. As its license term drew to a close, the station realized that its referral sources were not optimally identifying prospective minority applicants. Its minority recruitment efforts then became more affirmative and its minority employment profile improved.

While I am pleased at the station's belated success in this regard, the Commission should have imposed a reporting condition on WYES-TV so that it could assess whether the station's recent efforts and success will be sustained. In failing to do this, the Commission has clearly signalled broadcasters that they can neglect affirmative action duties throughout most of the license term, secure in the knowledge that eleventh hour improvements will save the day. I deeply regret this signal. Its consequences are all the more troubling now that broadcast license terms have been considerably lengthened.

Common Carrier, Interconnection
Common Carrier, Interconnection, Carrier to Carrier
Common Carrier, Joint Use of Facilities
Common Carrier, Rates, Charges

Notice of Proposed Rulemaking adopted seeking comment on proposed rules and requirements to complement the adoption of access charges in Phase I of this proceeding, and the revised industry structure which will result from implementation of the Modification of Final Judgement in *United States* v. *Am. Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982).
–Market Structure (Phase III)
CC Docket No. 78–72

FCC 83–178

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MTS and WATS MARKET STRUCTURE, Phase III Establishment of Physical Connections and Through Routes Among Carriers; Establishment of Physical Connections by Carriers With Non-carrier Communications Facilities; Planning among Carriers For Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and Regulations for and in Connection with the Foregoing	CC Docket No. 78–72, Phase III

NOTICE OF PROPOSED RULEMAKING

(Adopted: April 27, 1983; Released: May 31, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES ABSENT.

I. Introduction

1. Interstate and foreign communications provided by common

carriers have historically been offered through electrical connection ("interconnection") of communications facilities operated by different entities. In decisions tracing virtually to the inception of the FCC in the 1930's, we have addressed carriers' obligations to interconnect their facilities with one another, and with non-carrier facilities (*e.g.*, private communications channel facilities and terminal equipment). The development of Commission policies relating to carriers' interconnection obligations is complex. We summarize our current policies below, as they relate to this proceeding.

2. As a general proposition, carriers today are under a legal obligation to offer interconnection (both to other carriers, and to non-carrier facilities and equipment) under tariffs which are subject to FCC regulation. There are normally two basic dimensions to carriers' interconnection obligations. First, arrangements are required to compensate a carrier offering interconnection for use of its facilities in interconnected service. Second, physical, technical and operating arrangements are required to ensure that interconnection is feasible and workable, and that such interconnection does not create unacceptable levels of interference or harm to service.

3. In view of the wide range of different service offerings which are subject to the Communications Act of 1934 as amended (the "Act"), we have appropriately tailored our interconnection regulation in each instance to the specific carriers and services involved. For example, in the traditional telephone service field, compensation and physical arrangements for carrier-to-carrier interconnection historically were largely worked out by the industry itself without direct regulatory intervention. The FCC served primarily as a forum for complaints concerning issues which could not satisfactorily be resolved by the carriers through negotiation, and as a forum for resolving issues of jurisdictional cost and revenue apportionment ("separations") which had bearing upon provision of interconnected telephone services. With the advent of new entry by competitive common carriers, this Commission was called upon to take a more active regulatory role with respect to carrier-to-carrier interconnection for telephone services.

4. In the telegraph and record service field, under provisions of 1943 legislation permitting Western Union to acquire Postal Telegraph's facilities[1], the Commission was required specially to regulate compensation and traffic division arrangements for traffic involving interconnection of Western Union's domestic facilities with the international facilities of international record carriers ("IRCs").

5. Other communications services have directly or indirectly involved interconnection of carriers' facilities to those of one another

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[1] These provisions were formerly in Section 222 of the Act, and were recently supplanted by the Record Carrier Competition Act of 1981, P.L. 97-130, 95 Stat. 1687, Dec. 29, 1981 ("RCCA").

or to non-carrier facilities, including domestic satellite services, microwave radio services and video services. Here too, we have addressed the compensation and physical arrangements for such interconnection.

6. In some of the foregoing interconnection circumstances, we have merely clarified that a legal obligation to offer interconnected service exists, and have allowed the carriers themselves in carrier-initiated tariffs (or private contracts in some circumstances) to determine the arrangements for interconnection. This largely was the historic pattern for traditional telephone services provided jointly by the integrated Bell System and the Independent telephone companies. The involved carriers had great incentives to interconnect with one another and the details, while sometimes controversial, could usually be worked out by the involved carriers without regulatory intervention. The American Telephone and Telegraph Company ("AT&T") controlled (and controls) the great bulk of all telephone facilities in this nation, through direct control of long distance facilities by its Long Lines Department, and through indirect control through ownership of the associated Bell Operating Companies ("BOCs"). The BOCs access approximately 80% of the nation's telephones (and approximately 50% of the land area of the nation). Quite naturally, with this degree of direct and indirect control, AT&T largely could itself determine the evolution of telephone service, including the terms of interconnection. Moreover, even without such control, the research and development resources of AT&T (primarily in the Bell Telephone Laboratories and in Western Electric Company, and to some extent in AT&T's General Department) effectively could exercise strong influence over the evolution of telephone services, including interconnection.

7. Moreover, AT&T's strong influence over interconnection has not been limited to traditional telephone services, as many non-telephone common carrier services have required interconnection to AT&T or BOC facilities. For example, while Western Union itself has the right to construct long distance and local telegraph facilities (a right which predates the development of the telephone and of AT&T), in fact Western Union almost exclusively employs local telephone facilities to reach its subscribers. Similarly, while we have authorized the provision of specialized and domestic satellite services by new entrants since the late 1960's, because of spectrum congestion the carriers involved have been unable to bring their services directly to their subscribers in urban areas, and have been required to use local telephone facilities on an interconnected basis to reach their urban subscribers[2]. Again, given AT&T's predominant control of such facilities, AT&T has largely determined the evolution of these interconnection offerings, subject to regulatory constraint.

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[2] Such facilities have been termed "entrance facilities."

8. Finally, the Act itself has, of course, affected this Commission's historic role with respect to interconnection. For example, all carriers engaged in the provision of interstate and foreign communications, including carriers which do so solely by virtue of interconnection, are subject to Sections 201 through 205 of the Act, which provisions include interconnection requirements. However, under Sections 2(b) and 221(b), the states and not the FCC regulate the offering of local (*i.e.*, exchange) services to carriers' subscribers. Where carrier-to-carrier interconnection for provision of interstate and foreign services is involved, this Commission's authority over all interconnection arrangements, including compensation arrangements, is preeminent. But, where interconnection of carriers' local facilities to those of non-carriers is involved (*i.e.*, for interconnection of terminal equipment, or of non-carrier private communications facilities), we have limited our role to one of assuring that interconnection is made available without discrimination, but without otherwise regulating local service compensation arrangements[3].

A. Changes Necessitating Action

9. A number of recent major events are causing us to examine comprehensively issues which bear upon carriers' interconnection offerings. First, we recently adopted a *Third Report and Order* in this proceeding, *93* FCC2d *241*, FCC 82-579, released Feb. 28, 1983 (hereafter, "Third Report"), addressing access charges. In the Third Report, we examined the more competitive nature of communications, and unreasonable and discriminatory ratemaking practices which existed in connection with provision of interstate and foreign services on a direct and interconnected basis. We concluded that the historic traditional telephone industry revenue division practices must be replaced by a system of access charges (*i.e.*, new arrangements for compensating carriers for use of their facilities when providing service on an interconnected basis). In part, this was the result of the increasingly competitive nature of telecommunications, and various forms of disparate treatment of service offerings and interconnection offerings made to other carriers and to subscribers by carriers. In part, this was a response to changes, discussed below, which are likely to flow from the revised antitrust decree governing AT&T and the BOCs. While our Third Report revises, on a nationwide basis, the compensation arrangements for interconnected service, it does not address the physical, technical and operational details of such interconnection. We believe that such matters are important, that they similarly should be addressed, and we propose to do so in these further proceedings.

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[3] *See, e.g.*, Carterfone, 13 FCC2d 420, recon. denied, 14 FCC2d 571 (1968); North Carolina Utilities Comm'n v. FCC., 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976) ("NCUC I"); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) ("NCUC II").

10. Second, on August 24, 1982, the United States District Court for the District of Columbia entered a Modification of Final Judgment ("MFJ") in *United States* v. *Am. Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), 1982–2 Trade Cas. (CCH) ¶ 64,979, *aff'd sub. nom.*, *Maryland* v. *United States*, ___ U.S. ___ , 51 U.S.L.W. 3628 (U.S., Mar. 1, 1983), requiring AT&T to divest the BOCs no later than eighteen months from entry, and establishing constraints and obligations on the subsequent activities of AT&T and the divested BOCs. Bearing most importantly on provision of interstate and foreign services through interconnection is a requirement in Section II of the MFJ, and related Appendix B, that each BOC:

> provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled tariff basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates. As noted, the Third Report in this proceeding addresses the "price" aspects of the BOCs' access and service provision obligations under the MFJ, but its does not address directly the physical, technical and operating arrangements for such interconnection.[4]

11. To some extent, these issues are addressed in the MFJ. For example, Appendix B acknowledges that equal treatment of access will require a phasing-in during 1984–86, and even thereafter in the case of smaller, older central offices upon an appropriate showing to the court. However, the MFJ is silent with respect to interconnection obligations which might govern AT&T after divestiture of the BOCs. Moreover, the exchange access provisions of the MFJ apply generally to provision of interconnection by the BOCs to "interexchange carriers" and, except with respect to provision of information access, the decree is silent as to an obligation of the BOCs to offer interconnection to facilities of non-carriers. These interconnection issues are important, and have been addressed by this Commission in the past. For that reason, we believe it appropriate to clarify their treatment in the changing industry structure.

12. Third, the industry structure that would result from implementation of the MFJ would, through the provisions of the MFJ, create specifically detailed arrangements for access to the BOCs' subscribers (as noted, approximately 80% of the nation's telephones), but not to the subscribers of non-Bell Independent telephone companies. We believe that the purpose of the MFJ is consistent with regulatory policy of this Commission to create, on a nationwide basis, opportunities for competitive providers of interstate and foreign services to access their subscribers through interconnection with

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[4] The entered Modification of Final Judgment is reproduced in United States v. Am. Tel. and Tel. Co. *supra.*, and parties may refer thereto in formulating their comments in this proceeding. Furthermore, if less than equal access is provided by a BOC, it is permitted to file access tariffs reflecting the lesser cost of such access, Section VIII.F of the MFJ. This BOC tariff filing obligation does not affect the authority of regulators subsequently to prescribe the rates, terms and conditions of such access (or, in the terms of this notice, "interconnection").

local telephone companies' facilities. The FCC and the courts have explicitly imposed such interconnection obligations on all local telephone companies, BOCs and Independents, and as noted we have addressed the compensation aspects of such interconnection in the Third Report herein.

13. In the altered industry structure of the MFJ, competitive interexchange carriers will have a detailed blueprint for interconnection to facilities for access to BOC subscribers (through the provisions of the MFJ), but not for subscribers in Independents' service areas. The object of the MFJ under the antitrust laws is creation of a competitive telecommunications marketplace nationwide, which is complementary to our mandate under the Act to ensure the availability of rapid, efficient communications with adequate facilities at reasonable charges, also on a nationwide basis. We have fostered the development of nationwide services in the past, and we believe it important to continue to do so upon implementation of the MFJ. For that reason, we propose generally to require, pursuant to our authority under the Act, that the Independent telephone companies offer interconnection (or in MFJ terms, exchange and information access) on a basis similar to that of the divested BOCs, in order that interstate and foreign services may be planned and offered on a reasonably uniform basis nationwide.

14. Fourth, the physical, technical and operational details of interconnection have increasingly become controversial in recent years, across a broad range of services and carriers. In some cases, we have been required to adopt specific regulations governing interconnection, *e.g.*, regulations in Part 68 of our rules governing interconnection of terminal equipment, wiring, and protective apparatus. In other cases, we have adopted specific tariff-prescribing orders governing carriers' interconnection offerings, *e.g.*, our original *Carterfone* decisions,[5] our "piece out" decision,[6] and our decisions implementing the Record Carrier Competition Act of 1981.[7] In other cases, we have served as a forum for carriers themselves to negotiate interconnection arrangements.[8]

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[5] Carterfone, supra. n. 3.

[6] Am. Tel. and Tel. Co., 60 FCC2d 939 (1976) ("Piece out"); *see also*, Am.Tel. and Tel. Co., 71 FCC 1 (1979) ("ARINC").

[7] Interconnection Arrangements Between and Among Domestic and International Record Carriers, 89 FCC2d 988 (1982) ("Interim Order"), ___ FCC 2d ___, FCC 82-264, released June 11, 1982 ("Rejection Order"), ___ FCC2d ___, 48 Fed. Reg. 12372 (Mar. 24, 1983) ("Store-and-forward and TWX/Telex Conversion").

[8] E.g., AT&T (Facilities for Use by Other Common Carriers), 52 FCC2d 727 (1975) ("Docket 20099") and Exchange Network Facilities for Interstate Access, 71 FCC2d 440 (1979) ("ENFIAA"). While these proceedings were resolved to some extent through informal carrier negotiation under FCC auspices, it should be noted that subsequent thereto, compensation issues have remained controversial, and we have been almost continuously called upon to interpret their results and to rule on proposed tariffs which affect or change their results. Thus, even where carrier agreements in lieu of direct FCC regulatory intervention have been employed, the

15. While we have no desire unnecessarily to extend direct and active regulation to activities which satisfactorily may be resolved without or with reduced regulatory intervention, it is clear that in a more fragmented and competitive telecommunications industry the interconnection "ground rules" must be set at the outset, particularly inasmuch as interconnection often represents the sole means for competitive carriers (and providers of equipment and facilities) to access their customers. When Congress considered this issue recently in the context of enacting the RCCA it recognized that the record carriers' interconnection practices largely would determine the extent of competition. For this reason, the FCC was directed to prescribe record carriers' interconnection arrangements if the carriers could not themselves reach a voluntary agreement (which, in fact, they were unable to do). This principle is not limited to record services, and in our view applies to all interconnection in a more fragmented and competitive telecommunications environment.

16. Moreover, we believe that the developing pattern of AT&T no longer unilaterally controlling the planning and evolution of communications services in this nation, which pattern was developing as a consequence of competition and new entry, will likely be accelerated upon implementation of the MFJ. While AT&T will continue itself to control a very large portion of this nation's long distance facilities, over time it is likely that the scope of this control may well diminish as competition continues to develop, which will impair AT&T's ability itself to implement its planning decisions. Concommitantly, AT&T will be divested of the BOCs and will lose the ability directly to mandate implementation of much such planning.

17. Our policies are to promote the ability of competitive carriers (and non-carriers through use of private facilities) to innovate and to offer diverse communications services, a result which may have to some extent been impeded in the past by AT&T's control over telecommunications planning and evolution. Such innovation is a positive benefit of competition and new entry. However, we cannot fail to recognize that we have a statutory mandate to foster the development of nationwide (and worldwide) services; at some point, if communications becomes too "balkanized" this mandate might be frustrated. Furthermore, communications is a capital-intensive industry which often involves relatively long planning periods for

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net result has largely been one of FCC regulation in any event, with respect to compensation.

Conversely, technical, operational, maintenance and administrative issues have largely been resolved by the affected carriers informally during the course of periodic public meetings among the carriers, under the supervision of the Common Carrier Bureau, *see*, 52 FCC2d at 733, to address such issues, as they arose in implementation of the Docket No. 20099 and ENFIA settlement agreements.

construction of new facilities (measured in years and in some cases in decades). AT&T in the past was a forum for amalgamation of various carriers' and subscribers' future communications needs for service, and for synthesis of appropriate advance construction plans. In the more competitive telecommunications industry which is evolving, and with divestiture by AT&T of the BOCs, an alternative advance planning mechanism to that traditionally performed by AT&T would appear to be required, and we are proposing in this proceeding to establish such a mechanism.

18. Finally, some forms of planning among carriers will be required to fulfill mandates of the Communications Act other than those related to nationwide service, most notably creation of administrative mechanisms and standby capabilities to support emergency communications bearing upon national defense and safety of life and property (national security and emergency preparedness, or "NSEP", communications capabilities). Here too, AT&T has generally coordinated the telephone industry's role in such matters in the past, and upon implementation of the MFJ alternatives may be required[9]. In this Notice, we are proposing the creation of appropriate mechanisms to address advance planning of interconnection by carriers, and we envision that these mechanisms will be useful both for planning associated with provision of routine services, and for NSEP communications. With respect to the latter, it should be noted that we are proposing in this proceeding to create a framework for planning which might involve NSEP implementation, but we are not addressing the important issues of what planning will be required, and the voluntary and regulatory administrative and other mechanisms which may prove necessary to carry out such planning[10].

19. Furthermore, while we are proposing in this Notice creation of a framework for advance planning by carriers, we do so in full awareness that such planning among competitors (and potential competitors) must be limited to the absolute minimum consistent with achievement of our statutory mandate, to minimize any distortion of competition. As is discussed below, in addressing limited joint planning generally, and planning in behalf of NSEP communi-

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[9] Under the MFJ, the divested BOCs are required to establish a single point of contact organization for these emergency services, to coordinate and to direct provision by the BOCs of NSEP services. However, it is unclear how this point of contact organization will relate to planning for administrative mechanisms and standby facilities arrangements involving AT&T and other interexchange carriers, or to such arrangements involving non-BOC Independent telephone companies.

[10] Thus, we conclude that other planning issues, which are focused primarily on exchange carriers' interconnection offerings, and which are involved in the proposals in this proceeding, are sufficiently related to planning for NSEP capabilities to justify our proposing that the planning addressed herein include NSEP.

cations specifically, we propose to be guided by analogous statutory provisions which have been in force since the early 1950's and which appear to achieve an appropriate balance between competition objectives and emergency planning objectives.

B. Summary of Proposals

20. We view this proceeding as complementary both to the Third Report addressing access compensation arrangements, and to the provisions of the MFJ addressing certain BOC interconnection obligations. With respect to the former, we are proposing to address the physical, technical and operational details of interconnection among carriers' facilities and between carriers' facilities and those of noncarriers, generally through a proposed requirement that such details be addressed in carriers' exchange access tariffs subject to FCC regulation. With respect to the latter, we are proposing to extend to all carriers interconnection requirements analogous to those of the MFJ (the latter of which is limited solely to the BOCs), and to clarify that such interconnection obligations apply both to interconnection with other carriers' facilities, and to interconnection with non-carrier communications facilities[11]. Finally, we are proposing to create carefully circumscribed mechanisms for the planning by carriers for the provision of interconnected services.

II. Discussion of Specific Proposals

A. Interconnection by Independent Telephone Companies

21. As noted, if the MFJ is implemented in its present form,[12] the BOC facilities which offer access to approximately 80% of the

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[11] To the extent that exchange services may be involved in the offering of interconnection to subscribers' terminal equipment or private communications facilities, we shall limit our consideration solely to the physical, technical and operational details of such interconnection, and not to the exchange rates themselves, consistent with the provisions of Sections 2(b) and 221(b) of the Act and NCUC I, 537 F.2d at 793–95 and NCUC II, 552 F.2d at 1045–48, supra. n. 3. It is our intent in this proceeding neither to seek to extend, nor to contract, our limited interconnection jurisdiction over exchange offerings which, through interconnection, support the provision of interstate and foreign services.

[12] Implementation of many aspects of the MFJ is subject to approval by the Commission. It might be noted that the Commission has expressed general approval of the MFJ in its *amicus* comments to the federal district court during the course of the court's Tunney Act proceeding on the public interest implications of the MFJ. *See*, United States v. AT&T, 552 F.Supp. at 211. In such circumstances, it is reasonable to explore in this proceeding extension of the overall principles of the MFJ to other carriers (e.g., non-Bell telephone companies) or to other circumstances not specifically addressed therein (e.g., interconnection with non-carrier facilities), subject to the outcome of any FCC approval proceedings on the MFJ itself. The instant proceeding may prove lengthy, and we conclude, consistent with the provisions of Section 4(j) of the Act, that such an approach is warranted to permit this proceeding to proceed to conclusion prior to full implementation of the MFJ.

nation's telephone subscribers will be required to be made available for interconnection under the exchange and information access provisions of the MFJ. These obligations are addressed variously in the MFJ, using concepts which are complementary to, but somewhat different than, concepts employed by the Commission in addressing analogous interconnection issues in the past. While we do not disagree with the structure envisioned by the MFJ, we believe it important to clarify the following discussion by identifying differences between the access structure of the MFJ and the jurisdictional split between intrastate offerings, and interstate and foreign offerings, in the Communications Act, as our proposals in this proceeding are pursuant to our authority under the Act.

1. Access Jurisdiction

22. Under the Act, the FCC is granted jurisdiction over interstate and foreign communications by wire and radio generally, but jurisdiction is reserved to the states over intrastate and exchange communications. Initially, under this jurisdictional split of regulatory authority, we regulated rates, tariffs and associated practices governing interstate and foreign services alone. However, often the same facilities are employed both for provision of interstate and foreign communications subject to our direct jurisdiction, and for the intrastate and exchange services over which state authority is reserved. In such circumstances, under developed case law[13] the FCC has plenary jurisdiction over interconnection even to exchange facilities, where such interconnection is required for interstate and foreign communications to proceed. However, we have not exercised urisdiction over the rates for the intrastate toll and exchange offerings made over such facilities, and have limited our exercise of atemaking jurisdiction to use of such facilities for interstate and oreign calling. In sum, under the Act there is a division of egulatory responsibilities between the Commission and the states with respect to ratemaking, and there is preemptive federal authoriy over the tariffs and associated practices governing interconnecion. Where ratemaking authority is so divided, the division is etween intrastate and exchange services on the one hand, and nterstate and foreign services on the other.

23. The MFJ also establishes market definitions, for division of esponsibilities and opportunities for AT&T and the BOCs. Rather han using the state line boundaries used primarily in the Act, the MFJ appears generally to seek a division between those local service ndertakings which are implemented using exchange-like facilities, nd those service undertakings which are implemented using long stance facilities which connect groups of exchanges with one nother. The basic analytic distinction in the MFJ is between a

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[3] *E.g.*, NCUC I and NCUC II, n. 3 supra.

species of exchange service (which may encompass more than the "telephone exchange service" definition of Section 3(r) of the Act), and interexchange service. Under the MFJ, the BOCs are limited to provision of the former (i.e., exchange-like services) and are not permitted to offer the latter (*i.e.*, interexchange services). They are, however, permitted and indeed required to participate in the provision of interexchange services by others on an interconnected basis (deemed "access" in the MFJ).

24. To describe the exchange-like offerings which may be made by the BOCs under the MFJ, and the concommitant interconnection ("access") obligations of the BOCs, the term Local Access and Transport Area ("LATA") has generally been employed to distinguish the exchange-like services of the MFJ from the traditional "exchange" and "toll" classifications used in regulatory statutes such as the Communications Act.[14]

25. While the BOCs are limited to provision of communications within such a LATA, and are prohibited from offering communications between LATAs, they are required to offer interconnection to others so that such others may provide inter-LATA and information services to the BOCs' subscribers. As is discussed below, we are proposing to impose on non-Bell telephone companies interconnection obligations patterned after those of the MFJ. However, in pursuing such an approach, we must be mindful of the differences between the jurisdictional divisions of the Act, and the interexchange/LATA distinctions employed in the MFJ. Interstate and foreign communications are subject to our jurisdiction regardless of whether the interexchange or LATA classifications of the MFJ are applicable to such communications. Conversely, intrastate toll and exchange communications are not (except with respect to intercon-

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[14] The term "LATA" does not appear in the MFJ; it has been used by various parties in their filings with the district court to avoid confusion. What is now generally termed a LATA is defined in Section IV.G of the MFJ as an "exchange area" or "exchange". Absent court approval, such a LATA is confined to the boundaries of a single state, and encompasses contiguous local exchange areas (presumably, in the traditional regulatory sense) which serve common social, economic, and other purposes. With court approval, a LATA may extend across a state boundary (somewhat similar to exchanges under Section 221(b) of the Act). Also, with court approval, a LATA may include multiple standard metropolitan statistical areas (or consolidated statistical areas in the case of densely populated states), but not otherwise. Also, the MFJ utilizes a facilities split between "class 4" and "class 5" switching facilities; groups of "class 5" facilities may be accessed in common for "access" under the MFJ.

These definitions do not preclude the creation of geographically very large LATAs, and indeed in its filings with the federal district court AT&T had sought to treat whole states as single LATAs, notwithstanding that much communication within such a large LATA would be viewed as intrastate toll service, and not exchange service, under traditional regulatory classifications such as those of Sections 3(r) and 3(s) of the Act. Certain of these were approved by the district court. United States v. Am. Tel. and Tel. Co., No. 82-0192, slip op. at 141-45 (D.D.C. Apr. 20, 1983.)

nection to facilities used in common for such state-regulated offerings and interstate or foreign communications), even if within the competitive inter-LATA category of the MFJ (for which interconnection by the BOCs is mandated under the MFJ).

26. In sum, because the jurisdictional divisions of the Act are somewhat different than the distinctions of the MFJ, we must of necessity decouple from the interexchange/LATA distinctions of the MFJ. To the extent that a LATA crosses state boundaries, interstate services within such a LATA may be subject to full Commission regulatory authority (if such service is not "exchange" service within the meaning of Sections 3(r) and 221(b) of the Act)[15]. Conversely, AT&T has proposed establishment of multiple LATAs in many states. Service between such LATAs, while "interexchange" within the meaning of the MFJ and invoking the "access" obligations of the MFJ, is intrastate toll service under Section 3(s) of the Act and not necessarily subject to full Commission jurisdiction. As a practical matter, it would be desirable for local telephone companies to interconnect with intrastate toll services on the same basis as they might with the interstate and foreign services subject to our direct jurisdiction. Such an approach would promote technical uniformity, and potentially might well contribute to telecommunications efficiency. Indeed, because unitary exchange facilities have historically been interconnected both with intrastate and interstate (and foreign) toll facilities on the same basis, disparate interconnection arrangements for the two groups of services may not be feasible. However, in this proceeding we shall address solely interconnection to exchange facilities to provide interstate and foreign communications. We do not at this time propose either expansion, or contraction, of our regulatory authority over such interconnection[16].

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[15] AT&T had sought from the district court exemptions from the provisions of Section IV.G of the MFJ to configure certain interstate LATAs, and in its recent decision addressing AT&T's LATA proposals, the district court has approved many LATAS which cross state boundaries. *See*, United States v. Am. Tel. and Tel. Co., slip op. at 23–24, n. 13 supra.

[16] As an example of the circumstances which require such a decoupling, and without our reaching a judgment on the desirability of such an example, AT&T had sought from the district court authority to include an entire state, Delaware, in a Pennsylvania LATA. The FCC has authorized competitive provision of interstate service, which authorization would include service between Delaware and portions of Pennsylvania in this LATA. While the district court has sought to ensure that competitive interexchange service providers are not disadvantaged by this arrangement, which it approved, United States v. Am. Tel. and Tel. Co., slip op. at 72–76, n. 13 supra, the interconnection obligations of the MFJ are addressed generally to provision of interconnection to facilitate inter-LATA service, not intra-LATA service as might be involved in Delaware to Pennsylvania calling. Thus, a "gap" could be created between the interconnection "blueprint" of the MFJ and the less detailed existing federal interconnection requirements for such interstate services. Similar such circumstances might arise elsewhere, where portions of states have been included in interstate LATAs, supra n. 14, and interstate service not qualifying for "exchange" treatment under

2. Access offerings of Independent telephone companies

27. We propose in this section to extend, pursuant to our regulatory authority under the Act, to non-Bell (Independent) telephone carriers interconnection obligations patterned after those which will govern the BOCs under the MFJ. Independent telephone companies currently are required to interconnect their exchanges with terminal equipment, with non-carrier communications facilities, and with competitive interstate carriers' facilities, pursuant to decisions of this Commission and of the courts[17]. However, as was the case of interconnection to the BOCs' facilities prior to adoption of the MFJ, the Independents' interconnection obligations have not been fully described and "fleshed out" in the past. Rather, we have reacted to specific complaints and have resolved controversies which have arisen[18].

28. What is altered in the environment of implementation of the MFJ is that under the provisions of the decree, competitive providers of interexchange services will in the future have a detailed "blueprint" for interconnection to the BOCs' exchange facilities. In these circumstances, we believe it most appropriate, in view of our statutory mandate to promote the development of efficient and broadly available service on a nationwide basis, to ensure the establishment of a similarly detailed "blueprint" for interconnection to the Independents' facilities. However, in so doing, we must be mindful that truly equal access to carriers' exchange facilities is not immediately possible in the BOCs' service areas, and that it may be less so in the Independents' areas because of intrinsic limitations of existing facilities. We discuss below the treatment in the MFJ of transition towards interconnection equality for the BOCs, and our proposals to address these issues analogously in the context of interconnection to the Independents' facilities.

29. The facilities of neither the BOCs nor the Independent

Section 221(b) of the Act is involved. It is important that our pro-competitive interstate service policies not be frustrated, directly or indirectly, by the failure of the MFJ more explicitly to address such interconnection.

[17] *E.g.*, Interstate and Foreign Message Service, 56 FCC2d 593 (1975), 57 FCC2d 1216, 58 FCC2d 736, 59 FCC2d 83 (1976), *aff'd sub. nom*, North Carolina Utilities Comm'n v. FCC ("NCUC II"), supra. n. 3; AT&T (Piece out) and AT&T (ARINC), supra. n. 6; Specialized Common Carrier Services 24 FCC2d 318 (1970), *aff'd sub. nom*, Washington Utilities & Transportation Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975), *see also*, Bell Tel. Co. of Penn. v. FCC, 503 F.2d 1205 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); Lincoln Telephone and Telegraph Co., 72 FCC2d 724, 74 FCC2d 196 (1979), 78 FCC2d 1219 (1980), *aff'd*, 659 F.2d 365 (D.C. Cir. 1981); MCI Telecomm'ns Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1975), *cert. denied*, 434 U.S. 1040 (1978) ("Execunet I"), 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) ("Execunet II"), and Order reproduced in appendix to Lincoln Telephone, 659 F.2d 365, supra. ("Execunet III").

[18] *E.g.*, Lincoln Telephone and Telegraph Co., supra.; United Tel. Co., 77 FCC2d 1015 (1980).

telephone companies are homogeneous. Both include central offices which range from relatively older electro-mechanical (*e.g.*, step-by-step, crossbar and panel) offices which are inflexible in their capabilities, to modern stored-program controlled electronic offices the capabilities of which may be changed (consistent with the limitations of the overall hardware) through software modifications. Both the relatively inflexible older offices and the more flexible newer electronic offices were designed in a monopoly environment to perform switching within a single supplier's central office and to perform switching to a single supplier of intrastate, interstate, and foreign long distance services. As interstate service competition was introduced in the recent past, an issue of significant controversy has concerned whether and to what extent other (interstate) long distance service providers may achieve access to telephone companies' central offices which is equal to that provided the traditional single supplier. It generally was claimed that equal access was not feasible because of the inherent design of the existing central office facilities, and for that reason interconnection has not been equal. Several remedies for this unequal access have been proposed, including a requirement that the inequality be minimized to the extent feasible, and proposals have been made that those who obtain better access should provide more compensation than others. We shall not address the latter remedy in these proceedings, as this "compensation" issue has been addressed in the Third Report and Order. Rather, we shall confine our proposals to ones which minimize, to the extent feasible, any interconnection inequality.

30. The MFJ represents one approach to the difficult issues surrounding the inability of existing non-electronic central offices, as a practical matter, to support truly equal access. First, as was noted previously, the MFJ contains phasing-in procedures to provide the BOCs an opportunity to replace with newer stored-program controlled switches many of the older central offices to which equal access will be sought. Equal access overall is not required until 1986 under the phasing-in schedule of the MFJ. Second, the MFJ contains exception provisions under which the BOCs may refuse provision of equal access in older and smaller central offices. The specific mechanism of the MFJ is to create a defense for the BOCs for failure to make equal access available in such offices in the event that an interexchange carrier complains to the district court of a refusal to provide equal access.

31. Broader transitional procedures are also specified in the MFJ. For example, until such time as the nationwide numbering plan is revised, access to all long distance service providers under the MFJ need not be on the same dialing basis. A customer may be permitted to access one service provider without dialing extra digits, although extra digits may be required to access other suppliers' services. However, the BOCs must give each of their subscribers the

opportunity to preselect *which* interexchange service provider will automatically be accessed without dialing extra digits. When the nationwide numbering plan ultimately is revised, access to all interexchange carriers' services is to be placed on the same basis.

32. We tentatively conclude that the approach of the MFJ as a general matter would be workable if applied to the Independent telephone companies. However, we must acknowledge that the Independents' central offices may be statistically weighted more towards the less flexible older electro-mechanical switching facilities than are those of the BOCs. In the MFJ, there is an exception mechanism applied to the BOCs for such cases. If the Independents' facilities more commonly would qualify for such exception treatment than those of the BOCs, the exception could well become the rule. The specific approach of the MFJ is to permit the BOCs to refuse equal access in these exceptional cases, and the BOCs are provided a defense before the district court. Such an administrative approach may be warranted for truly exceptional cases, but in our view it could prove unworkable if such situations were common, as may prove to be the case of the Independents' central offices.

33. It should be noted that access to interstate services is required to be offered pursuant to access tariffs which are subject to our regulatory review and jurisdiction, under principles adopted in the Third Report and Order, and as is discussed below, we are proposing that interconnection be offered generally in the access tariffs. In view of this, we believe it reasonable to utilize such tariffs as an appropriate administrative mechanism for addressing unequal interconnection offerings by Independents. We tentatively conclude that the issues of unequal access may best be addressed by adopting principles in this proceeding governing tariffs which are to be filed, and we propose to do so herein. As an express goal of this proceeding, we are seeking to address all major possibilities which may arise. But, to the extent that a given Independent telephone company might wish to raise special circumstances not previously addressed or accommodated in the principles which might be adopted, we believe that flexible treatment might be warranted, in view of the disparities in size, resources, and facilities, which may exist among various Independent telephone companies. Thus, a given company should be free to do so upon an appropriate showing that special treatment is warranted.

34. Specifically, we propose to adopt principles requiring that interconnection be offered by the Independents in their access tariffs, to be filed subject to our regulatory jurisdiction in accordance with the Third Report and Order. Furthermore, we propose to review such tariffs initially under principles patterned generally after the substantive "access" requirements of the MFJ, as follows:

a. *Access to existing stored-program controlled central offices.* Programming of existing stored-program controlled central offices shall be modified, during a three year period[19], to support access to the services of all interexchange carriers which is equal in all respects, except that the minimum number of digits necessary to reach other than a carrier pre-selected by the subscriber may be utilized until such time as the nationwide numbering plan is changed. At such time as the central office modification is completed, existing subscribers shall be given an option to pre-select a specific interexchange carrier which is interconnected with the exchange, and no additional digits shall be required for the subscriber to reach the services of that carrier. Thereafter, new subscribers shall be given this choice at the time when service is initially arranged. In both cases, the selection may subsequently be changed by the subscriber at his or her option. Until such time as access is provided under this subparagraph, access shall be made available in accordance with subparagraph c. below.

b. *Access to newly-installed stored-program controlled central offices.* Within two years[20], all new stored-program controlled offices shall be initially deployed with the capabilities required under subparagraph a. above.

c. *Access to existing electro-mechanical central offices (e.g., step-by-step, crossbar and panel).* To the extent feasible, such offices shall be modified to offer the capabilities identified in subparagraph a. above, utilizing techniques such as interconnection on a tandem basis where common equipment is capable of supporting such operation. If ANI (automatic number identification) capabilities or subscriber billing capabilities are capable of being made available to more than one interexchange carrier, to the extent the same is requested by such carriers they shall be made available in the same manner as is specified in the MFJ. If preselection of a particular carrier which might be accessed without dialing additional digits is not possible because of inflexibility of the electro-mechanical switching facilities, at minimum the exchange carrier must make available seven digit local telephone number access, with facilities and capabilities no worse than those provided in connection with PBX trunk service by the carrier. The carrier must make available transmission capabilities (as opposed to switching and billing) which are no worse than those provided the traditional interexchange service provider accessing its office, and it shall provide access, to the extent possible, which uses the minimum number of accessing digits, and which makes possible access from rotary dial equipment to the services of each interexchange carrier[21].

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[19] The BOCs will have had approximately three years from initial adoption of the MFJ to relatively full implementation, and this strongly suggests that a three year period for the Independents to make similar programming modifications to their existing stored-program control switching facilities is reasonable. We specifically invite comment on the reasonableness of this proposed period, and on whether different periods may be appropriate for different types or units of stored-program control central office switching equipment.

[20] It is assumed that suppliers of central office switches which are to be newly deployed will be able to create programming to support equal access more expeditiously for new equipment (i.e., in two years) than might be the case for programming modifications to existing switches (i.e., the three year period proposed in the previous subparagraph). Furthermore, it would appear that such suppliers would have great incentives to do so, if they wish to seek to supply new central office switches to the BOCs. However, we specifically invite comment on the reasonableness of the proposed two year period.

[21] We recognize that there is wide variability in deployed electro-mechanical central office switching equipment, and in proposing adoption of the principles in subparagraph c. we have sought to differentiate dialing and billing capabilities, to which equal access may be impracticable, from communications channel capabilities (e.g., gain, linearity, noise characteristics, etc.), to which equal access would appear practicable without material modifications. Our guiding principle in

35. To ensure that the foregoing principles, or alternatives which may be adopted as a result of these proceedings, are complied with, and to fulfill the substantive requirements of Sections 202(a) and 203(c) of the Act, as noted we are proposing to utilize the vehicle of access tariffs for carriers to make known the basis upon which interconnection will be offered to interexchange carriers. However, we wish to minimize our regulatory role over such offerings, and to encourage, to the maximum extent feasible, voluntary resolution by the affected interexchange and exchange carriers of any disputes which may arise. We believe that one method of achieving this result might be to require the access tariff filings to indicate whether there has been precoordination of the filing with interexchange carriers, as a means of "flagging" to our staff and to interested interexchange carriers the filings which will not be controversial. Furthermore, to the extent that exchange carriers may file joint or common access tariffs (i.e., throught the Exchange Carriers Association procedures in the Third Report and Order) it would be desirable to create a mechanism under which individual carriers might continue to concur in joint or common access tariffs, but still indicate their particularized interconnection offerings. We invite comment on procedural and administrative mechanisms to achieve these results, and which minimize, to the extent possible, the flow of unnecessary paper. In any event, it might be noted that the administrative framework which we are proposing to accomodate offerings of unequal access is somewhat different than the exception approach of the MFJ, but in view of the possibility that unequal access will be more common in the Independents' service areas than those of the BOCs, we believe that it better will comport with the requirements of Sections 202(a) and 203(c) of the Act[22].

C. Interconnection of Exchange Carrier's Facilities With those of Non-Carriers, and Related Tariff Issues:

36. Our considerations here are related to, but somewhat different than, those involved in the previous section. There, we have clarified that existing interconnection policies remain applicable to Independent telephone companies, but we have, to some extent, proposed that additional interconnection capabilities which are not necessarily being made available currently be made available by the

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phrasing the proposed requirements is that any inequality in the treatment of interexchange carriers must be minimized to the extent practicable. We invite specific comment on our proposed formulation, and upon alternatives which might be more reasonable or more practicable.

[22] Of course, the BOCs will remain bound by the exception requirements of the MFJ. Furthermore, identification in their tariffs by the BOCs of locations where equal access will not be made available would similarly comport with the requirements of the Communications Act, and for that reason our proposal in this regard is not limited to the Independent telephone companies.

Independents in the future. Here, we are addressing solely existing interconnection obligations of the Independents and the BOCs, and we are proposing merely to clarify how these offerings are to be made to the public, as a matter of tariff policy, in the future.

37. Specifically, in the past the Commission has mandated interconnection to non-carrier communications facilities and premises terminal equipment through orders and rules in Part 68 of the Commission's rules which prescribed provisions in AT&T's interstate tariffs, and which also effectively prescribed the terms of exchange carriers' offerings. This use of our prescriptive authority over the interstate tariffs subject to our direct jurisdiction under the Act ensured that all telephone companies would be bound by our specific prescribed requirements, since all telephone companies concurred in AT&T's tariffs in the monopoly supply environment of the past.

38. However, telecommunications is changing. First, it is unclear whether local telephone companies will continue to concur in tariffs of a single entity, AT&T, for the provision of interstate and foreign services in the future. An end-on-end tariff environment, with separate tariffs for the exchange access portion and for the long distance service portion, may become possible or desirable in the increasingly competitive telecommunications industry. Second, AT&T is no longer the sole long distance service provider. To maintain the obligation of exchange carriers to interconnect with non-carriers' facilities to facilitate interstate and foreign communications in a manner consistent with that of the past, it might prove necessary to prescribe terms of interstate and foreign service tariffs of entities other than AT&T. But, as competition develops, the present requirement for such tariffs might prove unnecessary.

39. While we believe that Part 68 of our rules will continue to govern exchange carriers, independently of whether they do or do not concur in interstate tariffs which reference or incorporate these rules, we conclude that any potential confusion on this point should be resolved now[23]. We have an appropriate vehicle to do so, namely the exchange access tariffs which will govern participation in interstate and foreign service of all exchange carriers, Independents and BOCs, and which will be subject to our direct jurisdiction. Accordingly, we hereby propose to require that interconnection to non-carrier facilities (i.e., communications systems and terminal equipment) be offered in each exchange access tariff, with an appropriate reference to Part 68 of our rules in each such tariff. As was the case in our discussion of analogous tariff requirements in para. 35 above, we invite comment on how best to implement such a

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[23] Furthermore, even currently not all forms of interconnection which have been sanctioned or required by this Commission are prescribed in Part 68 of our rules; forms of interconnection are authorized under the tariffs which are not explicitly addressed in the rules because in certain circumstances it has proven more desirable and flexible to utilize tariffs.

requirement in a manner which minimizes the flow of unnecessary paper.

40. A requirement that interconnection to non-carrier facilities and terminal equipment be offered in exchange access tariffs also will have the effect of addressing several issues concerning the BOCs which arose during the course of the district court's Tunney Act proceeding[24], but which were not explicitly resolved in the MFJ. First, the MFJ as initially proposed would have barred the BOCs from providing terminal equipment. Since they could not do so, it had the effect of ensuring that others' terminal equipment could be interconnected with the BOCs' exchange facilities on a fair basis, else the BOCs could not provide service. But, as ultimately modified during the course of the Tunney Act proceeding, the MFJ now permits the BOCs to supply (but not manufacture) terminal equipment. Specific reference in the BOCs' tariffs to Part 68 of our rules will ensure that they do not discriminate in their treatment of others' terminal equipment as opposed to their own. Second, the MFJ contains provisions which address interconnection of other carriers' facilities and, to some extent, terminal equipment, to exchange facilities. It does not explicitly address interconnection with non-carrier communications systems or facilities. An offering of such interconnection in the BOCs' exchange access tariffs, in accordance with the Commission's decision in *AT&T (ARINC)*, 77 FCC2d 1 (1978) and its decision interpreting the requirements of Part 68 of the rules, *Memorandum Opinion and Order*, 59 FCC2d 83, 86 (1976), will clarify to the public that the BOCs' established obligation to provide such interconnection will continue to be discharged[25][26]. Such a clarification is similarly desirable for subscribers of non-Bell Independent telephone companies.

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[24] Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h) (the "Tunney Act"), the district court examined the public interest ramifications of the settlement agreement between AT&T and the Department of Justice as a prelude to entering the MFJ.

[26] We believe that two related interconnection offerings should also be made, where appropriate, in access tariffs. First, in circumstances addressed in our AT&T (Piece out) and AT&T (ARINC) decisions, supra. n. 6, AT&T itself is obliged to offer interconnection to its facilities. Upon implementation of the MFJ, to the extent that AT&T might discharge this obligation through the use of interposed exchange facilities provided by the BOCs, we believe the latters' access tariffs should offer such interconnection. To the extent that AT&T may be authorized to provide service directly to subscribers' premises, AT&T's own tariffs should offer such interconnection. Second, the status of resellers under the MFJ is unclear. The MFJ establishes specific exchange access requirements for access by interexchange carriers to the BOCs' facilities, but it is unclear whether resellers are to be treated as carriers for this purpose. To the extent that interconnection is to be offered to resellers, we tentatively conclude that such interconnection be offered in the access tariffs. We invite comment on the foregoing proposals.

D. Planning

41. As was noted in the introduction to this Notice, forms of joint action by carriers, in some cases under this Commission's sponsorship, and in many cases by the carriers themselves, have historically proved necessary in telecommunications to achieve important objectives: development of industrywide technical standards, operating principles, administrative procedures and maintenance procedures; informal resolution of service and maintenance disputes which may arise where there is divided responsibility for elements of a joint through service; development of standby procedures and facilities to support extraordinary communications requirements (*e.g.*, NSEP communications); and development of appropriate forecasting and circuit requirements amalgamation procedures to facilitate planning for construction of new facilities with relatively long "lead" times. Because of AT&T's preeminence, many of these activities were performed or sponsored by AT&T, and because of its ownership of the BOCs, AT&T was able to ensure that the results of these activities would be carried out.

42. With divestiture of the BOCs, and the more competitive nature of telecommunications, it is apparent that dominance over such activities by a single firm, AT&T, is neither likely nor desirable. Concerted action by competitors may, if carried too far, be anticompetitive and inimical to the pro-competitive policies of this Commission. However, many forms of planning are not necessarily anticompetitive, and indeed may be desirable. Moreover, the fact is that such planning has proceeded for over a century, and immediate discontuance of all such planning could disrupt the provision of service to the public.

43. We propose below to establish limited joint planning procedures to ensure continued attainment of important efficiency, service, defense, and emergency communications objectives under the Act, but in full awareness of the requirement that such activity not frustrate our pro-competitive policies. We shall carefully consider the competitive implications of any planning which is to be sanctioned, and we make tentative proposals below which, in our view, will ensure that anticompetitive problems will not arise[27].

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[27] "It might be noted that Commission sanctioning of joint planning by carriers has been sought in a pending petition by the National Telecommunications and Information Administration which predated the structural industry changes addressed in this Notice, *see*, Petition for Notice of Inquiry and Proposed Rulemaking, Oct. 10, 1980, RM-3781." A basis was shown in that petition for Commission sponsorship of limited joint planning among carriers even in the absence of the major changes now underway, and, as is discussed below, we believe that there is even more of a basis for limited joint planning now. In view of the substantial changes in the predicate for any such planning, we shall merge the record therein with this proceeding.

1. *Basis for Proposing Limited Joint Planning*

44. Limited joint planning among exchange carriers for interconnection arrangements offers several advantages as a means of assisting carriers in meeting interconnection obligations and carrying out the purposes of the Act.[28] Joint planning is an effective means of standardizing equipment and system design and functions at the point of interconnection (but not necessarily the internal design of equipment and facilities). This standardization, and the resulting compatibility among equipment and systems used by different carriers and other users, promotes the efficient operation of the telecommunications system. This efficiency has attendant advantages for subscribers to carrier services. As we previously have noted, planning among carriers also is an important means of securing appropriate standby communications capabilities to serve the NSEP needs of the Nation.[29]

45. The development of competition among long distance carriers raises the possibility that joint planning among exchange carriers for interconnection with the competitive long distance carriers will become increasingly necessary in order to ensure efficient operations. As the number of competing carriers increases, it is possible that the risks of inefficiency also will increase if the various carriers employ incompatible designs and functions for interconnected equipment.[30] It should be noted, however, that any such inefficiencies would diminish (and the need for joint planning consequently could decrease) if technological developments evolve in the direction of telecommunications systems which operate independently, and for which interconnection is neither necessary nor desirable.

46. In the past, AT&T has been the locus of joint planning for interconnection arrangements. AT&T's control of the BOCs, and its working relationships with the Independent telephone companies, has enabled AT&T to initiate and oversee joint planning in a manner which has been sufficient to mitigate any need for this Commission to take an active role in providing structures for this planning. Because of this preeminence AT&T has also largely served as a locus for accommodation by the traditional telephone carriers of the needs of other carriers as well (*e.g.*, specialized carriers, record carriers). AT&T's role, however, necessarily will be altered by the divestiture to be carried out in accordance with the MFJ.[31] Although the long-term effects of the divestiture on joint planning cannot be assessed

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[28] These interconnection obligations have been addressed in the previous sections of this Notice.

[29] See para. 18, *supra*.

[30] *See* Lavey, *Joint Network Planning in the Telephone Industry*, 34 Fed. Comm. L.J. 345, 348 (1982) (hereinafter cited as Lavey).

[31] See para. 16 *supra*.

with certainty, it is reasonable to conclude that short-term dislocations are likely to occur if joint planning is disrupted during the period following divestiture. Further, since AT&T is proposing that the divestiture be effected on January 1, 1984,[32] there may not be sufficient time for carriers to work out planning arrangements to replace the existing structure, in the absence of action by this Commission.

47. Although there are benefits to be gained from joint planning for interconnection arrangements, it should be recognized that joint planning poses two sets of potential risks. Product and service innovation generally can be expected as a by-product of competition,[33] and innovation usually results in benefits to the public in the form of quality improvements and cost reductions. If, however, joint planning for interconnection results in excessive standardization of design and operational specifications at the point of interconnection, then this very success could have a dampening effect on innovation. As connectivity tolerances are narrowed through standardization, design and operational variations which would result from innovation could become dysfunctional. Thus, the incentives for innovation could diminish to the extent that carriers and equipment vendors opted to take advantage of the benefits of standardization.[34] It must

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[32] Plan of Reorganization of AT&T in United States v. AT&T at 5 (D.D.C., filed Dec. 16, 1982) (hereinafter cited as Plan of Reorganization). In any event, the divestiture must take place not later than February 24, 1984, in accordance with Section I.A of the MFJ. *See also,* n. 12 *supra.* relating to FCC approval.

[33] *See* Specialized Common Carrier Services, 24 FCC 2d 318, 333 (1970). It has been noted, as a general matter, that "freedom of entry and competition [serve] as a device for innovation—for encouraging the development of new and different services and for assuring the optimal development and exploitation of new technology." 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 149 (1971) (footnote omitted). It also has been argued that this general principle applies in the communications industry:

> [T]here are concrete evidences of the contribution competitive innovation can make in communications where it has had an opportunity to work . . . . The revolutionary development in the last decade of microwave and satellite communications, the burgeoning of user-owned attachments and in particular those associated with the use of shared computer facilities . . . have . . been vigorously pressed not only by large users and independent entrepreneurs in communications but also, at least with equal vigor, by competing manufacturers of equipment.

Id. at 304 (footnote omitted).

[34] This Commission has taken notice of this disadvantage of central planning in a different context:

> Implicit in the central planning approach to designing and engineering the telephone network is the assumption that the planners know what is best for the customers. However, in the present era of rapid technological change and computerization of communications functions, it is difficult if not impossible for a centralized planning system to detect and respond to the many diverse needs of customers who continually seek to make more efficient use of the telecomunications system.

be stressed, however, that the joint planning we are proposing involves the achievement of standardization and compatibility *only* at the point of interconnection. Innovation in overall system design and operation, which would be fostered by competition among long distance carriers and among equipment vendors, should not be seriously affected by this limited form of standardization in most cases. However, there might be circumstances in which a particular innovation (*e.g.*, digitized voice transmission at less than 64 kbits/sec) might be adversely affected by a standard which did not accommodate that innovation. We are interested in comments on how best to balance this potential effect in formulating our approaches herein.

48. A second set of potential risks posed by joint planning involves the possibility of abuse of the joint planning mechanism. Various types of anticompetitive practices—including price-fixing, market and capacity allocation, exclusionary standard-setting—can be germinated through joint planning activities. The rules proposed here will seek to confront these potential abuses and establish requirements and constraints intended to prevent them from occurring.[35]

49. A decision regarding the efficacy of joint planning for interconnection involves a balancing of the advantages and risks which we have outlined. It is our tentative conclusion that the advantages to be gained from joint planning, as well as the short-term dangers posed by disruptions in this planning, outweigh the potential risks involved and point toward a conclusion that joint planning under the aegis of this Commission will serve the public interest.

2. *Authority of Commission To Require Limited Joint Planning*

50. Federal agencies, in the absence of specific statutory prohibitions, have authority to require concerted action on the part of private entities subject to their regulatory authority if this concerted action is necessary or appropriate to further the statutorily established goals and functions of the agencies. Such authority, in fact, has been exercised by this Commission in this proceeding.[36] Section

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Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations, and Rate Structures (Docket No. 20003), 75 FCC 2d 506, 547 (1980) (discussing the appropriateness of integrated control and planning regarding specialized private line services).

[35] See para. 59, *infra*.

[36] Third Report at paras. 339–44 (establishment of an intra-industry association to carry out tariff filing and pool distribution functions under the access charge system). We have rejected the notion that we lack authority to provide for the establishment of a private association which would engage in joint actions. Third Report at para. 343. We have noted, in addressing the issue of joint planning in an earlier phase of this proceeding, that we have sufficient authority to require

222 of the Act, as amended by RCCA, provides a recent example of the imposition of negotiation requirements upon carriers.[37] Negotiations to arrive at the Docket No. 20099 Settlement Agreement and thereafter[38] and the ENFIA negotiations[39] are further examples of carrier negotiations conducted under our aegis.

51. There is ample authority in the Act to support the establishment of joint planning requirements by this Commission. Section 1 of the Act, 47 U.S.C. § 151, provides that this Commission was established "[f]or the purpose of . . . [making] available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." Since we perceive the goal of joint planning for interconnection to be the promotion of efficiency, with the resulting provision of adequate facilities at reasonable charges, we conclude that a rulemaking to provide for joint planning is within our statutory authority. A further basis for Commission action is found in Section 201(a) of the Act, 47 U.S.C. § 201(a), which requires carriers to furnish service upon reasonable request, to establish physical connections with other carriers, and to establish through routes. Joint planning for interconnection arrangements can be viewed as an appropriate means for enabling carriers to comply with these requirements of Section 201(a). Section 201(b) of the Act, 47 U.S.C. § 201(b), requires all carrier practices relating to the provision of service and the establishment of physical connec-

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exchange carriers "to acquire facilities and to adopt design criteria that will make interconnection effective." MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177, 207 (1980).

[37] Section 222(c)(3)(A) of the Act, 47 U.S.C. § 222(c)(3)(A), required this Commission to convene meetings of IRCs for purposes of negotiating an interconnection agreement.

[38] Paragraph 16 of the Settlement Agreement provided as follows:

> 16. The parties agree that on the second Monday of each month after the effective date of this Settlement Agreement, or on such other day as the parties may from time to time determine, they shall meet under the aegis of the Commission's Common Carrier Bureau to review the progress made in implementing this agreement. In addition, subcommittee meetings between Bell System company and OCC representatives will be held during the Interim Period with respect to technical, engineering, maintenance and test procedures.

American Telephone & Telegraph Co., (Offer of Facilities for Use by Other Common Carriers), 52 FCC 2d 727, 742 (1975). The parties conducted meetings over a period of approximately 15 months and reached agreement regarding principles of interconnection, organization, operations, administrative matters, interconnection facilities and arrangements, and other matters, and pursuant to the settlement agreement and the Commission's acceptance, they have done so on a continuing basis since. *See also*, Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service under Part 21 of the Commission's Rules, 63 FCC 2d 87, 89 (1977).

[39] Exchange Network Facilities for Interstate Access (ENFIA), 71 FCC 2d 440 (1979).

tions and through routes to be just and reasonable. Furthermore, certain communications facilities require authorization by this Commission under the provisions of Section 214(a) of the Act, 47 U.S.C. § 214(a). Limited joint planning by carriers under our aegis has proven useful as a means of aiding us in carrying out our responsibilities under Section 214(a). Moreover, Section 214(d) of the Act, 47 U.S.C. § 214(d), authorizes this Commission to require any carrier "to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier . . . ." It is our view that this Commission can further the goals expressed in Section 214(d) by establishing joint planning procedures.[40] Also, Section 218 of the Act, 47 U.S.C. § 218, mandates that we be informed of the manner in which service is rendered; planning under our sponsorship is an appropriate mechanism to discharge this Section 218 mandate. Further, Section 4(i) of the Act, 47 U.S.C. § 154(i), grants this Commission broad authority to carry out its responsibilities under the Act.[41] We conclude that the establishment of joint planning procedures by this Commission falls within the ambit of the authority established in Section 4(i) of the Act. Finally, we believe that the flexibility accorded us in ordering our procedures under Section 4(j) of the Act, 47 U.S.C. § 154(j), permits us to sponsor activity of this nature to carry out the express goals of the Act. We conclude that limited joint planning is, as constrained below, an appropriate mechanism for ensuring the just and reasonable administration of interconnection arrangements.

3. *Structure for Limited Joint Planning*

52. It is our tentative belief that the carrier association established by the Third Report[42] affords an appropriate structure for limited joint planning. The Third Report found that a carrier association is necessary to prepare and file joint tariffs and to administer distributions from a joint revenue pool because AT&T cannot be called upon to perform such a role in the post-divestiture environment. The Third Report further found that action by this Commission to mandate creation of the association is necessary because there is not sufficient time to permit institutional arrangements among carriers for these purposes to develop spontaneously. Under the framework established in the Third Report, the association will be comprised only of exchange carriers participating in

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[40] Consistent with these mandates, under Sections 214(a) and 214(d), we have sponsored facilities planning by United States international carriers and have accommodated the views of their foreign correspondents through a related consultative process.

[41] Section 4(i) of the Act, 47 U.S.C. § 154(i), provides that "[t]he Commission may perform any and all acts . . . as may be necessary in the execution of its functions."

[42] See note 36, *supra*.

access charge revenue pools administered by the association. This Commission subsequently will adopt a supplemental order establishing membership rules providing for appropriate representation of different classes of exchange carriers.[43] The association is barred from engaging in any activity not related to the preparation or filing of access charge tariffs or the collection and distribution of access charge revenues, unless the additional activity is approved by this Commission.

53. We tentatively conclude that the association established by the Third Report is a readily available mechanism for joint planning, and that there is no need to establish some form of parallel organization the membership of which would overlap extensively with the membership of the established association. The association already will be involved with access issues as a result of the functions assigned to it by the Third Report, and it thus becomes logical to extend these functions to include the administrative, technical, and operational aspects of interconnection planning which are involved in this Notice. We propose to impose procedural requirements and guidelines which will have application only in the context of the joint planning activities of the association and not in the context of other activities carried out in accordance with the Third Report, but it is our preliminary belief that this bifurcated approach to the operational rules of the association should not hamper its ability to carry out any of the functions assigned to it. Further, the fact that the association will be performing tariff preparation and revenue collection and distribution functions in addition to the joint planning functions we are here proposing will not, in our preliminary view, increase the potential for the development of anticompetitive practices to which we previously alluded.[44] In this respect it should be emphasized that the interexchange carriers which are in direct competition will not be members of the association. Their projections and other information will be considered by the association for planning purposes, but, as is discussed below, we propose to prohibit such information from being disseminated except in amalgamated form.

54. We tentatively have concluded that the membership of the association, as established in the Third Report, is suitable for the joint planning functions which we envision. It is our preliminary belief that it is appropriate to exclude representatives of this Commission, representatives of State public utility commissions, members of the general public, and interexchange carriers from membership on the association for joint planning purposes. However, as will be discussed subsequently,[45] it is our tentative belief

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[43] See Third Report at para. 346.

[44] See para. 48, *supra*.

[45] See paras. 61, 62, and 64, *infra*.

that this Commission should be assigned responsibilities and functions regarding the joint planning activities of the association which are designed to ensure that the association does not operate in a manner which frustrates the goals and policies which we are establishing. This result can be achieved without requiring that this Commission be given membership on the association. A main objective of our proposals is to ensure the continuation of joint planning activities regarding interconnection which presently are being carried out on an informal basis, largely through the efforts and under the auspices of AT&T, but which may be seriously disrupted in the post-divestiture period if we do not act to establish a structure for planning. We are preliminarily satisfied with the assumption that this continuity can be achieved without carving out a direct role for this Commission in the planning functions of the association. It does not seem to us to be appropriate to propose that this Commission should take an active policymaking or management role in the planning negotiations of the association—such a role appears to be unnecessary and would constitute a departure from the manner in which joint planning historically has been carried out.[46]

55. As to representation of State public utility commissions and the general public on the association for joint planning purposes, we tentatively reiterate our finding in the Third Report that the interests of the State commissions and the public are amply protected by safeguards already established in the Act.[47] With respect to public representation, it is our further view that the technical nature of the interconnection planning deliberations to be conducted by the association are such that a direct decision-making role for representatives of the general public does not seem apt. Membership for interexchange carriers on the association for joint planning purposes, in our tentative view, would pose special problems sufficient to warrant the conclusion that interexchange carriers should be excluded from membership. At least for the foreseeable future, local exchange service and exchange access will

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[46] This Commission has taken a similar approach regarding the general area of network planning:

> [P]lanning of the nationwide network has been and remains today primarily a private activity. While . . . we intend to monitor the network to ensure it is not designed in a manner that forecloses entry, technical and design disputes among the different entities who comprise the network largely have been resolved without Commission intervention.

In re Applications of Winter Park Tel. Co. and Orange City Tel. Co., 84 FCC 2d 689, 696 (1981).

[47] Third Report at para. 345 (citing Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135, 150 (1982)).

be provided by exchange carriers which are regulated monopolies in their service areas.[48] This fact in itself lends credence to the argument that an association of local carriers for joint planning purposes will not pose serious anticompetitive risks. Stated another way, anticompetitive conduct by local carriers will increase in likelihood only as competitive forces are sought to be introduced in the local exchange and local access markets. The situation with respect to interexchange carriers, however, is different. The interexchange market is increasingly becoming subject to competition.[49] Interexchange carriers operating in a competitive environment might sieze upon their membership on the association as a device for effecting exclusionary and other anticompetitive interconnection practices. Since interexchange carriers obviously are affected by interconnection planning, it is important that they be allowed to play some role in this planning.[50] It is our preliminary belief, however, that this role should stop short of membership on the association.[51]

56. We seek comments on the following issues regarding the structure for joint planning arrangements and our proposal thereupon set out in this section. First, should a framework other than the association established by the Third Report be utilized for this joint planning? Are there alternative existing structures which could be better utilized for this purpose? Would it be more appropriate to establish a new organization for the exclusive purpose of engaging in joint planning for interconnection arrangements? Second, if the association established by the Third Report is used for this joint planning, should we modify our tentative conclusions regarding representation of State public utility commissions, the general public, and interexchange carriers as members of the association? We also request comments regarding whether other groups should be represented as members of the association for joint planning purposes, or, in the alternative, whether and how others might best participate in the planning process, but short of actual membership.

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[48] *See* Majority Staff of Subcomm. on Telecommunications, Consumer Protection, and Finance of House Comm. on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong., 1st Sess. 228 (1981).

[49] United States v. AT&T, 552 F. Supp. at 171. In 1980, revenues earned by specialized common carriers constituted 1.3 percent of the toll service revenues of the telephone industry, and their plant had 0.5 percent of the value of the gross communications plant of the telephone industry. Lavey, *supra* note 30, at 367.

[50] See para. 63, *infra*, for a discussion of our tentative conclusions regarding the nature of this role.

[51] We recognize, however, that certain larger Independent telephone companies will perform the dual role of being exchange and interexchange service providers. In present circumstances, however, they would not appear to have sufficient market power to change our belief that the proposed structure is appropriate. Parties may wish to comment on this.

Finally, we would like the parties to comment upon whether we should modify our tentative conclusion regarding membership of this Commission on the association with respect to its planning activities.

4. *Functions of Association*[52]

57. It is our preliminary belief that the joint planning functions of the association should be grouped into three areas. First, the association should conduct advance planning regarding administration of interconnection procedures, technical standards for the provision of interconnection, design and operational standards relating to interconnection equipment and systems, and related administrative and maintenance procedures. The primary purposes of this planning should be to make adjustments to interconnection processes on an ongoing basis in order to achieve operational efficiency, to promote nationwide compatibility, and to anticipate future needs and problems so that adjustments can be planned and carried out on the basis of these projections. It should be stressed that it is our tentative conclusion that these functions of the association should be limited to the point of interconnection. Interexchange network design and planning will be beyond the scope of the association's activities. Second, it is our tentative view that the association should be involved in the collection of information to be used in connection with short- and long-term forecasting regarding patterns of interconnection demand and construction needs. Necessary exchange facilities to meet interexchange carriers' needs often require long periods for construction and deployment. The efficiency with which exchange carriers are able to provide interconnection services is in some measure dependent upon the carriers' accuracy in assessing trends in the level and nature of demand for these services. The rapid pace of technological developments in this field, and the impact of these developments on interconnection demand, places a premium upon the need for effective forecasting. It is our preliminary belief that the effectiveness of this forecasting can be maximized if it is performed on a central basis.

58. The structure of the association would enable it to collect and collate data from exchange carriers, to review and analyze this information, and to arrive at planning decisions based upon these analyses. It is our tentative view that the association should develop alternative plans for responding to projected demand, study these options in order to select the most appropriate plan, and carry out reviews of the implementation of the selected plan. In this way, interconnection procedures and standards would be responsive to

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[52] For the convenience of discussion, our subsequent comments make reference to the "association" based upon our tentative conclusion that the association created by the Third Report is the proper structure for interconnection planning. These references, however, should not be construed to preclude designation of one or more different entities to carry out these planning functions.

changing needs. However, we propose to restrict dissemination to interexchange carriers of forecasing information except in amalgamated form in order to ensure that the projections themselves do not become a mechanism for impermissible concerted action by the competitive interexchange carriers.[53] Third, it is our preliminary view that NSEP planning functions could be carried out by the association.[54] Concern has arisen over a claim that the divestiture, and the attendant changes in AT&T's emergency planning role,[55] could result in the disruption of telecommunications functions which are deemed critical to the Nation's defense and emergency communications capabilities.[56] Although the MFJ requires the BOCs to establish a point of contact for NSEP purposes,[57] it is our tentative

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[53] *See, e.g.*, Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

[54] The important role played by communications carriers in connection with NSEP often has been recognized. *See* Section 1 of the Act, 47 U.S.C. § 151; Section I.B of the MFJ; H.R. Rep. No. 1252, pt. 1, 96th Cong., 2d Sess. 90 (report on H.R. 6121, Telecommunications Act of 1980) ("It is important and valuable to the Nation that carrier networks be interconnected (or capable of interconnection) and capable of interoperation in emergencies . . . ."); S. Rep. No. 170, 97th Cong., 1st Sess. 52 (1981) (report on S. 898, Telecommunications Competition and Deregulation Act of 1981).

[55] For an example of the role AT&T has played in meeting national defense needs, see Bell Telephone Laboratories, Inc., *A History of Engineering and Science in the Bell System* 232–38 (1978).

[56] *See, e.g.*, In the Matter of MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177, 206–07 (1980). After divestiture an AT&T government communications organization will act as the point of contact between AT&T and the government for NSEP purposes, including NSEP technical standards, NSEP network planning, and all other aspects of AT&T's role (as an interstate regulated entity) in nationwide NSEP planning or exercises. AT&T has indicated that:

> AT&T will retain its network operations center and established NSEP relocation sites, which will continue to perform, among other things, NSEP alerting services with respect to AT&T's network and interconnected carrier networks, if those carriers and the government so desire.

Consolidated Application of American Telephone & Telegraph Company and Specified Bell System Companies, In the Matter of AT&T (Consolidated Applications), No. W-P-C-4955, at 74 (FCC, filed March 1, 1983).

[57] Section I.B of the MFJ requires a BOC single point of contact for NSEP purposes. Under the Plan of Reorganization submitted by AT&T, the BOCs will establish a specialized government communications group within the Central Staff Organization in order to comply with this MFJ requirement. The functions of this group will include (1) the development of technical standards for use by the BOCs; (2) operation as a single point of contact for alerting BOCs in emergency situations; and (3) cooperation "with AT&T and its affiliates and other carriers to effectuate NSEP communications requirements . . . ." Plan of Reorganization, *supra* note 32, at 418.

The Plan of Reorganization describes the manner in which the communications group will coordinate with interexchange carriers and other vendors in the view that the MFJ requirements should be supplemented, to the extent necessary or desirable, by a limited planning process involving all exchange carriers, to minimize disruptions in emergency communications by all involved sectors of the industry.

59. Furthermore, we propose that explicit restrictions be placed upon the functions of the association in order to eliminate any potential anticompetitive problems which might be an outgrowth of the association's activities. The Third Report achieves this result in a general sense by barring any additional activities by the association unless these activities have been approved by this Commission.[58] It is our preliminary conclusion that the rules of this Commission also should specify that the association may not, in connection with the

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following terms:

> [T]he BOCs and the centralized government communications group will cooperate fully with the interexchange carriers and equipment vendors involved to provide efficient service. Specifically, the centralized group will, if the government desires, serve as a point of contact for other carriers and vendors to arrange for the installation, joint testing, maintenance, restoration, repair and all other operational aspects of BOC-provided NSEP services that are interconnected with services provided by other carriers.

Id. at 421. It should be noted that the arrangements described in the Plan of Reorganization do not appear to include coordinated planning and do not appear to involve Independent telephone companies. *See* Comments of United States Independent Telephone Association on the Plan of Reorganization, at 4 (D.D.C., filed Feb. 16, 1983).

AT&T, in materials filed with this Commission subsequent to the filing of the Plan of Reorganization with the District Court of the United States for the District of Columbia, has alluded to the possibility of coordinated planning between the BOCs and other carriers for NSEP purposes.

> [T]he CSO [the central staff organization for the BOCs] would, if requested by the government, act as the point of contract for other carriers to coordinate the installation, joint testing, maintenance, restoration, repair, and all other operational aspects of BOC-provided intraLATA NSEP services that are interconnected with services provided by other carriers and terminal equipment vendors. To effect this coordination, it is assumed that the involved carriers, including the independent telephone companies, would designate NSEP coordinators and would be in communication with CSO's national alert center. Neither the BOCs nor the government communications groups in the CSO will select interexchange carriers or terminal equipment vendors for the government.

Consolidated Application of American Telephone Telegraph Company and Specified Bell System Companies, In the matter of AT&T (Consolidated Applications), No. W-P-C-4955 at 78 (FCC, filed March 1, 1983). The Department of Justice had indicated to the district court that it would require the Plan of Reorganization to be amended to clarify that the central staff organization will have authority to "require" that the BOCs carry out NSEP activities on a coordinated basis, and that the central staff organization wouldbill and collect from federal agencies on a centralized basis. These changes have been accepted.

[58] Third Report at para. 344.

planning activities addressed in this Notice, collect or share any information relating to pricing[59] or procurement,[60] and that the association may not take any action which is intended to allocate, or has the effect of allocating, any markets or facilities. These rules should provide that information which the association is authorized to collect and collate may be disseminated to interexchange carriers only in amalgamated form in order to prevent any possibility of anticompetitive collusion by these carriers. Further, these rules should require that interconnection standards and procedures must be established by the association on an objective basis, so that the standards and procedures do not amount to anticompetitive devices for excluding potential competitors.[61]

60. With respect to the functions of the association, we request the parties to comment on the nature and scope of the functions which we have outlined, with particular attention to whether these functions are necessary or appropriate functions for the association to perform. We also seek comment regarding whether other functions should be assigned to the association, either in lieu of or in addition to the functions we have outlined. We further would like the parties to comment on the limitations we tentatively have

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[59] The exchange carrier association is necessarily involved in the collection and sharing of pricing information in connection with its preparation of access tariffs. Third Report at para. 348. The pricing restrictions we propose to establish here relate exclusively to the planning activities of the association and would in no way constrain or impair the functions established in the Third Report.

[60] We recognize that the functions of the association in establishing technical interconnection standards, see para. 57, *supra*, may pose the risk that technical standards might be adopted which indirectly lead to creation of procurement guidelines. That is, technical standards could be fashioned in a way that would tend to favor the facilities and equipment of certain vendors. However, our goal is to delineate the functions of the association and restrictions applicable to its activities in a manner which minimizes this risk, while maintaining the potentially desirable goal of permitting operational problems to be avoided through the use of appropriate technical standards. We seek comments regarding possible ways in which reconciliation of these goals may appropriately be achieved.

[61] The Supreme Court in holding that an industry standard-setting organization is civilly liable under antitrust law for antitrust violations of its agents acting with apparent authority, noted that:

> [A] standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes . . . . [S]ome may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 50 U.S.L.W. 4512, 4516 (U.S. May 17, 1982) (footnote omitted). *See*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) for a discussion of the unlawfulness of exclusionary standard-setting.

decided to place upon the activities of the association. Again, we seek comment regarding whether these limitations are necessary or appropriate and regarding whether other limitations should be established. Finally, we request comments regarding the nature of the relationship, if any, which should be established between the association, the BOC point of contact for NSEP purposes to be created under the MFJ, and other carriers' administrative elements with NSEP communications responsibilities. In this regard, we seek comments on the following questions: What should be the nature and extent of coordination between these entities? Should any such entity have any "veto" authority over the decisions of the others?

5. *Procedures of Association*

61. It is our tentative view that procedures applicable to the operation of the association should serve three primary objectives. First, the public should be given ample opportunity to observe the processes of the association and to examine the decisions and other actions of the association. Second, this Commission should reserve sufficient authority to oversee the operations of the association in order to ensure that actions taken by the association are consistent with the policies of the Act and any rules we may adopt herein. And third, sufficient flexibility should be incorporated in the procedures of the association to enable it to carry out its planning functions efficiently and effectively. It should be noted that the procedures which we tentatively are proposing, in seeking to meet these and other objectives herein, have been drawn in large measure from provisions contained in Section 708 of the Defense Production Act of 1950, 50 U.S.C. App. § 2158, which addresses analogous issues.

62. We propose that the association be governed by bylaws submitted to, and approved by, this Commission. We propose that the chairman of the association be selected from among its membership and serve for a term to be fixed by the members in the bylaws of the association. Meetings for planning purposes will be held at the call of the chairman or upon the request of a majority of the membership, and reasonable public advance notice of meetings must be given by the association. The association will have the discretion to establish permanent or ad hoc subcommittees to be responsible for various aspects of the association's planning activities. This Commission will have authority to monitor the activities of the association by sending an official representative to its meetings. The Commission representative will have authority to require the association to terminate any particular proceeding if he concludes that actions taken in the proceeding, or the manner in which the proceeding is being conducted, violate the Act or the rules established by this Commission. We propose that the representive may exercise this authority without being required to obtain any further approval from the Commission. If the representative terminates a meeting,

then the association may not reconvene to discuss the topic which caused such termination without the express prior approval of the Commission.[62] Meetings of the association will be open to the public, unless the association determines (by majority vote of those members of the association who are present) that matters to be discussed at the meeting are within the purview of matters described in paragraph (1), (3), or (4) of subsection (b) of Section 552 of Title 5, United States Code.[63] The association will be required to keep minutes of its meetings. These minutes must be filed with this Commission and made available for public inspection, except that information in the minutes pertaining to matters described in paragraph (1), (3), or (4) of subsection (b) of Section 552 of Title 5, United States Code, would not have to be disclosed to the public.[64]

63. The procedures we are proposing also would require the association to permit interexchange carriers (including voice and data communications carriers) and other users of exchange access facilities to make written and oral presentations to the association regarding interconnection planning matters under consideration by the association.[65] The rules we are proposing will not specify the extent to which the association must take these presentations into account in arriving at planning decisions, but we note that it is not our intent that participation by interexchange carriers and other users force the deliberations of the association to take on the strictures of an adversary proceeding. Rather, it is our tentative view that these carriers and other users will be in a position to assist the association, and to affect the decisions of the association in a positive way, through the provision of information and comments to the association. It is our opinion that, by barring interexchange carriers

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[62] See Section 708(d) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(d).

[63] See Section 708(e)(3)(D) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(e)(3)(D). Paragraph (1) of subsection (b) of Section 552 of Title 5, United States Code, relates to information classified as nonpublic under Executive orders; paragraph (3) relates to information which is exempted from disclosure by statute; and paragraph (4) relates to trade secrets and commercial or financial information which is privileged or confidential. It should be noted that the exclusions established in Section 708(e)(3)(D) of the Defense Production Act of 1950 embrace only the information described in paragraphs (1) and (3).

[64] See Section 708(d) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(d).

[65] This Commission, in discussing the overall network planning process, has noted that:

> [T]he public is well served when . . . users and constituents of the network also are involved in the planning process. Joint planning introduces more directly the perspective and experience of other responsible entities, bringing to light viewpoints that might otherwise go unnoticed. We expect that a broader planning perspective will lead to the consideration of alternative plans and ultimate improvement of the network.

In re Applications of Winter Park Tel. Co. and Orange City Tel. Co., 84 FCC 2d 689, 697 (1981).

and other users from playing an active role in the decision-making of the association, the proposed rules will mitigate the types of anticompetitive problems we previously have discussed.[66] Furthermore, it would appear that equipment manufacturers would have an interest in, and the ability to contribute to, deliberations concerning technical standards. Thus, we would propose that such entities also have the right to make presentations to the association with respect to standards.

64. The proposed rules also would require the association to disseminate information regarding its interconnection decisions and policies in a manner which is sufficient to keep the industry and the public adequately informed of association actions.[67] Further, we propose that the association be required to file planning decisions and related information with this Commission.[68]

65. We request parties to comment generally regarding the procedural requirements we are proposing, and we would like the parties to suggest additional or alternative procedural requirements. We also seek comments regarding the following specific issues: First, is the role we have outlined for this Commission appropriate, or should it be modified? Should the Commission role be narrowed (*e.g.*, by eliminating the monitoring function)? Or should the Commission role be expanded (*e.g.*, by making a Commission representative a member of the association, by authorizing this Commission to screen interconnection planning topics in advance of meetings, or by barring planning decisions from taking effect unless they specifically are approved by this Commission)? Second, should the proposed rules require this Commission to oversee the implementation of association decisions after they have been made? This Commission has general authority under the Act to prohibit interconnection policies and actions which are not consistent with the Act, but we request comments regarding whether the proposed rules should formalize this function of this Commission by setting up specific monitoring procedures and requirements. Third, should modifications be made in the role established for interexchange carriers, other users of exchange access facilities, and equipment manufacturers, under the proposed rules? For example, should these interests be given any decision-making authority regarding the planning activities of the association?[69] Should these interests be permitted to propose or to

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[66] See para. 48, *supra*.

[67] It is useful to note that section II.B.2 of the MFJ requires the BOCs to establish and disseminate "technical information and . . . interconnection standards."

[68] See Section 708(e)(3)(F) of the Defense Production Act of 1950, 50 U.S.C. App. § 2158(e)(3)(F). It should be noted that, in the area of telecommunications network planning, requirements have not been established for the systematic filing of planning decisions. Lavey, *supra* note 30, at 346.

[69] See para. 56, *supra*, for a discussion of whether interexchange carriers should be represented as members of the association.

initiate planning topics for consideration and action by the association, or should their role be limited to commenting upon planning activities initiated by the association?

66. Fourth, should the role of the general public in the proceedings of the association be expanded, with due regard to procedures to accommodate classified information (*e.g.*, by permitting members of the public to make oral or written presentations, or both)? Or should the public role be restricted (*e.g.*, by barring public attendance at association proceedings)? Fifth, we invite comment regarding whether the proposed rules should address informal planning contacts and other arrangements among exchange carriers. Up to this point, our discussion has focused on more formal carrier arrangements for interconnection planning through the association established in the Third Report and through subcommittees which may be established for planning purposes by the association. We note, however, that exchange carriers engage in a variety of informal contacts relating to interconnection planning,[70] and it is appropriate to conclude that these contacts may make important contributions to the efficiency of interconnection planning. We are interested in receiving the views of the parties regarding whether it is appropriate for the proposed rules to be applicable to these informal contacts and, if so, the nature of procedures and requirements which would have the most utility in this informal setting. In this regard, we should note our particular concern that these informal contacts should not become a vehicle through which competing interexchange carriers obtain information which may be used in connection with their competitive activities. Finally, we seek comments regarding the proposed requirement that minutes of association meetings be kept and filed with this Commission. Specifically, would such a requirement prove to be an undue constraint upon planning negotiations? Or should the requirement be strengthened (*e.g.*, by requiring transcripts, rather than minutes) as a means of further ensuring against anticompetitive activities?

6. *Antitrust Considerations*

67. It is our conclusion that the interconnection planning activities and the organizational structure for this planning which we are proposing in this Notice are consistent with the antitrust laws. The Third Report, in fact, already has rejected arguments that the access charge functions of the association pose antitrust problems, noting that "[t]he Sherman Act does not prohibit concerted

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[70] *Cf. Hearings on S. 898 Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 445 (1981) (testimony of T. Brophy, Chairman and Chief Executive Officer, GTE Corp.) (informal contacts among telephone companies regarding planning for toll switching and transmission facilities), *cited in* Lavey, *supra* note 30, at 378 n.126.

activities, it merely prohibits concerted activities that are likely to produce an unreasonable restraint of trade."[71] It has been our intent in fashioning our proposals herein to assign to the association functions which are important for the provision of efficient planning but which will not create a basis for anticompetitive conduct. We also have proposed restrictions upon association activities as a means of protecting competition.[72] Finally, we have proposed procedural requirements which will act as a further bar against anticompetitive activities. It also should be noted that, although it is true that competition is an important factor which should be given weight in the administration of the Act,[73] this Commission also is required by the public interest standards of the Act to consider factors other than competition, such as the efficiency of the communications network, the provision of reliable service to the public, and the future needs of carriers and users.[74] In sum, we believe that we have sufficient authority under the Act to sponsor procedures as outlined, and that use of such procedures would not raise antitrust issues. Of course, in formulating final rules and requirements herein, we will give weight to the views of the Attorney General of the United States regarding any aspects of the association's activities which may have anticompetitive effects.

IV. *Regulatory Flexibility Act Analysis*

68. We have found at an earlier stage of this proceeding that the Regulatory Flexibility Act is not applicable to this proceeding because no local exchange carrier falls within the definition of "small entity" for purposes of that Act. Third Report at paras. 358–62. We noted in the Third Report, however, that the policy objectives of the Regulatory Flexibility Act are also encompassed in Sections 2(b) and 203(a) of the Communications Act of 1934, the provisions of which are intended to relieve many small telephone companies from various reporting and other requirements established in the Commu-

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[71] Third Report at para. 333.

[72] *See* para. 59, *supra*.

[73] FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953). The Court also noted, in the *RCA* case, that "encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." *Id.* at 93 (footnote omitted).

[74] Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 722 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3533 (U.S. Jan. 17, 1983) (No. 81-2359). We do not find it necessary here to address the question of whether the planning requirements which would be imposed upon exchange carriers under our proposed rules would have the effect of establishing any antitrust immunity for such carriers, although we do note the general principle that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust statutes." Jarvis, Inc. v. American Tel. & Tel. Co., 481 F. Supp. 120, 123 (D.D.C. 1978) (citing Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973)).

nications Act. Any recordkeeping and other requirements (*e.g.*, tariff requirements) imposed by any final decision in this proceeding would be applicable to all exchange telephone companies, regardless of their size. See paras. 27–40, *supra*, for a detailed discussion of the proposed requirements. However, it is important to note that in fashioning these proposals, we have been cognizant of the differences in resources available to the BOCs and the larger Independent telephone companies, on the one hand, and the smaller Independents, on the other, and we have sought to tailor our proposed requirements to accommodate the limited resources of the smaller companies. We specifically request small Independent telephone companies, their trade associations and others which may represent their interests, to comment on the implications of these requirements in the light of their operations, and to propose appropriate administrative mechanisms which will minimize the flow of unnecessary paperwork.

V. *Ordering Clauses*

69. IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 201–205, 214, 218 and 403 of the Communications Act of 1934, and 5 U.S.C. § 553, That NOTICE IS HEREBY GIVEN OF THE PROPOSED ADOPTION OF RULES IN PART 69 OF TITLE 47 OF THE CODE OF FEDERAL REGULATIONS, in accordance with the discussion and delineation of the issues and the specific proposals made herein.

70. IT IS FURTHER ORDERED, pursuant to Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, That an original and five copies of comments may be filed with the Secretary, Federal Communications Commission, Washington, D. C. 20554 on or before August 8, 1983, and that replies may be filed on or before October 7, 1983. In reaching its decision in this proceeding, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

71. IT IS FURTHER ORDERED, pursuant to Section 1.2 of the Rules of the Commission, 47 C.F.R. § 1.2, and authority delegated under Section 0.291 of the Rules of the Commission, 47 C.F.R. § 0.291, That meetings among carriers, under the aegis of the Common Carriers Bureau, MAY CONTINUE DURING THE PENDENCY OF THIS PROCEEDING pursuant to the decision of the Commission in *American Telephone and Telegraph Company (Offer of Facilities for Use by Other Common Carriers)*, Docket No. 20099, 52 FCC 2d 727, 733 (1975).

72. IT IS FURTHER ORDERED, That this proceeding shall be continued as a non-restricted notice and comment rulemaking

proceeding. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff, which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not covered fully in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231.

73. And, IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Notice of Proposed Rulemaking to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In Re: MTS and WATS Market Structure, CC Docket No. 78–72, Phase III, Notice of Proposed Rulemaking on Interconnection in the Wake of Access Charges and Implementation of the MFJ.

I am pleased to see that the Regional Bell Operating Companies and the major Independent exchange carrier companies have already begun to form an association of exchange carriers for the specific purpose of structuring, planning, and formulating telephone network standards in the coming post-divestiture era.* Such an industry planning organization is, in my judgment, absolutely vital for this nation's national defense and emergency preparedness, as well as the basic integrity and viability of our national telecommunications network. I am also pleased that this *Notice* promises that the Commission's public interest imprimatur will be given to an industry planning body in the performance of its appointed interconnection and exchange access tasks.

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* *See* Telecommunications Reports, Vol. 49, No. 16, at 44 (April 25, 1983), "Washington Legislative Council Members Move on Group to Set Network Standards."

Common Carrier, Complaint Against
Common Carrier, Rate or Tariff, Unlawful
Common Carrier, Rates, Just and Reasonable Charges

> **AT&T's refusal to honor MCI's order for Telpak circuits in 1975 on the basis of customer premises tariff restrictions was unjust, unreasonable and discriminatory in violation of Section 201(b) and 202(a) of the Communications Act and resulted in injury to MCI. Damages assessed. Prejudgement interest awarded on contingency basis.**
> *-MCI v. AT&T*
> CC Docket No. 81-217

FCC 83-236

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

and

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION

CC Docket No. 81-217

Appearances

Ruth S. Baker-Battist, *William J. Potts* and *John M. Pelkey*, on behalf of MCI Telecommunications Corporation; *Alfred Winchell Whittaker*, *Hiram D. Gordon*, *M. Jean Dabney* and *Michael J. Goldey*, on behalf of American Telephone and Telegraph Company; *Robert M. Ralls*, on behalf of Pacific Telephone and Telegraph Company; *Louise L. M. Tucker*, *William Gerstenslager*, *Gay Ludington* and *Theodore D. Kramer*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Issued: May 12, 1983; Released: June 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY DISSENTING; COMMISSIONER DAWSON CONCURRING IN THE RESULT

Preliminary Statement

1. This case involves the formal complaint of MCI Telecommunications Corporation (MCI) filed September 22, 1976, against American Telephone and Telegraph Company (AT&T) and Pacific Telephone and Telegraph Company (PT&T). In October 1979, the Commission denied MCI's complaint.[1] MCI sought judicial review of the 1979 decision in the United States Court of Appeals for the District of Columbia Circuit.[2] In June 1980, the Commission voluntarily requested the Court to remand the case to the Commission for "consideration of matters raised in MCI's brief which either were not addressed or were addressed inadequately in the order under review."[3] The Court ordered the remand in September 1980. On April 7, 1981, the Commission released its Designation Order herein.

2. The Commission specified that an expedited proceeding be held to determine the following issues:

> (a) Whether AT&T's refusal to accept MCI's April 10, 1975 order of two bundles of Telpak C offerings from Oakland, California to Los Angeles, California was unjust or unreasonable or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act;
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> (b) Whether, and if so, to what extent, AT&T's response to MCI's March 31 and April 8, 1975 orders for 116 voice grade circuits from Phoenix, Arizona to Oakland, California was unjust or unreasonable or otherwise unlawful under Sections 201(b) or 202(a) of the Communications Act; and
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> (c) What damages, if any, should be awarded to MCI for any unlawful acts or omissions of AT&T found under issues (a) and (b) above.

3. Following hearings held in June, July and October 1981, Presiding Judge Joseph Chachkin released his Initial Decision[4] on December 7, 1981. With respect to AT&T's refusal to provide Telpak circuits to MCI (Issue (a)), the Administrative Law Judge (ALJ) concluded that AT&T's customer premises and resale tariff restrictions under its Tariff FCC No. 260 were unjust, unreasonable, and discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act and that those restrictions could not justify

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[1] *MCI Telecommunications Corporation* v. *AT&T*, 74 FCC 2d 184 (1979).

[2] *MCI Telecommunications Corporation* v. *FCC*, No. 79-2315 (D.C. Cir., filed Nov. 2, 1979).

[3] 85 FCC 2d 994, 995 (1981) (Designation Order).

[4] FCC 81D-62.

AT&T's refusal to satisfy MCI's order for Telpak service. Under Issue (b) the ALJ concluded that MCI had failed to demonstrate that AT&T's quotation of 25 weeks as the length of time necessary to provide 116 circuits to MCI pursuant to Tariff FCC No. 266 was unreasonable, discriminatory or otherwise in violation of Sections 201(b) and 202(a) of the Act. The ALJ determined that AT&T's failure to provide the Telpak circuits to MCI had damaged MCI and awarded damages to MCI in the amount of $931,880.15. On January 6, 1982, MCI, AT&T and PT&T and the Common Carrier Bureau filed Exceptions to the ALJ's Initial Decision. Each of the parties filed a Reply to the other parties' Exceptions on January 20, 1982. On January 20, 1982, AT&T and PT&T requested that we hold oral argument on the Exceptions filed in this proceeding. We do not believe that oral argument would elucidate any significant factual or legal issue involved herein. Accordingly, we shall deny the foregoing requests for oral argument.

4. Except as modified or clarified by this Decision, we hereby adopt the findings of fact and conclusions of law set forth in Judge Chachkin's Initial Decision, *supra*. Nevertheless, we shall set forth the general factual background of this proceeding and the final determinations of the ALJ so that the parties' Exceptions can be considered in their appropriate context.

Initial Decision

A. *Background*

5. In February 1975, MCI and General Motors (GM) entered into a contract whereby MCI agreed to provide Common Control Switching Arrangement (CCSA)[5] private line circuits between the Midwest (Chicago and Detroit) and a new CCSA switch being built by AT&T at Oakland, California. In choosing MCI as the provider of this service, GM specifically rejected the option of obtaining service from AT&T.[6]

6. MCI comtemplated that the CCSA circuits would be provided as follows: over existing MCI facilities from the Midwest (Chicago and Detroit) to either Phoenix, Arizona or Los Angeles, California and over AT&T and PT&T facilities between MCI's West Coast terminations (Phoenix or Los Angeles) and the GM switch in Oakland. MCI preferred the Phoenix terminal to assure interstate rate treatment with respect to the facilities it desired to obtain from AT&T and PT&T. Therefore, MCI ordered 116 voice grade circuits from Phoenix to Oakland under AT&T's Other Common Carrier

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[5] CCSA is an arrangement which links together a customer's private line circuits between its various offices through switches located on the telephone company's premises. *See* Joint Exhibit 1, para. 1.

[6] Joint Exhibit 1, para. 5.

(OCC) Tariff FCC No. 266 as a means of obtaining the facilities necessary to fulfill the contract with GM.[7] Although MCI placed this order by early April 1975, AT&T contended that it could not provide the requested facilities in less than 25 weeks and thus would be unable to supply the circuits in time for MCI to meet the early July 1975 deadline established by its agreement with GM.[8]

7. In early April 1975, MCI also placed an order for 120 circuits at the TELPAK rate between the MCI terminal in Los Angeles and the CCSA switch in Oakland.[9] The TELPAK bulk price for such circuits would have been significantly less than the price for such circuits if purchased individually. AT&T refused to provide the circuits, basing its refusal exclusively on the Tariff No. 260 restriction prohibiting the termination of private line circuits at any point other than premises at which the customer has "a regular and continuing requirement to originate or terminate communications."[10] This restriction is commonly known either as the "customer premises" or the "piece-out" restriction.

8. After AT&T refused to lease MCI circuits at the Telpak rate and also asserted that it could not provide MCI with circuits under FCC Tariff No. 266 in a timely fashion, MCI obtained 118 circuits from the Pacific Telephone and Telegraph Company ("PT&T"), a subsidiary of AT&T.[11] The circuits which PT&T provided, while identical to the circuits which AT&T would have supplied to MCI if AT&T had filled MCI's Telpak order, were tariffed at a rate nearly six times that charged for Telpak.[12]

B. *Conclusions*

25 Week Issue—Issue (b)

9. The Judge concluded that MCI had failed to develop facts demonstrating that AT&T's treatment of MCI's Tariff No. 266 order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act.[13] Since MCI had failed to meet its burden of proof, AT&T was not liable for damages under this issue.

10. The Judge found that AT&T's response in April 1975 that it needed 25 weeks to provide the Tariff 266 Circuits was based on the

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[7] Jt. Ex. 1, paras. 7 through 9.

[8] Jt. Ex. 1, para. 10.

[9] Jt. Ex. 1, para. 14; Tr. 781.

[10] Jt. Ex. 1, Documents 9 and 10. Transcript 276, 200.

[11] Jt. Ex. 1, para. 18.

[12] The Telpak charge was $32,000 per month, whereas PT&T charged about $181,000 per month. 85 FCC 2d 994, 995–96 (1981).

[13] Section 201(b) makes unjust and unreasonable practices and regulations unlawful. Section 202(a) makes it unlawful for any common carrier to unreasonably discriminate with respect to its charges, practices, regulations, facilities and services.

general knowledge and experience of AT&T engineers employed in its Western Area Engineering Department.[14] AT&T's report prepared in 1976 which detailed the components of the various intervals totalling 25 weeks[15] substantiated the correctness of the earlier judgment. The ALJ decided that AT&T's quote of 25 weeks to provide the facilities required by MCI was entirely reasonable. If anything, the 25 week schedule was ambitious, and MCI had not offered any evidence requiring a different conclusion.

11. The 25 week period envisioned "normal" time intervals. Normal time intervals means following regular engineering procedures. It does not contemplate extraordinary efforts such as treating a particular job on a priority basis.[16] The 25 week period quoted by AT&T took into consideration the fact that AT&T had other customers besides MCI and that all customers would be treated on a first come, first served basis. Indeed, the ALJ observed, if AT&T had shown preference to MCI in filling its order, it might be concluded that AT&T had discriminated against its other customers in favor of MCI. Although the Commission has not had occasion to comment on AT&T's method of handling orders from customers for large number of circuits, it has noted that in a case where simultaneous demand cannot be accommodated, the provision of service on a "first come first served" basis is not unreasonable or unduly discriminatory within the meaning of Sections 201 and 202 of the Act.[17]

12. The procedures for processing OCC requests were the subject of discussion in the Docket 20099 settlement negotiations.[18] MCI participated in these discussions. Docket 20099 provided for expedition of the normal time intervals at the customer's request. The findings show that some of the activities which AT&T had to perform to fill MCI's order could have been expedited. However, MCI never requested expedition. The ALJ concluded that it was doubtful, even assuming that expedition had been requested, that MCI's time constraints could have been accommodated.

Telpak Issue—Issue (a)

13. The ALJ concluded that AT&T denied MCI's Telpak request on the basis of the customer premises restriction contained in Tariff 260. Although the resale restriction was not considered in evaluating MCI's order, AT&T's Business Relations Manager for Long Lines in

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[14] Tr. 677–78.

[15] MCI Ex. 6.

[16] Tr. 693–94.

[17] *Metrock Corp.*, 73 FCC 2d 802, 806 (1979). *See also Spanish International Network, Inc. et al.*, 78 FCC 2d 1451, 1465–66 (1980).

[18] The Commission accepted the settlement agreement in Docket No. 20099 in *American Telephone & Telegraph Co.*, 52 FCC 2d 727 (1975).

1975 testified that MCI's use of Telpak to provide service to GM would violate the resale restriction contained in that tariff.[19] The ALJ found that the lawfulness of AT&T's action denying MCI's Telpak request turns on the lawfulness of these restrictions.

14. The customer premises or "piece-out" provision included in Section 2.6.3 of Tariff 260 restricted interconnection of private line services to premises where the customer had a regular and continuing requirement to originate or terminate communications.[20] Pursuant to the customer premises restriction, AT&T would not provide private line service between Cities A and B if the potential customer wished to provide its own communications system between Cities B and C and City B was merely to be used to connect the AT&T line with the customer's own system. Similarly, AT&T would not provide the circuit between Cities A and B if that circuit were merely to be connected at City B to the circuit of another common carrier between Cities B and C.[21] However, the tariff contained exceptions to the customer premises restriction for several classes of customers. Thus, AT&T provided service to the international record carriers (IRCs) for use by the IRCs' customers, even though the service did not terminate at the customer's premises.[22] AT&T also supplied service to an IRC's data message switcher in order to permit the IRC to connect to AIRCON, PLC or ARX services even though a customer's premises was not involved.[23] Similarly, AT&T would have provided service to a switch, not located on a customer's premises, if the switch were owned by a composite data service vendor and were used for the switching of data messages. AT&T ignored the customer premises restriction if NASA or the U.S. Air Force needed service.[24] AT&T also made an exception to the restriction if an entrance facility connection between a customer's microwave system and that customer's premises were involved.[25]

15. In addition, AT&T did not require that the interconnection take place at a customer's premises if the connection were to be between AT&T and either a Bell System operating company or an independent telephone company, such as the Lincoln Telephone and Telegraph Company.[26] Thus, the tariff in 1975 discriminated among

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[19] Tr. 278–79.

[20] Jt. Ex. 1, Document 10; Tr. 200.

[21] Tr. 205–06.

[22] Tr. 207–08.

[23] AIRCON, PLC, and ARX were the names of computerized message switching services provided by RCA Global Communications, Inc., Western Union International and ITT World Communications, Inc. These services permitted customers to share the use of computers to switch data and telegraph services. *See American Telephone and Telegraph Company*, 60 FCC 939, 940 (1976).

[24] Tr. 218–221.

[25] *See* para. 53 of the Initial Decision, (I.D.); and Tr. 232.

[26] *See* paras. 51 and 52 of the I.D.

various classes of customers. Further, the ALJ observed that AT&T's OCC Tariff No. 266 offered to other common carriers in 1975 the same facilities which MCI sought pursuant to the Telpak tariff, but without the customer premises restriction and at a higher price. Therefore, he concluded that the Telpak tariff discriminated in connection with the provision of like communications services, and that AT&T had not justified the discriminatory treatment.

16. The ALJ noted that AT&T contended that the customer premises restriction was necessary to protect AT&T from economic harm resulting from impairment of its nationwide average pricing scheme and to prevent technical harm to the network. AT&T asserted that carriers such as MCI would choose to provide their own facilities for the high density, low cost portion of the overall route, while leasing only the low density high cost portions from AT&T.[27] This would allegedly undermine AT&T's nationwide average pricing scheme which is based on the average costs for high density and low density routes. The ALJ concluded that AT&T's claim is undercut by the fact that the tariff restriction made no distinction between high-cost and low-cost routes. The restriction was based on the type of termination, not on the type of route. Thus, the restriction acted to prevent the interconnection of high-cost OCC or private microwave routes with low-cost AT&T routes just as much as it served to prevent the converse situation.[28] As long as the customer had a need to originate and terminate communications at the location which linked the routes, the customer premises restriction would have permitted the interconnection. Moreover, the special construction provision of FCC Tariff No. 260 allowed AT&T to charge a customer for costs incurred in providing a costly facility between two cities for the purpose of connecting that facility to an OCC circuit or a private microwave system.[29]

17. Further, the ALJ concluded that AT&T has presented no evidence to document economic harm to itself or to the public if it were to de-average its prices. Significantly, AT&T was advised in 1972 by its Council of Economic Advisors that the best economic answer to cream skimming is not to prohibit piece-out but to abandon nationwide average pricing and to price each route according to its costs.[30] If such pricing were used, according to the Economic Advisors, there would be no economic justification for refusing to piece-out. Thus, the ALJ noted that the economic rationale advanced by AT&T in support of its customer premises restriction was belied by its own Council of Economic Advisors.

18. The ALJ also determined that AT&T's end-to-end responsi-

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[27] Tr. 237.

[28] Tr. 239–40.

[29] Tr. 259–60.

[30] MCI, Ex. 13, p. 1, and para. 60 of the I.D.

bility rationale is similarly unsupported, and without merit. AT&T made the bare assertion that unless one carrier or individual has responsibility for the entire telephone network, the probability of it not working properly is very high.[31] However, AT&T offered no evidence in support of its contention that harm to the network or technical difficulties would result if piece-out was allowed. Indeed, AT&T admitted there were no technical studies to support its theory of harm to the network if the customer premises restriction were not in effect.[32] In this connection, as noted by the Commission in the "Piece-Out" decision, which has not been rebutted by AT&T:

> "[n]o greater potential for technical or engineering harm to AT&T's network results from termination of Tariff 260 services at the premises of OCCs than results from termination of like circuitry obtained under AT&T 266 and B.O.C. Tariff 3 at the premises of OCCs."[33]

In the absence of a showing of specific technical harm to the network or economic loss to the carrier that will impair its ability to serve the public adequately, a restriction on customer interconnection is unlawful. *Hush-a-Phone Corp.* v. *U.S.*,[34] and *Carterfone.*[35] In *Carterfone*, the Commission rejected as unreasonable:

> ". . . AT&T's position that because AT&T cannot control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system . . . without regard to the actual harmful effects."[36]

19. The ALJ concluded that MCI had met its burden of demonstrating that AT&T's refusal to accept its Telpak Order on the basis of the customer premises restriction was unjust, unreasonable and unduly discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act. Likewise, he held that a refusal to accept MCI's Telpak Order on the basis of the resale restrictions would also be violative of Sections 201(b) and 202(a) of the Act.

20. Essentially, the resale restriction meant that AT&T would refuse to provide service to a customer because that customer was not the ultimate user of the service.[37] In addition, AT&T's Tariff No. 260 contained certain restrictions, known as use restrictions, which limited the purposes for which services included in that tariff, such as Telpak, could be used. The use restrictions of AT&T Tariff 260 complemented the resale restriction, in a further effort to ensure that such services could not be resold.[38] AT&T asserted that the

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[31] Tr. 251.

[32] Tr. 258, 238–39. *See* para. 49 of the I.D.

[33] *AT&T Restrictions on Interconnection of Private Line Services*, 60 FCC 2d 939, 945 (1976).

[34] 238 F.2d 266 (D.C. Cir., 1956).

[35] 13 FCC 2d 420, 423 (1968); *recon. denied*, 14 FCC 2d 571 (1968).

[36] 14 FCC 2d 571, 572.

[37] Tr. 300.

[38] Tr. 279, 281–285, and Jt. Ex. 1, Document 11.

restrictions were needed to prevent the establishment of a message telecommunications service (MTS) and to prevent the undercutting by a reseller of AT&T's unit rates for message and private line service.[39] The ALJ determined that neither of these reasons can justify the imposition of the resale and use restrictions.

21. The ALJ concluded that AT&T's claim that its resale and use restrictions were necessary to prevent the establishment of a type of MTS pursuant to established Commission policy is both factually and legally irrelevant in the context of this case. He found that the evidence was clear that MCI wanted circuits to provide CCSA service to GM, and that the Commission had already ruled that CCSA was a private line service. *See Bell System Tariff Offerings.*[40] Furthermore, contrary to the premise of AT&T's rationale for the restrictions, the ALJ concluded that there was no legal prohibition against the provision of MTS by MCI at the time of the GM circuit order. See *MCI Telecommunications Corp.* v. *FCC.*[41]

MCI's Exceptions

22. In its Exceptions, MCI asserts that the ALJ erred with respect to his conclusions under Issue (b) and that the ALJ should have awarded MCI prejudgment interest on the damages awarded to MCI under Issue (c). With respect to Issue (b), MCI claims that AT&T should have borne the burdens of proof and of going forward with the presentation of evidence under that issue, because the facts necessary to determine whether the requested circuits were available or whether AT&T could establish such circuits in less than 25 weeks were uniquely within the knowledge of AT&T. This argument is in direct conflict with the Designation Order in this proceeding, which explained that relevant case law concerning analogous complaint proceedings before the Interstate Commerce Commission has established the principle that a carrier's customer has the burden of proving unreasonableness as well as damages in a complaint proceeding.[42]

23. MCI contends that the burden of proof properly rests with the carrier when it is the sole repository of information which could establish the lawfulness of its tariff actions, citing, *inter alia*, *Atchison, Topeka, and Santa Fe Ry. Co.* v. *United States*,[43] *Chesa-*

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[39] Tr. 298, 281.

[40] 46 FCC 2d 413 (1974); *aff'd sub nom. Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd. Cir. 1974); *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[41] 561 F.2d 365 (1977); *cert. denied*, 431 U.S. 1040; *mandate enforced*, 580 F.2d 590, *cert. denied*, 439 U.S. 980 (1978).

[42] *See* 85 FCC 2d 999 (1981), citing *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454–55 (1979).

[43] 218 F. Supp. 359, 374 (N.D. Ill., 1963).

peake and Ohio Ry. v. *United States,*[44] and *Referral of Chastain* v. *AT&T.*[45] We agree with the Common Carrier Bureau that the cases cited by MCI stand for the principle that a carrier bears the burden of proving the reasonableness of its actions only after the complainant has established a *prima facie* case of unreasonableness. After having reviewed the record evidence, the Findings of Fact contained in paragraphs 4 through 38 of the Initial Decision and the Conclusions of Law in paragraphs 82 through 87 of the Initial Decision concerning AT&T's response to MCI's request for 116 interstate circuits pursuant to Tariff FCC No. 266, we have determined that MCI has failed to demonstrate a *prima facie* case that AT&T's treatment of MCI's tariff order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act. Therefore, MCI's arguments that AT&T did not submit sufficient evidence or provide enough witnesses to carry its burden of proof under issue (b) are completely irrelevant and must be disregarded.

24. MCI further excepts to the ALJ's conclusion in paragraph 87 of the Initial Decision that AT&T made its employees and records available to MCI in a timely fashion. MCI claims that the basic documents necessary to determine the availability of circuits were the year-end computer summaries for the years 1974 and 1975, but that when it requested that AT&T supply it with the computer summaries for 1975 and the latter months of 1974, AT&T stated that those tapes were too seriously deteriorated for a suitable print-out to be made. Thus, MCI asserts that AT&T did not provide any documentary evidence demonstrating that the 116 requested circuits were not available. In response, AT&T explains that since the circuit records to which MCI refers were updated and superseded on almost a daily basis in 1975, the data contained in the year-end reports would not have shown the facilities actually available in April 1975.[46] Thus, there is no evidence that AT&T sought to hide relevant evidence from MCI. Moreover, the record evidence summarized in paragraphs 7 through 22 of the Initial Decision establishes that AT&T lacked sufficient spare individual circuits in April 1975 to meet MCI's requested service and that the only feasible way to provide MCI with 116 direct Phoenix-Oakland circuits was over two spare Phoenix-Los Angeles supergroups which had to be connected with two spare Los Angeles-Oakland supergroups.[47]

25. Regardless of which party should have had the burden of

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[44] 11 F. Supp. 588, 593 (S.D. W. Va., 1935), *aff'd*, 296 U.S. 187 (1935).

[45] 49 FCC 2d 749, 751 (1974), *vacated on other grounds*, 65 FCC 2d 25 (1977).

[46] *See* AT&T's Reply to the Exceptions filed by MCI and the Common Carrier Bureau, p 20 n. 29; para. 87 of the Initial Decision; and AT&T's Reply to the Proposed Findings of Fact and Conclusions of MCI and the Common Carrier Bureau, pp. 23–24.

[47] Tr. 450–52, 460–61, 661.

proof in this proceeding, MCI contends that the manner in which AT&T and PT&T reacted to the MCI order under Tariff FCC No. 266 indicates that AT&T's response was unjust and unreasonable. Its argument is that AT&T's assertion that it would need 25 weeks to provide MCI with 116 circuits from Phoenix to Oakland assumed a need for Western Electric services which AT&T did not prove. However, the record evidence establishes that the supergroup connection work, which AT&T needed to prove service to MCI in 1975 under Tariff No. 266, was performed by Western Electric installers.[48]

26. While MCI claims that AT&T's "assumption" that Western Electric work was required "takes on special significance" because PT&T provided MCI with 116 circuits without any Western Electric involvement, this argument is also without merit. It omits the facts that AT&T did not have available 116 spare circuits between Phoenix and Los Angeles and that the 116 circuits provided by PT&T between Los Angeles and Oakland did not involve supergroup connections, but were a collection of individual idle spare circuits from other established routes.[49] In brief, since no circuit or carrier equipment was needed for PT&T to provide the 116 individual circuits from Los Angeles to Oakland, no Western Electric work was needed.[50]

27. MCI further argues that AT&T's 25-week projection amounted to a refusal to meet MCI's needs and was an attempt to stifle competition from MCI, since General Motors had decided to cancel part of its previous order placed with AT&T for private line service to Oakland and to buy that part of its order from MCI. The record evidence does not support this argument, however. None of the CCSA trunks which AT&T had under construction for the GM CCSA service was routed through either Phoenix or Los Angeles,[51] and AT&T had insisted on a 78-week period for itself to extend GM's CCSA service to Oakland.[52] In addition, MCI's argument that AT&T failed to investigate the alternative of providing 116 circuits on a voice grade level through Los Angeles is equally faulty. The evidence makes clear that such an alternative would have involved 116 back-to-back (Phoenix-Los Angeles, Los Angeles-Oakland) circuits,[53] which were the very type of circuit which MCI had stated was not acceptable. MCI required "direct" (single link) circuits between

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[48] *See* Mr. Lambert's testimony at Tr. 517, 522–23, 537, 690–91, 698 and the testimony of Mr. Louis Mahoney, a Western Electric manager in 1975, at Tr. 1245–47, 1269–70, and 1289.

[49] Tr. 706–07.

[50] *See* AT&T's Reply to MCI's Exceptions, p. 15.

[51] Jt. Ex. 1, para. 4.

[52] Jt. Ex. 1, para. 3 and Tr. 748–49.

[53] Tr. 706–09.

Phoenix and Oakland because GM needed the circuits to transmit data, as opposed to voice.[54]

28. MCI also argues that AT&T showed bad faith in failing to inform MCI about four direct channel groups (48 circuits total) which were available and could have been activated in 16 weeks. In response, AT&T points out that a 16-week interval would not have met MCI's required service date. Moreover, AT&T observes that it tried to "inform" MCI of the four channel groups, but could not because Mr. Knowles of MCI did not return certain telephone calls made by AT&T.[55] Thus, the record evidence does not establish that AT&T's actions were unjust, unreasonable, or otherwise unlawful under Sections 201(b) and 202(a) of the Communications Act.

29. MCI alleges that the manner in which AT&T reacted to MCI's Tariff No. 266 order resulted in confusion and delay and, therefore, that AT&T has failed to meet the minimum requirements of concern for the welfare and interest of customers imposed upon carriers by Section 201(b) of the Communications Act. MCI supports this theory by pointing to AT&T's one-week delay in notifying MCI that its order had to be placed with AT&T's Long Lines Business Relations Group in Somerset, New Jersey, rather than AT&T's GM National Account Manager in Detroit, where MCI first placed its order.[56] MCI stresses that this delay occurred despite the fact that it gave advance notice to AT&T's Detroit office that MCI would place this order. At the time it received this advance notice, AT&T did not inform MCI of the change in procedure.[57] MCI also argues that while AT&T researched the availability of circuits for MCI before notifying it of the change in procedure,[58] the results of that research were purposefully not relayed to MCI for eleven days.

30. Contrary to MCI's foregoing contentions, the record evidence summarized in paragraphs 11 through 22 of the Initial Decision does not indicate that AT&T delayed any of its actions on MCI's Tariff No. 266 request. Moreover, Section 201(b) of the Communications Act does not require AT&T to "affirmatively guide" MCI in placing orders. That section of the Act only requires that AT&T's practices "shall be just and reasonable." We agree with the ALJ's conclusion in paragraph 85 of his Initial Decision that AT&T has met this standard.

31. MCI also claims that the ALJ erred by failing to award it prejudgment interest on the damages it received. It asserts that when damages can be calculated with mathematical precision, prejudgment interest is awardable as of right, citing *Eazor Express,*

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[54] Tr. 800–01; Jt. Ex. 1, para. 11.

[55] Tr. 406–07 and 414–15.

[56] *See* paras. 11 and 12 of the Initial Decision.

[57] Tr. 864–66.

[58] Tr. 439–441, 450–453.

Inc. v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.*[59] MCI argues that there the damages were easily calculated. Further, MCI observes that under the damages payment format envisioned by the ALJ, AT&T would pay MCI $931,880 and PT&T would then presumably look to MCI for the difference between $1,163,006, *i.e.*, the amount billed to MCI, and $320,000, which is the amount paid on account to MCI. Nevertheless, MCI notes, in the collection suit filed against MCI by PT&T,[60] PT&T seeks not only this difference, but also an award of interest. Thus, if PT&T wins its suit against MCI, MCI may be forced to pay interest to PT&T on an amount which, if PT&T's parent had acted lawfully, MCI would never have been required to pay. MCI contends that an award of interest to PT&T could result in MCI paying more in interest than it would have been required to pay for the Telpak circuits. Thus, MCI argues that AT&T should be required to reimburse MCI for whatever interest MCI must pay PT&T as a result of PT&T's collection suit.[61]

32. In response, AT&T claims that MCI has not proved damages and therefore is not entitled to either principal or interest on its complaint. We shall treat this argument when we deal with AT&T's Exceptions. Assuming *arguendo* that MCI is entitled to damages, AT&T asserts that MCI should not receive prejudgment interest. AT&T argues that, at best, an award of prejudgment interest to MCI is a matter of discretion.[62] AT&T also claims that MCI was obligated to pay the PT&T Tariff 126 charges when due, and that if AT&T is now compelled to reimburse MCI for any interest that MCI must pay PT&T, MCI would be rewarded for its unlawful action and awarded a preference prohibited by Section 202(a) of the Communications Act. Further, AT&T contends that MCI has had the use of the money it improperly withheld from PT&T and, therefore, interest should be imputed to MCI. Lastly, AT&T argues that even if MCI had promptly paid PT&T the Tariff 126 charges when due, an award of the difference between PT&T charges and Telpak charges would be a

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[59] 520 F.2d 951, 973 (3rd Cir. 1975), *cert.denied*, 424 U.S. 935 (1976).

[60] *PT&T* v. *MCI*, Case No. 77-2624-HP (C.D.Cal., filed June 8, 1977). This suit has been stayed pending our decision in this case.

[61] MCI cites *Illinois Central RR* v. *Texas Eastern Transmission Corporation*, 551 F.2d 943 (5th Cir., 1977). In that case, the District Court awarded prejudgment interest on a demurrage charge recovered by a carrier. The Court of Appeals affirmed the District Court on the theory that a converse rule would encourage shippers to withhold payment of demurrage charges on the slightest pretext since, regardless of the result of any litigation, they would always benefit to the extent of the interest value of the sums detained. 551 F.2d at 945.

[62] AT&T cites, *inter alia*, *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962); *Eazor Express, Inc.* v. *International Brotherhood of Teamsters*, *supra*; and *Thomas* v. *Duralite Co.*, 524 F.2d 577, 589 (3d Cir., 1975).

penalty rather than damages and penalties do not draw prejudgment interest.[63]

33. It is clear from the cases cited by the parties that this agency has considerable discretion in deciding whether to award prejudgment interest in a case such as this one. If PT&T were not asking for prejudgment interest from MCI in PT&T's collection suit, we would not be inclined to award any interest to MCI, because MCI engaged in unlawful self-help by withholding the major part of the payments due to PT&T under valid tariffs.[64] Thus, MCI was not deprived of the use of most of the money in question during the prosecution of its complaint. Indeed, if we awarded interest to MCI in such circumstances, MCI would have had not only the use of its money during the period of controversy, but also an award of interest on that money that could rest only on the theory that MCI did not have its use during that time.[65] Thus, awarding interest on the damages, in effect, would compensate MCI two times: once, as a result of the interest; the second time, as a result of its actual retention of the money pending the completion of the complaint proceeding, with freedom to use it.

34. On the other hand, we agree with MCI that, if the California court should award prejudgment interest to PT&T in the collection suit against MCI, failure to require AT&T to reimburse MCI for this interest would unfairly penalize MCI. Thus, MCI would have to pay PT&T interest for the period in which MCI had use of the money it withheld from the tariff charge, but would not receive interest on the money owed by AT&T for the overcharge. Depending upon the action taken by the California court, MCI could suffer a net loss as the combined result of (1) an adverse decision in that court with interest and (2) an award of damages by the Commission in this proceeding without interest. While MCI should not have resorted to self-help by withholding payment, we will not exercise our discretion with respect to interest on damages in such a way that would permit MCI to be penalized unfairly for its misdeed, in a case where our basic finding is that AT&T acted unlawfully.

35. Therefore, we shall require AT&T to reimburse MCI for any prejudgment interest which MCI is required to pay to PT&T in the collection proceeding. The theory of our award is not that the prejudgment interest MCI pays to PT&T is part of the ordinary

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[63] AT&T cites *Pennsylvania RR* v. *International Coal Mining Co.*, 230 U.S. 184, 200 (1913) and *Rodgers* v. *United States*, 332 U.S. 371 (1947) for this proposition.

[64] *See* our earlier Memorandum Opinion and Order in *MCI Telecommunications Corp.*, 62 FCC 2d at 705-06, finding that MCI was legally obligated to pay the tariff charges to PT&T, that its resort to "self-help" was contrary to the Communications Act, and that MCI's proper recourse was through the complaint procedure.

[65] An award of interest in such a case is not a penalty, but an effort to make the damaged party whole by compensating it for any monetary loss.

damages that AT&T must pay. Rather, our theory is that if PT&T wins its collection suit against MCI, MCI may be forced to pay interest to PT&T on an amount which, if AT&T had acted lawfully, MCI would never have been required to pay. Moreover, an award of interest to PT&T could result in MCI paying more in interest than it would have been required to pay for the Telpak circuits.

Common Carrier Bureau's Exceptions

36. The Common Carrier Bureau concurs with the ALJ's findings of fact and conclusions of law under Issues (a) and (b), but has filed two Exceptions to the Initial Decision. In its first Exception, the Bureau argues that the ALJ erred by not considering the factual assertions contained in certain documents offered by AT&T in its rejected Exhibit 7 as evidence that the judgment against AT&T in *MCI Communications Corp.* v. *AT&T*, No. 74-C-633 (N.D. Ill., June 16, 1980) ("Chicago case") precluded the imposition of liability on AT&T pursuant to the Telpak issue (Issue (a)) under the legal doctrine of *res judicata*. We shall accept the documents submitted by AT&T in its rejected Exhibit 7 as evidence in this proceeding. Even on consideration of that evidence, however, we agree with the ALJ's determination that the jury verdict in the Chicago case does not preclude the imposition of liability in this case, for the reasons set forth in paragraphs 40 through 44, *infra*.

37. In its second Exception, the Bureau argues that the ALJ miscalculated the damages which should be awarded MCI. Thus, the Bureau contends that, rather than using the best cost per circuit features of AT&T Tariff FCC Nos. 260 (Telpak) and 266 in determining the charge which MCI should have paid, the ALJ should have used the charge for service under PT&T's Tariff 126 for 25 weeks and then used the Telpak charge for the remainder of the period during which MCI utilized PT&T circuits. The Bureau calculated that this amount totaled $498,632.05, which is $178,632.05 more than MCI actually paid PT&T. In this light, the Bureau argues that MCI has not yet incurred any damages. Therefore, the Bureau recommends that the actual calculation of damages should be held in abeyance pending the outcome of PT&T's collection suit against MCI, at which time MCI might have incurred actual damages.

38. The foregoing argument of the Bureau is without merit. As the ALJ explained in paragraph 102 of his Initial Decision, the rationale for the Bureau's argument is an erroneous assumption that no Telpak circuits would have been available during the relevant period that MCI utilized PT&T circuits due to the 25-week interval involved in providing new circuits. The Bureau has overlooked the fact that the only record evidence dealing with non-availability of circuits concerned MCI's request for circuits between Phoenix and Oakland. MCI's request for Telpak service was for circuits between Los Angeles and Oakland. It has not been alleged that there was a

shortage of circuits between Los Angeles and Oakland and the evidence demonstrates that circuits were, in fact, available to meet MCI's Telpak request. As AT&T's witness admitted,[66] AT&T would use PT&T circuits if necessary to fill a Telpak order and PT&T did, in fact, have sufficient circuits to fill MCI's order for 116 circuits.

AT&T's Exceptions

A. *Estoppel Arguments*

1. *Res Judicata*

39. AT&T claims that the ALJ erred with respect to his conclusions under Issue (a) (the Telpak issue) and Issue (c) (the damages issue). For the most part, AT&T's Exceptions repeat arguments already made in AT&T's proposed findings of fact and conclusions of law. Since the ALJ disposed of these arguments adequately, we shall treat these points briefly. First, however, we shall discuss the assertion made by AT&T in the Appendix to its Exceptions that, under the legal doctrine of *res judicata*, MCI is barred from recovering damages under Issue (a) (the Telpak issue) because MCI previously litigated or could have litigated the same claims made herein in *MCI Communications Corp.*v. *AT&T* (the "Chicago case"), *supra*. AT&T contends that under the doctrine of *res judicata*, a prior final judgment on the merits precludes all additional litigation involving the same parties or their privies based on a claim which was or could have been litigated as part of the original case.[67] Further, AT&T argues that, in the Chicago case, MCI sought damages allegedly arising from AT&T's denial of interconnection based upon (among other things) the customer premises restriction during a period that ended April 30, 1975,[68] a claim which encompassed the April 15, 1975 denial of Telpak circuits in the present case. In this regard, AT&T observes that MCI's complaint in the Chicago case mentioned AT&T's alleged denial of "interconnection at other than the premises of plantiffs' customers;"[69] that there was repeated testimony in the Chicago case concerning the customer premises restriction in AT&T's tariff and its effect on MCI;[70] that the example which the court used when it instructed the jury in the Chicago case on MCI's claim that AT&T denied it interconnection for multipoint service was the same example the ALJ used in paragraph

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[66] Tr. 336.

[67] In support of this proposition, AT&T cites *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *RKO General, Inc.*, 82 FCC 2d 291, 312 (1980); and 1B *Moore's Federal Practice*, § 0.405 at 621–22 (2d Ed. 1980).

[68] *See e.g.*, AT&T's Ex. 7, Tab 6, pp. 76–85.

[69] AT&T's Ex. 7, Tab 1, p. 18.

[70] *See* AT&T's Ex. 7, Tabs 7, 10, 11, and 12.

45 of his Initial Decision to explain AT&T's denial of Telpak to MCI;[71] and that MCI was awarded a special verdict in the Chicago case on its claim that AT&T denied it interconnection for multi-point service.[72]

40. AT&T has overstated the preclusive effect of the judgment in the Chicago case. The three sources AT&T cites in support of its expansive argument[73] explain that under the doctrine of *res judicata*, a judgment on the merits in a prior suit involving the same parties bars a second suit based on the same cause of action even to the extent of barring issues which might have been raised in the prior suit but were not. If the second suit involves a different cause of action, however, those same sources make clear that the principle of collateral estoppel applies rather than the principle of *res judicata.* When collateral estoppel applies, as it does in the case now before us, the prior judgment only precludes litigation of issues actually litigated and determined in the prior suit.[74] *Moore's Federal Practice* states that while, under the doctrine of collateral estoppel, parties are precluded from relitigating relevant and material matters that were adjudged in a prior suit, the parties are not, as to the different cause of action, precluded from raising and litigating matters that were not adjudged even though they could have been raised and litigated in the prior suit.[75]

41. AT&T claims that the ALJ erred when he ruled that *res judicata* was inapplicable because the Chicago case was an antitrust action, while the instant case is a regulatory proceeding arising out of the Communications Act. Thus, AT&T observes that successive actions brought under different statutes or theories do not avoid the application of *res judicata.*[76] Nevertheless, it is clear that *res judicata* does not apply here because the instant proceeding involves a different cause of action than was involved in the Chicago case. In this regard, courts have determined whether a subsequent lawsuit involves the same cause of action as a prior lawsuit by focusing on the questions of whether a different judgment in the second action would impair or destroy rights or interests established by the judgment rendered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in

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[71] *Compare* AT&T's Ex. 7, Tab 2 with para. 45 of the Initial Decision.

[72] AT&T's Ex. 7, Tab 4, p. 42.

[73] *See* the three sources cited in note 67, *supra.*

[74] *See e.g., Stebbins* v. *Keystone Ins. Co.*, 481 F.2d 501, 506 (D.C. Cir. 1973).

[75] 1B *Moore's Federal Practice*, § 0.410(1), p. 1153. This source cites *Cromwell* v. *County of Sac*, 94 U.S. 351, 352–53 (1876) for this principle.

[76] AT&T cites, *inter alia*, *Norman Tobacco & Candy Co.*v. *Gillete Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961) and *Williamson* v. *Columbia Gas and Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert.denied*, 341 U.S. 921 (1951).

the first, and whether the essential facts and issues in the second lawsuit were present in the first.[77] Applying these principles to the Chicago case and the instant case, it is clear that a judgment for AT&T in the present case would not impair any interests established by the judgment against AT&T in the Chicago case, that different evidence is necessary to prove the cause of action in this proceeding than was required in the Chicago case and that the essential facts and issues in this case were not present in the Chicago case.

42. Thus, in the Chicago case, MCI complained that AT&T monopolized the intercity market for business and data communications in violation of Sections 1 and 2 of the Sherman Act, whereas in this proceeding MCI has alleged that AT&T violated the Communications Act by unjustly refusing to provide Telpak service. This proceeding involves a different cause of action than the Chicago case because this proceeding arises under the Communications Act complaint procedure rather than under the antitrust laws, requires different proof, is subject to different rules of evidence and turns on different standards of conduct (*i.e.*, whether AT&T acted reasonably and lawfully in responding to MCI's requests for service versus whether AT&T hindered competition in certain markets). Clearly, the evidence in the Chicago case concerning AT&T's monopolization of relevant markets by refusing to provide MCI with essential local interconnections, such as FX or CCSA, was far different from the evidence in this case concerning AT&T's unlawful refusal to provide Telpak service. Further, the ALJ was correct when he explained that MCI was not collaterally estopped from bringing the suit now before us because there are no issues of fact common to this proceeding and the Chicago case.[78] Thus, AT&T's refusal to provide interstate circuits at the Telpak rate to MCI was not litigated in the Chicago case.[79]

43. As we indicated previously, we shall accept all of the various documents proffered by AT&T as its Exhibit 7 in this proceeding so that there will be no doubt that we have considered them in determining that the jury verdict in the Chicago case does not bar MCI from receiving damages in the case now before us. In this regard, the AT&T documents referred to in paragraph 39, *supra*, as evidence that MCI's claim in the Chicago case encompassed the April 15, 1975 denial of Telpak circuits in the present case actually suggest the opposite of what AT&T urges. Thus, the documents demonstrate

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[77] *Herendeen* v. *Champion International Corp.*, 525 F.2d 130, 133–34 (2d Cir. 1975).

[78] Tr. 970–71.

[79] The antitrust case involved Telpak only insofar as it included an issue as to whether AT&T's Telpak offering amounted to predatory pricing. AT&T prevailed on this issue. AT&T has not shown that there was any allegation in the Chicago case that AT&T violated the antitrust laws by refusing to sell intercity circuits at Telpak rates to MCI; indeed, such an allegation would have been out of place in the context of the antitrust suit.

that the Chicago case focused on AT&T's refusal to provide MCI with local interconnections to its telephone lines or circuits and did not deal with the Telpak issue in the case now before us, *i.e.*, AT&T's refusal to provide intercity circuits. Moreover, this distinction is readily apparent if one compares, as AT&T suggests, the example which the court used when it instructed the jury in the Chicago case on MCI's claim that AT&T denied it interconnection for multipoint service[80] with the example the ALJ used in paragraph 45 of his Initial Decision to explain AT&T's denial of Telpak service to MCI. Thus, the multipoint interconnections involved in the Chicago case were between MCI and AT&T terminals in the same city and did not involve the provision of intercity facilities by AT&T to MCI which is involved in the case now before us.

44. In reaching our conclusion that the Chicago case does not bar MCI from prosecuting the case now before us, we have drawn upon our special expertise regarding complaints which properly fall under the Communications Act rather than the antitrust laws.[81] An article entitled *Preclusion/Res Judicata Variables: Adjudicating Bodies*, written by Professor Allan D. Vestal,[82] has particular relevance here. In his article, Prof. Vestal explains that a court or administrative agency must examine a number of variables to determine whether litigation of an issue has been precluded by an earlier proceeding. Thus, in addition to the parties involved in the instant suit and the prior suit and the nature of the controversy in the two suits, the adjudicatory bodies, *i.e.*, the one which handed down the earlier decision and the one before which the instant action is pending, must also be examined.[83] In this light, Prof. Vestal concludes that issue preclusion cannot be assumed where the second adjudicatory body is one with "some unusual competency in a particular matter."[84] Further, Prof. Vestal points out that agency determinations should not be foreclosed by a prior court decision

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[80] AT&T's Ex. 7, Tab 2.

[81] We observe that a recent Memorandum Opinion of United States District Judge Charles R. Richey in *Southern Pacific Communications Company* v. *American Telephone and Telegraph Company*, Civil Action No. 78–0545 (D.C., issued December 21, 1982) contains a footnote (note 154, p. 244) which asserts that AT&T had no duty under the antitrust laws to lease Telpak circuits to specialized common carriers for resale. In this regard, Southern Pacific Communications Company is a specialized common carrier like MCI. Judge Richey's ruling in the foregoing antitrust case does not conflict with our conclusions that AT&T violated Sections 201(b) and 202(a) of the Communications Act when it refused to honor MCI's order for Telpak circuits. The fact that AT&T's conduct was unlawful under the Communications Act does not mean that it also was unlawful under the antitrust laws.

[82] 54 Geo. L.J. 857 (1966).

[83] *Id.*, at 860–61.

[84] *Id.*, at 886–87.

because different standards may govern the procedures and substantive decisions of administrative agencies and courts.[85] Thus, in determining whether the Chicago case precludes the case now before us, it is important to observe that the two cases involve different adjudicatory bodies which apply different rules of evidence and focus on dissimilar standards of conduct as well as the fact that the two cases involve separate causes of action.

2. *The Agency Argument*

45. Another estoppel argument raised by AT&T is that MCI ordered Telpak service as GM's agent and therefore lacks a justiciable claim to damages for any unlawful denial of service to GM. As the ALJ explained in paragraph 89 of his Initial Decision, we previously considered and rejected this contention in our initial denial of MCI's formal complaint.[86] Although our Designation Order vacated our previous denial of MCI's formal complaint, the reasoning supporting our ruling on AT&T's agency argument in our 1979 order denying MCI's complaint was correct. In brief, MCI ordered Telpak service for GM as GM's carrier. Thus, AT&T personnel treated the Telpak order as a "repeat" of earlier orders for the same purpose under AT&T's Tariff FCC No. 266.[87] As the ALJ stated in paragraph 89 of the Initial Decision, the evidence establishes that AT&T clearly understood that the Telpak services, though ordered in GM's name, were intended for the use and benefit of MCI in meeting its July 1, 1975, target date for providing comprehensive services to GM. AT&T itself had been an unsuccessful competitor for the GM contract and was aware of GM's needs.

46. Further, since AT&T knew the basis for MCI's Telpak order, AT&T also knew that MCI was acting as an independent contractor for GM and not as an agent.[88] Clearly, when MCI labelled itself as an agent of GM in placing its Telpak order, it was attempting to circumvent AT&T's Tarriff FCC No. 260 restrictions. Nevertheless, MCI was obviously making the design and the economic decisions regarding GM's service in the capacity of GM's carrier, and, more significantly, AT&T knew of the relationship between MCI and GM. Thus, as the ALJ stated in paragraph 89 of his Initial Decision, the agency designation in MCI's order which AT&T required did not mislead AT&T as to the relationship between MCI and GM or the purpose of GM's order. Moreover, in view of the actual relationship between MCI and GM and the purpose for which the Telpak order

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[85] *Id.*, at 888. *See e.g., North Carolina* v. *Charles Pfizer & Co., Inc.*, 537 F.2d 67, 73-74 (4th Cir. 1973); *cert.denied*, 429 U.S. 870 (1976).

[86] *MCI Telecommunications Corp.* v. *AT&T and PT&T*, 74 FCC 2d 188, 192 (1979).

[87] Tr. 275.

[88] *See e.g., United Insurance Company of America* v. *NLRB*, 304 F. 2d 86 (7th Cir. 1962); *Steen* v. *Potts*, 75 S.D. 184, 61 N.W. 2d 825 (1953); and *Restatement Second of Agency*, § 2 (1958).

was placed, MCI clearly had an interest in the Telpak transaction sufficient to entitle it to sue AT&T.[89]

3. *The Docket 20099 Argument*

47. AT&T states that MCI was barred from ordering Telpak under Tariff No. 260 by the Settlement Agreement in Docket No. 20099.[90] All of AT&T's arguments on this matter were rejected in paragraph 90 of the ALJ's Initial Decision. In brief, AT&T asserts that the terms of the Settlement Agreement required MCI to order all of its interstate facilities pursuant to Tariff 266 and all of its intrastate facilities pursuant to the appropriate Bell System Operating Company tariffs. Nevertheless, as the ALJ observed, paragraph 15 of the Settlement Agreement specifically states that the provisions of AT&T Tariff FCC No. 260 were not included in the matters designated for investigation in Docket No. 20099.[91] Further, a recurrent theme in AT&T's argument concerning the Settlement Agreement is that MCI could not order circuits under AT&T's Tariff FCC No. 260 because that tariff dealt with "services" or end-to-end offerings, while Tariff FCC No. 266 involved the provision of "facilities" or various components necessary for an OCC (Other Common Carrier, like MCI) to complete its end-to-end service offering.[92] Nevertheless, AT&T's own witness, Mr. Delane, who was Manager of Business Relations for AT&T's Long Lines Department in 1975, admitted that there was no language in Tariff 260 which would prevent an OCC from ordering facilities under that tariff or would require the OCC to order facilities under Tariff 266.[93] In brief, the Settlement Agreement in Docket No. 20099 did not bar MCI from ordering Telpak service.[94]

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[89] *See Restatement Second of Agency* § 364 (1958). *See also, Restatement Second of Agency*, § 372(1) and Comment (b).

[90] *AT&T*, 52 FCC 2d 727, 738 (1975).

[91] 52 FCC 2d at 742. The same paragraph refers to two other paragraphs of the Settlement Agreement which deal with Tariff FCC No. 260 to a limited extent. Nevertheless, as the ALJ suggested, it is clear that the Agreement does not bar MCI from ordering Telpak service.

[92] Tr. 318–19.

[93] Tr. 325–26.

[94] This is not inconsistent with our ruling in *Associated Press v. AT&T*, 16 FCC 2d 277 (1968), *aff'd*, *Associated Press v. FCC*, 452 F.2d 1290 (D.C. Cir. 1971). In that case, we refused to allow press customers to pick and choose between rates for services and facilities contained in special press classification tariffs and rates for identical services and facilities contained in the general public offering. The point there was that the FCC, after having conducted a hearing, had authorized a special discount rate schedule for the press for use in the transmission of general news. The rate schedules for press and non-press uses had been structured differently, so as to make clear the Commission's intention to create "two distinct clases of . . . users to which different rate schemes applied." 452 F.2d 1298. In light of this careful scheme, the Court of Appeals agreed with the FCC that the press customers could not arrange their service packages with "selected parts" from

B. *Other Arguments Concerning the Telpak Issue (Issue (a))*

48. Many of AT&T's arguments with respect to the ALJ's findings and conclusions under the Telpak issue (Issue (a)) are irrelevant because they fail to focus on the question of whether the tariff restrictions under Tariff FCC No. 260 which were in effect in 1975 were "unlawful at the time and under the circumstances in which they were applied."[95] Thus, even though our Designation Order recognized that two 1976 Commission decisions had found the customer premises[96] and resale[97] restrictions to be unlawful, it rejected MCI's argument that it was entitled automatically to a judgment in its favor simply as a result of those decisions. We explained that the issues in MCI's complaint for damages are different from those in the 1976 policy making investigations and that there may be changes in circumstances or defenses available to AT&T which would justify a different result in this adjudicatory proceeding. Nevertheless, we stated that carrier-initiated tariff provisions which are merely allowed to become effective may later be found to be unlawful and thus subject the carrier to liability, citing *Arizona Grocery* v. *Atchison, T. and S.F.R. Co.*[98] We also explained that AT&T's customer premises and resale restrictions were never approved or prescribed by the Commission, but were initiated by AT&T and merely allowed to become effective. Thus, MCI had the burden of proving that the foregoing restrictions were unlawful when they were applied in 1975 as justification for refusing to fill the Telpak order.

49. Despite the foregoing directives in our Designation Order, AT&T argues that retroactive application of the 1976 *Resale and Shared Use Decision, supra*, would be legally impermissible and fundamentally unfair and that the ALJ imposed "retroactive liability on AT&T for the customer premises restriction without

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press and non-press parts of the tariffs. *Id.* at 1301.

AT&T has not made a comparable case here. While AT&T and the OCCs did negotiate rates for certain services and facilities in Docket No. 20099, there was no intention on the FCC's part to create distinct classes of users (*i.e.*, OCCs and non-OCCs) to which different rate schemes applied. The OCCs could and did obtain service and facilities under the negotiated rates. But they also have obtained service and facilities under AT&T's public offerings. In short, unlike the press situation, there was no comprehensive rate schedule in Docket No. 20099 that required the OCCs to take service under the negotiated rates to the exclusion of other rate schedules that offered service to the general public.

[95] 85 FCC 2d at 1000.

[96] *AT&T Restrictions on Interconnection of Private Line Services*, 60 FCC 2d 939.

[97] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976); *recon. granted in part*, 62 FCC 2d 588 (1977); *aff'd sub nom AT&T v. FCC*, 572 F.2d 17 (2d. Cir); *cert denied*, 439 U.S. 875 (1978).

[98] 284 U.S. 370 (1932).

making a determination whether retroactive liability would be fair and equitable."[99] Thus, AT&T refuses to recognize that the Designation Order made clear that "retroactivity" was not an issue to be tried. In the Designation Order, we explained that if AT&T's customer premises and resale restrictions were found to have been unlawful at the time and under the circustances in which they were applied, damages could be awarded for injury suffered as a result of those restrictions.[100] In brief, AT&T's retroactivity arguments have already been considered and rejected by this Commission in our Designation Order.

50. In similar fashion, AT&T argues that Section 203 of the Communications Act requires carriers to enforce all of their tariff provisions and that, therefore, the Commission may not impose liability on AT&T for meeting its obligation to enforce its tariff provisions prohibiting resale in 1975.[101] This contention flies in the face of the rationale set forth in the *Arizona Grocery* case, namely, that a common carrier can be held liable for unlawful activity undertaken pursuant to carrier-initiated tariff provisions which were allowed to become effective but were never specifically approved by the Commission. AT&T's argument would also render useless the complaint procedure for carrier customers provided for in Sections 206 through 209 of the Communications Act whenever carrier-initiated tariffs not approved or prescribed by the Commission are involved.

51. AT&T cites the Supreme Court decision in *Terminal Warehouse Co.* v. *Pennsylvania Railroad*[102] to support its theory that the Commission cannot impose what AT&T views as "retroactive" liability on a carrier which has enforced a tariff provision for a long period of time. In that case, however, the Supreme Court stressed that, under the Interstate Commerce Act (ICA), the Interstate Commerce Commission could impose liability on a carrier for activities conducted pursuant to a carrier-initiated tariff provision which had not been approved or prescribed by the ICC and which was later discovered to be unlawful, even though it had been in effect for several decades.[103] Significantly, as noted in our Designation

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[99] AT&T Exceptions at Appendix, p. 7.

[100] 85 FCC 2d at 1000.

[101] AT&T also argues that from July 1975 to June 1976, MCI apparently did not have a tariff covering the service it provided GM into Oakland, as required by Section 203 of the Act. In this regard, AT&T claims that the ALJ erred in rejecting its Exhibit 14. After having reviewed the data in AT&T's Exhibit 14 and MCI's Tariff No. 1 for July 1975 to June 1976, we find that AT&T has failed to establish a *prima facie* case that MCI did not have a tariff covering the service it provided GM into Oakland during that period. We hereby take official notice of MCI's Tariff No. 1 which was in effect from July 1975 to June 1976.

[102] 297 U.S. 500 (1936).

[103] *Id.* at 506 and 516.

Order, the language of Sections 206 through 209 of the Communications Act, which provide a complaint procedure for customers of communications common carriers, was lifted from the ICA. It would appear that AT&T is referring to language in the *Terminal Warehouse* case which explains that a carrier's liability under the ICA for a mistake of law should not be used to demonstrate that the carrier had been guilty of conspiring to violate the antitrust laws.[104] Nevertheless, there is no conflict between *Arizona Grocery* and the *Terminal Warehouse* case. It is clear that both of these cases support our explanation of the manner in which this case was to be tried in our Designation Order.

52. AT&T asserts that the ALJ erroneously shifted the burden of proof on the issue of the reasonableness of the resale prohibition in Tariff 260 from MCI to AT&T and that the record evidence does not support the ALJ's conclusions that the customer premises and resale restrictions in Tariff 260 were unreasonable and unduly discriminatory pursuant to Sections 201(b) and 202(a) of the Communications Act. AT&T's arguments in support of the foregoing general contentions consist of erroneous and irrelevant assertions and we shall not repeat them here. It is abundantly clear that the ALJ's findings of fact in paragraphs 45 through 73 of the Initial Decision and his conclusions of law in paragraphs 92 through 100 concerning the Telpak issue have overwhelming support in the record evidence and demonstrate that MCI carried its burden of proving that AT&T's refusal to accept MCI's Telpak order was unjust, unreasonable, and unduly discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act.

C. *Arguments Concerning Damages*

53. Assuming *arguendo* that AT&T unlawfully refused to accept MCI's Telpak order, AT&T contends that MCI has failed to prove damages. First, AT&T claims that until MCI has paid PT&T the full amount it owes PT&T, MCI has suffered no actual damages. Further, AT&T argues that since the damage award is not contingent on satisfaction of MCI's obligation to PT&T, there is a possibility that MCI will obtain the "windfall" of being paid by AT&T to use PT&T's facilities without paying PT&T. We affirm the ALJ's conclusions that MCI has incurred damages as a result of its legal liability to pay PT&T in the amount of $1,163,006.79 and that MCI was required to pay AT&T only $231,126.64. Therefore, we concur with the ALJ that AT&T should pay the difference between the foregoing amounts as damages to MCI. Nevertheless, we shall make the award of

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[104] *Id.* at 516.

$931,880.15 in damages to MCI contingent upon MCI's payment of the $843,006.79 it still owes PT&T.[105]

54. Second, AT&T asserts that MCI did not prove any actual damages. Thus, AT&T claims that MCI's showing of the difference between the charges for PT&T's circuits at Tariff 126 rates ($1,163,006.79) and the amount which MCI would have paid under AT&T's Tariff 260 and under Tariff 266 when the per-line rate was less expensive than Telpak ($231,126.64) is not sufficient to establish damages. We disagree. As the ALJ explained in paragraph 105 of his Initial Decision, the Supreme Court's decision in *ICC* v. *United States ex rel. Campbell*,[106] upon which AT&T relies, does not preclude the possibility that the foregoing rate discrepancy can be the proper measure of damages. All that *Campbell*, other court decisions, and our previous decisions require is that the plaintiff prove specific pecuniary loss in order to obtain damages.[107] Clearly, MCI has incurred actual damages totalling $931,880.15 as a result of being billed $1,163,006.79 by PT&T.

55. Third, AT&T argues that MCI failed to mitigate any damages it might have incurred. Thus, AT&T claims that if MCI had ordered the Phoenix-Oakland facilities under Tariff 266 in December 1974, when it first knew it would need Bell facilities to serve GM, AT&T would have had sufficient time to fill the order by July 1, 1975, which was the date that GM needed the circuits in question. Further, AT&T contends that if MCI had placed the order in February 1975, it could have used PT&T facilities from July 1 until mid-August[108] and the less expensive AT&T facilities thereafter. Nevertheless, GM did not place a firm order with MCI for the routes which would require MCI to procure circuits from AT&T until February 25, 1975.[109] In this regard, paragraph 10 of the Initial Decision summarizes the testimony of an MCI witness, Mr. Knowles, who explained why he did not believe that the GM circuits order would have been accepted by AT&T prior to the implementation of the Settlement Agreement in Docket No. 20099,[110] which was signed on March 13, 1975, by AT&T, MCI and the common carriers and accepted by the Commission on April 23, 1975. Although AT&T argues that it offered

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[105] MCI has already paid PT&T $320,000.

[106] 289 U.S. 385 (1973).

[107] *See, e.g., Campbell, supra*, 289 U.S. 385 at 390, and *Hughes Sports Network*, 25 FCC 2d 550, 555 (Rev. Bd. 1970).

[108] We assume that AT&T is referring to PT&T facilities between Oakland and Los Angeles. MCI already had facilities between Phoenix and Los Angeles. *See* MCI Reply Brief, p. 17, para. 9 of the Initial Decision, and Tr. 774–778.

[109] Jt. Ex. 1, para. 5.

[110] *AT&T*, 52 FCC 2d 724, 738 (1975).

intercity facilities between points in different states under AT&T Tariff 266 in 1974,[111] it has not shown that MCI could have obtained the Phoenix-Oakland circuits it required under that tariff prior to March 31, 1975,[112] or that MCI was negligent or imprudent in placing its Tariff 266 order on March 31, 1975. Thus, in light of all the foregoing circumstances, it appears that MCI ordered the Phoenix-Oakland facilities with reasonable dispatch.

56. AT&T also alleges that MCI failed to mitigate damages by accepting AT&T's proposal to provide 46 Phoenix-Oakland circuits by July 1, 1975, additional circuits by mid-August, and the balance by mid-October 1975.[113] Thus AT&T claims that switching to these AT&T circuits would have substantially reduced the amount of MCI's liability to PT&T.[114] In response to these arguments, MCI points out that it began reducing the number of circuits rented from PT&T within two months of initiating service to GM and discontinued using PT&T circuits rented from PT&T within one year of initiating service to GM.[115] Further, MCI contends that it was under no obligation to obtain circuits from AT&T, especially when it could only obtain AT&T's circuits by ordering service between Phoenix and Los Angeles, where MCI already had facilities. We concur with MCI that its method of mitigating its damages was appropriate under the circumstances.

57. In this regard, we must recognize the fact that AT&T has conceded that 30 of the 46 circuits offered under Tariff 266 on April 18, 1975, were unsuitable for GM's Oakland CCSA requirement.[116] Further, although AT&T located an additional 48 circuits between Oakland and Phoenix, and AT&T estimated that it could make these circuits available by approximately mid-August, it does not appear that Mr. Knowles, who was MCI's representative in the negotiations,

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[111] AT&T cites its Exhibit 9, at 10; Tr. 1047–49; and revisions to AT&T's Tariff 266 contained in Transmittal No. 12107, which became effective on August 2, 1974.

[112] The testimony by Mr. Dalane which AT&T cites (Tr. 1047–49) clearly indicates that AT&T would not have provided MCI the Phoenix-Oakland circuits it sought for GM in January 1975. Further, the relevant tariff provisions allowing AT&T to provide the service required by GM did not become effective until May 15, 1975. *See* 3rd Revised Page 8 and 4th Revised Page 9 which added new subsections (F) and (G) to Section 2.1.4 of Tariff FCC No. 266. We hereby take official notice of the referenced tariff pages. We also take official notice of 2d Revised Page 9 (effective August 2, 1984) and 3rd revised Page 9 (effective January 15, 1975) of Tariff 266 which contain relevant provisions of Section 2.1.4 of Tariff 266 during the period of August 1974 to May 1975.

[113] See Joint Exhibit 1, paras. 10 and 12.

[114] AT&T cites Jt. Ex. 1, para. 22, line 6, which the ALJ includes as para. 80 of his Initial Decision. Data contained in para. 80 of the I. D. indicates that a switch from PT&T Tariff 126 on October 17, 1975, would have resulted in charges of $847,316.98 rather than the $1,163,006.79 which PT&T charged MCI for the circuits actually used by MCI.

[115] Jt. Ex. 1, para. 21.

[116] Jt. Ex. 1, para. 11.

was informed about these circuits. Rather, Mr. Knowles stated that he was informed by AT&T that 24 additional circuits would be made available a few weeks after July 1, 1975.[117] In addition, on April 18, 1975, Mr. Knowles was told by AT&T that it was unlikely that all 116 circuits could be supplied by the July 1, 1975 date and that it would take an additional two weeks to determine whether expedition by July 1, 1975, was possible.[118] Thus, given the apparent difficulty of obtaining 116 circuits from AT&T pursuant to Tariff 266 at the time when MCI needed them, it is understandable that MCI would be reluctant or cautious in asking AT&T to supply it with 116 circuits by mid-October. In light of all the relevant circumstances, MCI's efforts to mitigate its damages appear to have been reasonable.

PT&T's Motion for Expedited Disposition

58. In a Motion for Expedited Disposition filed May 20, 1982, PT&T requested that we dismiss MCI's complaint as to PT&T.[119] As the ALJ observed in paragraph 101 of his Initial Decision, MCI has not offered any evidence which demonstrates that PT&T acted improperly in providing service under Tariff 126 or played any part in AT&T's unlawful refusal to provide service under Telpak. In brief, there is no evidence that PT&T has violated the Communications Act or engaged in any improper conduct. Therefore, in order to promote the resolution of PT&T's suit to collect amounts due it from MCI,[120] which has been stayed pending our resolution of the complaint in this proceeding,[121] we shall grant PT&T's motion and dismiss MCI's complaint as to PT&T.

59. ACCORDINGLY, IT IS ORDERED, That the record in this proceeding IS REOPENED to accept into evidence the documents submitted by American Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company as their Exhibit 7, which was rejected by the Administrative Law Judge on July 9, 1981; and the record is RECLOSED.

60. IT IS FURTHER ORDERED, That the request for oral argument filed January 20, 1982, by American Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company IS DENIED.

61. IT IS FURTHER ORDERED, That the Brief and Exceptions filed by American Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company, the Exceptions filed by MCI Telecommunications Corporation, and the Exceptions filed by

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[117] Jt. Ex. 1, para. 12; Tr. 406-07; MCI Ex. 7, p. 8.

[118] Tr. 797–98.

[119] On May 27, 1982, MCI filed a Motion to Strike PT&T's motion. The Common Carrier Bureau filed Comments supporting PT&T's motion on June 1, 1982. In light of our action granting PT&T's motion, MCI's motion will be denied.

[120] *PT&T v. MCI* Case No. 77-2624-HP (C.D. Cal., filed June 8, 1977).

[121] *PT&T v. MCI*, 649 F. 2d 1315 (9th Cir. 1981).

the Common Carrier Bureau on January 6, 1972, ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

62. IT IS FURTHER ORDERED, That American Telephone and Telegraph Company SHALL PAY MCI Telecommunications Corporation $931,880.15 within thirty (30) days of the release date of this Memorandum Opinion and Order. This payment is contingent on the payment of $843,006.79 by MCI Telecommunications Corporation to The Pacific Telephone and Telegraph Company for amounts due from MCI under its Tariff FCC No. 126. PROVIDED, HOWEVER, that if American Telephone and Telegraph Company seeks reconsideration or judicial review of our Decision, IT MAY PAY MCI Telecommunications Corporation $931,880.15 as late as thirty (30) days after the forum which has jurisdiction to review this proceeding issues its mandate.

63. IT IS FURTHER ORDERED, That if The Pacific Telephone and Telegraph Company is awarded any prejudgment interest on the amount due it from MCI Telecommunications Corporation as a result of its suit to collect amounts due under Tariff 126, *PT&T* v. *MCI*, Case No. 77-2624-HP (C.D. Cal., filed June 8, 1977), American Telephone and Telegraph Company SHALL REIMBURSE MCI Telecommunications Corporation for the prejudgment interest which it pays to The Pacific Telephone and Telegraph Company.

64. IT IS FURTHER ORDERED, That the Motion for Expedited Disposition filed May 20, 1982, by The Pacific Telephone and Telegraph Company IS GRANTED, the complaint filed in this proceeding IS DISMISSED insofar as The Pacific Telephone and Telegraph Company is concerned, and the Motion to Strike the foregoing Motion for Expedited Disposition filed May 27, 1982 by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

FCC 81D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MCI TELECOMMUNICATIONS CORPORATION v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and In the Matter of MCI TELECOMMUNICATIONS CORPORATION	CC Docket No. 81-217

Appearances

Ruth S. Baker-Battist, *William J. Potts* and *John M. Pelkey*, on behalf of MCI Telecommunications Corporation; *Alfred Winchell Whittaker*, *Hiram D. Gordon*, *M. Jean Dabney* and *Michael J. Goldey*, on behalf of American Telephone and Telegraph Company; *Robert Ralls*, on behalf of Pacific Telephone and Telegraph Company; *Louise L. M. Tucker*, *Bill Gerstenslager*, *Gay Ludington* and *Theodore D. Kramer*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

(Issued: November 25, 1981; Released: December 7, 1981)

Preliminary Statement

1. This case involves the formal complaint of MCI Telecommunications Corporation (MCI) filed September 22, 1976 against American Telephone and Telegraph Company (AT&T) and Pacific Telephone and Telegraph Company (PT&T). MCI seeks damages upon two distinct theories. The first relates to MCI's request for Telpak C circuits under AT&T's Tariff 260 and the second to the request for service under AT&T's Other Common Carrier Tariff FCC No. 266. On October 25, 1979, the Commission released its Memorandum Opinion and Order in which it denied MCI's complaint.[1] *MCI*

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[1] The Commission also denied a petition for reconsideration and petition for stay of its Memorandum Opinion and Order in *MCI Telecommunications Corporation*, 62 FCC 2d 703 (1976). In that decision, the Commission denied MCI's "Petition for

Telecommunications Corporation v. *AT&T*, 74 FCC 2d 184 (1979). MCI sought judicial review of the 1979 decision in the United States Court of Appeals for the District of Columbia Circuit. Thereafter, on June 16, 1980, the Commission voluntarily requested the Court to remand the case to the Commission for "consideration of matters raised in MCI's brief which either were not addressed or were addressed inadequately in the order under review" Memorandum Opinion and Order released April 7, 1981, 85 FCC 2d 994 at 995 (Designation Order). The Court ordered the remand on September 2, 1980. On April 7, 1981, the Commission released its Designation Order herein.

2. The Commission specified that an expedited proceeding be held on the following issues:

> (a) Whether AT&T's refusal to accept MCI's April 10, 1975 order of two bundles of Telpak C offerings from Oakland CA to Los Angeles, CA was unjust or unreasonable or otherwise in violation of Section 201(b) or 202(a) of the Communications Act;
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> (b) Whether, and if so, to what extent, AT&T's response to MCI's March 31 and April 8, 1975 orders for 116 voice grade circuits from Phoenix, AZ to Oakland, CA was unjust or unreasonable or otherwise unlawful under Sections 201(b) or 202(a) to the Communications Act; and
>
> (c) What damages, if any, should be awarded to MCI for any unlawful acts or omissions of AT&T found under issues (a) and (b) above.

3. The initial prehearing conference was held on May 5, 1981. Further prehearing conference were held on June 4, 1981 and June 18 1981. Hearings commenced on June 24, 1981 and continued through 9 hearing days until July 17, 1981, when the record was closed. Proposed findings of fact and conclusions were filed by the parties on August 24, 1981. Replies were filed by the parties on either August 31 or September 1, 1981. On September 21, 1981, MCI filed a motion to reopen the record. The motion was prompted by MCI's recent discovery of the existence of a June 22, 1972 memo from W. J. Schindele to R. T. Dugan. At that time, Schindele was an AT&T assistant vice-president for business relations and was in charge of relations with MCI and the other specialized carriers (Tr. 1712). The memo relates to a proposal by General Electric to interconnect a private microwave system to the CCSA network which AT&T was providing GE. The Schindele memo was clearly encompassed within the scope of Document Request No. 7 of MCI's First Set Of Document Requests. MCI's motion was granted at a hearing conference held on September 25, 1981. Further hearings were held on October 5 and 9, 1981. The record was reclosed on the

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Emergency Relief" in which MCI requested the Commission to order PT&T not to terminate service for nonpayment of past-due bills for private line circuits that MCI ordered between Oakland and Los Angeles to meet its commitment to General Motors.

latter date. Supplemental Proposed Findings and Conclusions were filed by the parties on October 21, 1981.

Findings Of Fact

A. *The 25 Week Issue*[2]

The GM Circuit Orders

4. In 1973, AT&T was providing General Motors (GM) a Common Control Switching Arrangement (CCSA), which was offered under AT&T's "private line" tariff, AT&T Tariff F.C.C. No. 260. CCSA is an arrangement which links together a customer's (*e.g.*, GM's) private line circuits between its various offices through switches located on the telephone company's premises. CCSA permits, at the customer's option, access to the public switched network. (Jt. Ex. 1, para. 1).

5. In 1973, the CCSA service provided to GM linked together GM offices in the following cities: New York, New York; Warren, Ohio; Detroit, Michigan; and Chicago, Illinois. In addition, GM had various private line (tie lines) from its midwest offices to its California offices in Fremont, South Gates, Van Nuys, and Goleta. (Jt. Ex. 1, para. 2).

6. In the fall of 1973, GM and AT&T discussed adding other locations including Oakland, California, to GM's CCSA service. By letter dated October 22, 1973, GM authorized AT&T to proceed with the addition of the "West Coast Switches" for the GM CCSA network. This included a CCSA switch to be provided GM by AT&T Long Lines or PT&T in Oakland. By letter dated December 28, 1973, AT&T proposed a June 1975 target date for cutover to the Oakland "West Coast Switches." (Jt. Ex. 1, para. 3). The GM Order involved, among other things, the following:

(a) 61 direct circuits between Oakland and Detroit.

(b) 85 direct circuit between Chicago and Oakland. (Jt. Ex. 1, para.).

7. In late 1973 and early 1974, AT&T initiated plans for providing those circuits. Those plans called for both the Chicago-Oakland and the Detroit-Oakland circuit to be routed over various facilities between the midwest and Oakland. None of those facility routes was planned to traverse Phoenix, Arizona or Los Angeles, California (Jt. Ex. 1, para. 4).

8. In October 1974, MCI contacted GM to explore the possibility of MCI providing service to GM, including the portion of the CCSA service at issue. MCI, in the beginning of November 1974 made a firm proposal to GM which included, *inter alia*, provision of CCSA trunks from Oakland to Detroit and Oakland to Chicago. The in-service date for those CCSA trunks, was proposed to be coincident with the cutover date (estimated to be early July 1975) for the

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[2] For purposes of clarity, the evidence under this issue will be considered first.

Oakland CCSA switch to be provided by PT&T. From the outset, MCI contemplated that the CCSA trunks would be provided as follows: over existing MCI facilities from the midwest (Chicago and Detroit) to either Phoenix or Los Angeles and over AT&T or PT&T facilities between MCI's West Coast termination (Phoenix or Los Angeles) or the GM switch in Oakland. MCI preferred the Phoenix terminal to assure interstate rate treatment with respect to the facilities it obtained from AT&T and PT&T. (Jt. 1, para. 5). On February 25, 1975, GM gave MCI a firm order for, *inter alia*, the Chicago-Oakland and the Detroit-Oakland portion of GM's CCSA network. On March 12, 1975, GM cancelled its Order with AT&T for the Chicago-Oakland and the Detroit-Oakland portion of GM's CCSA network. (Jt. Ex. 1, para. 5).

9. In December, 1974 the MCI Circuit Engineering Department received two service orders from MCI Sales Department. The orders were for 15 voice-grade tie-lines between GM's Detroit CCSA switch and Oakland and for 60 voice-grade tie-lines between GM's Chicago CCSA switch and Oakland. The terminations at Oakland were to be at the new GM CCSA switch then being constructed. (MCI Ex. 7, p. 4, Tr. 855–856). At that time, MCI owned and operated facilities terminated at Phoenix, Arizona (Tr. 773–774). Pursuant to an agreement with Western Telecommunications, Inc., MCI had obtained the use of Broad Band intercity facilities between Phoenix and Los Angeles, California (Tr. 774–778). It had no arrangements whereby it could provide the service north of Los Angeles. Therefore, in order to provide the service to the GM Oakland CCSA switch, it was necessary to obtain facilities from the Bell System (Tr. 777). At the time this order was received, the Docket No. 20099 interconnection negotiations were being conducted and it appeared that such an order for service, in the quantities initially involved, would be capable of fulfillment under the new procedures being established (MCI Ex. 7, p. 4).

10. Prior to the placing with AT&T of the orders for facilities and services which are the subject of this proceeding, Hugh A. Knowles, MCI's CCSA engineering manager, had been involved in the furnishing of MCI service to GM's CCSA switches at Detroit and elsewhere. Those earlier orders antedated the implementation of the procedures agreed to in Docket No. 20099 and involved the Bell System only as to the local interconnection of MCI facilities with the GM CCSA switch on Bell System premises. AT&T was not called upon by MCI at that time to provide intercity connections between the MCI terminal and the CCSA switches. Prior to the implementation of the agreements in the Docket No. 20099, AT&T and its operating companies refused to provide intercity circuits that were not part of the Local Distribution Area (MCI Ex. 7, p. 3). The Local Distribution Area was an area around the city beyond which AT&T would not provide intercity circuits (Tr. 869–871). As a result of this

restriction, it was not possible for MCI to use AT&T facilities for providing intercity intermachine circuits to its customers (Tr. 870–871). One of the results of the settlement reached in Docket No. 20099 was the elimination of the Local Distribution Area restriction on AT&T facilities leased by other carriers. AT&T for the first time accepted orders from MCI for intercity facilities to serve MCI's customers (Tr. 853–855).

11. On March 31, 1975, Knowles sent to Weaver, AT&T's GM National Account Manager at Detroit, Michigan, an order for 116 voice-grade circuits between MCI's facilities at Phoenix and GM's CCSA switch to provide through service between GM's Oakland CCSA switches in Detroit and Chicago and the Oakland switch (MCI Ex. 7, p. 4). The letter stated that the request for circuits was made pursuant to the provisions of Tariff FCC No. 266 as modified in FCC Docket No. 20099 negotiations, *i.e.*, Settlement Agreement in FCC Docket No. 20099, dated March 13, 1975 (Jt. Ex. 1, para. 7). The sending of that written order followed, by a day or so, telephone conversations between Knowles and a person or persons on Weaver's staff at which time Knowles informed AT&T's employees that they were going to receive an order for 116 voice-grade circuits between Phoenix and Oakland (Tr. 779, 865–866). Knowles was not informed at that time that the 116 circuit order should not be placed with the Detroit GM National Account office (MCI Ex. 7, p. 5; Tr. 866).

12. On April 7, 1975, Weaver telephoned Knowles to inform him that his order of March 31, 1975 would not be accepted by the AT&T GM National Account team at Detroit and that such requests for intercity facilities should be channeled through the AT&T Long Lines Business Relations Group at Somerset, New Jersey (MCI Ex. 7, p. 5; Jt. Ex. 1, para. 8). Knowles was given the name of Donald G. Haynes, Staff Manager-Common Carrier Facility Leases, as the person to contact at Somerset (MCI Ex. 7, p. 5; Jt. Ex. 1, para. 8).

13. On April 8, 1975, Knowles telephoned the Somerset Business Relations Group and discussed with Haynes and/or Charles W. Bruton[3] the transfer of the GM Circuit order from the GM National Accounts office (MCI Ex. 7, p. 6; MCI Ex. 1, p. 1). Knowles was told to send the Business Relations Group a letter transmitting that order (MCI Ex. 7, p. 6; Tr. 358). Later the same day Knowles sent to Haynes a letter retransmitting the order for 116 voice-grade private lines circuits which would be used to provide intercity intermachine service between the existing GM CCSA switches at Detroit and Chicago and the new CCSA switch at Oakland. Knowles' letter of April 7, 1975 to Haynes was identical in content to his March 31, 1975 letter to Weaver (MCI Ex. 7, App. 3 and 4). Both letters

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[3] Bruton worked in the business relations group and his responsibility was to implement OCC facility requests. He reported directly to Haynes (Tr. 347, 350). Haynes reported to Rolf Dalane who was Manager of Business Relations of Long Lines (Tr. 266–70).

transmitted order forms which directed that the GM CCSA Oakland terminations be extended via Los Angeles, California, to MCI's facilities at Phoenix, Arizona (MCI Ex. 7, App. 3 and 4).

14. Knowles' letter to Haynes of April 8, 1975 was received April 11, 1975 by Bruton (Tr. 358). Bruton proceeded to form a project team to process the MCI request (Tr. 361). In cases where orders were received by the Business Relations Group for intercity circuits in excess of seven, the sales person responsible for coordinating the completion of the order was instructed to follow a procedure known as the Intercompany Services Coordination System (ISC) (Tr. 361–362, 378). Under the ISC procedure, Bruton formed a Project Team of which he was Chairman (Tr. 362–363, 382). The ISC Project Team for the MCI 116 voice-grade circuits request consisted of 14 people including the following: a customer service engineer to support the AT&T sales unit; two facility engineers in the Cincinnati circuit design group; a Long Lines plant person responsible for the terminations in Oakland; a PT&T ISC special project coordination chairman in the Oakland area; facility engineers from the Western Area; Mountain Bell engineers responsible for the Phoenix end of the local facilities to go through MCI's location; members of the Detroit national accounts team to explain how many additional CCSA switch terminations would be needed in Chicago and Detroit and how the switches planned for Long Lines provision of service to GM would be used to fill the MCI order; and an AT&T Chicago CCSA switch customer team member (Tr. 390, 391, 392, 393).

15. Bruton initiated a conference call on April 16, 1981 to all the ISC project team members in which he advised everyone of MCI's due date of July 1. He requested the members of the team to analyze their specific jobs to determine whether or not they could meet the July 1 deadline. If not, they were to determine what time interval was necessary to provide the facilities to MCI (Tr. 382). It was agreed that another conference call would be held on April 18 with the same team members (Tr. 382). During the project team call on April 18, 1975 Bruton was informed that 46 circuits could be made available by July 1, 1975 and that it would take 25 weeks to provide all 116 Phoenix-Los Angeles-Oakland circuits (MCI Ex. 2).

16. On April 18, 1975 Bruton telephoned Knowles and advised that it would require 25 weeks to complete the order, but that 46 circuits, of which 30 would have two or three links could be available between Phoenix and Oakland by the July 1, 1975 target date (MCI Ex. 2, MCI Ex. 7, pp. 7–8, Tr. 407, 408). It is conceded that the 30 circuits with two or three links would not be technically suitable for the GM Oakland CCSA requirement (MCI Ex. 7, p. 8; Jt. Ex. 1, Para. 11; Tr. 409, 800–801). In mid-April, 1975, AT&T also located four additional direct channel groups (48 circuits) between Oakland and Phoenix. AT&T estimated that it would require 16 weeks to make

each of those four channel groups available for service (Jt. Ex. 1, Para. 12).[4] No further steps were taken by AT&T to process MCI's request for 116 circuits between Phoenix and Oakland because a final delivery date was not agreed upon (Tr. 414).

17. Knowles discussed the subject of expedition with Haynes in a telephone conversation which took place on or after April 18, 1975, and was told that even if MCI requested expedition of the order, it did not look likely that all 116 circuits could be supplied by the July 1, 1975 target date (Tr. 797–798). Haynes told Knowles that it would take an additional two weeks to determine whether expedition by July 1, 1975 was possible (Tr. 798). After the April 18 telephone call, Bruton tries unsuccessfully to contact Knowles. His telephone calls to Knowles were not returned and he was unable to clarify or confirm the components of the MCI facilities request (Tr. 415). By letter dated May 1, 1975, MCI cancelled its March 31, 1975 and April 8, 1975 orders to AT&T Long Lines for the original 116 circuits (Jt. Ex. 1, para. 3).

18. Following Knowles' telephone conversations with Haynes and Bruton and AT&T's rejection on April 21, 1975 of MCI's order for two Telpak C services[5], MCI turned to PT&T for service (Tr. 813–814). On April 23, 1975, MCI ordered 118 circuits between PT&T's "Oakland CCSA switch" and the "MCI office in Los Angeles" to be provided on or about July 13, 1975. PT&T provided these facilities by the required date[6] and pursuant to PT&T Tariff FCC No. 126, *i.e.*, PT&T's facilities tariff as modified pursuant to the Docket No. 20099 Settlement Agreement (Jt. Ex. 1, para. 18).

Role Of Western Area Engineering Department

19. In April, 1975, Myron Lambert was employed as District Engineer of the AT&T Long Lines Department Western Area Engineering Department at San Francisco, California (Tr. 433–434). Lambert supervised a staff of about sixty people. The responsibilities of his group included the forecasting of the number of message trunks necessary to provide message telephone service in the Western Area, the planning of the annual facility construction programs necessary to provide message and private line services,

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[4] Bruton could not recall whether or when he had been informed by Western engineering that an additional 48 circuits could be made available in the 16 week interval (Tr. 406–407). He thinks that he was so informed after April 18 and that he tried unsuccessfully to inform Knowles of the fact (Tr. 407). Knowles testified that Bruton told him on April 18 that 24 additional circuits would be made available a few weeks after July 1, 1975 (MCI Ex. 7, p. 8) but there is no indication in the record that he was ever informed about the 48 circuits.

[5] AT&T's rejection of MCI's order for Telpak service is discussed, *infra*.

[6] PT&T found 118 activated and available spare circuits between Los Angeles and Oakland. These circuits were on already established PT&T Los Angeles - Oakland channel groups scattered over three different radio routes (Tr. 706).

and the preparation of the paperwork necessary for Section 214 construction applications to be filed with the Commission (Tr. 435).

20. Dick Cullen and Don Koch, two of Lambert's subordinates in the Western Engineering Center, were informed by AT&T personnel in Chicago on April 4, 1975 that an order would be received from MCI for a large number of circuits (Tr. 436–437, 439). Koch decided on the basis of that report that the matter was serious enough to warrant spending some extra research time on it and he authorized one of the people in his group to work overtime on the matter (Tr. 441). Lambert first heard about the MCI order for a significant number of voice-grade circuits when he was briefed by Cullen and Koch on Monday, April 7 or Tuesday, April 8, 1975 (Tr. 435). They brought the matter to Lambert's attention because of the number of circuits involved and Lambert testified that, on the basis of the research which they had done since April 4, 1975, "it appeared that we would have trouble meeting that facility request and meeting the requested service date." (Tr. 437). Lambert discussed with his subordinates their capability to provide the MCI requested service, and the reasons why Cullen and Koch thought they would be unable to meet the requested starting date. They reviewed with Lambert some preliminary research work which they had conducted over the weekend. Lambert concluded that his staff had done ". . . a fairly thorough job of researching." It was decided by Lambert and his subordinates to let the matter stand at that point pending receipt of what Lambert termed a "legitimate" facility inquiry or order (Tr. 439–440).

21. Cullen and Koch informed Lambert during the briefing early in the week of April 6, 1975, that the result of some individual circuit searches showed the availability of 16 direct circuits and 30 indirect circuits. They reported to Lambert that the AT&T Long Lines Department Engineering Bureau of Cincinnati, Ohio, had already done a similar study and had reached about the same conclusions as had Lambert's staff (Tr. 440–441). They found that the 16 direct circuits could be routed on a direct Phoenix to Oakland Master Group on some individual spare circuit slots which were available on those channel groups. They also found that the 30 indirect circuits available were routed to various intermediate offices, brought down to voice level at those intermediate offices, and ultimately routed from Phoenix to Oakland through those intermediate offices (Tr. 449–450).[7] The 30 indirect circuits plus the 16 direct circuits could have been made available for a July 1, 1975 start up (Tr. 454–455).

22. Koch and Cullen continued to work on the MCI-GM circuit

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[7] More than one voice-grade connection per circuit was unacceptable to both AT&T and MCI (Tr. 800; Jt. Ex. 1, para. 11).

inquiry between April 8 and April 18, 1975. Looking for alternatives, they discovered on or about April 13, 1975, that two Super Group[8] slots were available between Phoenix and Los Angeles which could be connected to two Super Group slots between Los Angeles and Oakland (Tr. 452, 461). That fact was determined from Facility Planning documents (Tr. 461).[9] In 1975 the task of connecting Super Group facilities at the Los Angeles office was a Western Electric Company responsibility (Tr. 522–523). The 25 week normal interval which was quoted involved an assessment of how the two Super Group slots were configured and what Western Electric work would be required (Tr. 456, 460).[10]

AT&T's Basis For Quoting A Normal Interval Of 25 Weeks

23. AT&T quoted MCI a 25 week interval for providing all of the 116 voice grade circuits from Phoenix to Oakland ordered on March 31, 1975. The 25 week interval quoted was based on the general knowledge and experience of Lambert's engineering department (Tr. 677). In 1976, AT&T prepared a document entitled "Normal Interval[11] Components Customer Order To Customer Service" (MCI Ex. 6) to explain the components of the various intervals totalling 25 weeks had MCI's order been processed (Tr. 497). Lambert considered the schedule ambitious since the 25 week interval calls for compressing some of the components. For example, the Western Electric activities are normally a 20 week interval rather than the 14 - 15 weeks quoted. In addition, activity 9 is more than two weeks and activity 4 calls for 11 weeks rather than the 8 weeks shown (Tr. 678–679).

24. The 25 week time line consists of twelve different parts, each of which is designed to encompass separate activities. Certain of these activities are shown to be performed concurrently with others

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[8] A "voice-grade circuit" occupies 4 kilo-Hertz of spectrum (Tr. 440). A "Group" or "Channel Group" consists of 12 circuits (Tr. 446–447, 453). There are 60 circuits in a "Super Group" and 600 circuits in a "Master Group" (Tr. 446).

[9] There was also a possible availability of two channel groups which could be established on a direct Phoenix to Oakland carrier facility and two channel groups on the indirect route between Phoenix and Oakland on facilities that went through Wolf Creek, California (Tr. 452). A 16 week normal interval was considered reasonable to establish these facilities (Tr. 456).

[10] Lambert's group did not investigate the possibility of meeting MCI's order by taking 116 voice circuits from Phoenix to Los Angeles, bringing them down to voice level at Los Angeles and putting them on a back to back arrangement with another 116 circuits from Los Angeles to Oakland, thereby providing two tandem voice links for one basic circuit (Tr. 688). Lambert considered such a proposal inefficient and uneconomic and one that would tie up too much equipment (Tr. 688). In his view, the preferred engineering practice was to put up co-terminal channel groups and/or supergroups to handle a large volume of circuits (Tr. 636).

[11] Normal interval is used in an engineering context and means following regular engineering procedures. It uses regular in-basket and correspondence practices and makes intelligent selection of work projects. It does not contemplate extraordinary efforts such as handcarrying documents or dropping everything else to start on a particular job (Tr. 694).

while other activities are shown to be performed consecutively. Lambert testified with respect to the entire 25 week interval as shown on MCI Exhibit 6. In addition, Louis Mahoney was presented as an expert on the subject of Western Electric's involvement and testified with regard to the details of the Western Electric components of the 25 week interval (Activities 4–6) which aggregate 14 to 15 weeks in the AT&T time line (MCI Ex. 6).

25. *Activity 1.* The first step is the Order itself. A telephone company sales person negotiates with the customer and all the Bell groups involved in providing the service. These groups give estimates of the length of time it will take to do their part of the service. The sales person deals directly with the customer. Then a mutually agreeable date is selected, a firm order or Uniform System Service Order ("USSO") is issued by the sales department to the divisions within the Bell Group. One week is allotted for this activity. Testimony reflected that an expedited order could have been prepared in four days (Tr. 507, 511, 679).

26. *Activity 2.* A total of three weeks is allotted for this step in the process. The firm order is received by the facility engineers. These engineers must analyze the order for requirements. They check to see what spare facilities exist anywhere in the network which can be used in filling the order. They review carrier records to determine where new facilities (channel groups or supergroups) can be built. They review all terminal equipment needed to fill the order and determine and authorize the engineering equipment which must be ordered from and installed by Western Electric. As a result of their analysis, they prepare a facility project, a form of written order. A significant amount of written work is required for the facility engineers to complete this step. This activity might have been expedited to two weeks (Tr. 509, 511, 512, 513, 679 and 710).

27. *Activity 3–6.* Generally activities 3 through 6 were the specific engineering components done by Western Electric. In 1975 Long Lines normally contracted with Western Electric (WECO) to run coaxial cables to supergroup (60 circuits) connectors. The MCI Order would have required coaxial cable to interconnect the two spare supergroup connectors that were in Los Angeles (Tr. 513, 517, 518–523).

28. Two to three weeks were allotted to *Activity 3* itself (Tr. 557) which included the Long Lines equipment engineering steps that were a prerequisite to WECO involvement. The engineers would make arrangements for the cable hook-up including soldering of wires. They would also prepare a schematic and determine the estimated cost, ownership of the equipment, the accounts to which the expeditures would be distributed and the specific aisle and bay location in the telephone company office where the circuit equipment would be installed and activated (Tr. 549, 550, 555, 557).

Testimony showed that this step might have been expedited to one week (Tr. 680 and 711). A Long Lines job order would result.

29. *Activity 4* describes eight weeks of Western Electric activity. WECO would receive the Long Lines job order and analyze it. A WECO engineer would check his own records to determine the specific location in the telephone office building where the new circuits to fill the order will be prepared. The specific length and location of cable runs between the components of the equipment is determined. An order is then sent to a WECO distributing house or factory. A Bell System Practice (BSP 001–815–700) shows the standard interval published by WECO to perform this detailed engineering function is eight weeks. At the end of the eight weeks the necessary documents are sent to the installation forces who ultimately do the work (Tr. 552, 564, 566, 567). The testimony showed that this eight week period could not be shortened by expedition (Tr. 680).

30. *Activity 5.* Two to three weeks were allotted for the order, putting it on a truck, time-in-transit, and having it received and stored in the telephone company building (Tr. 572). This time could not be shortened by expedition (Tr. 680 and 711).

31. *Activity 6.* One week is specified for the actual installation by Western Electric, scheduled by determining the available work force. In the MCI case, WECO would have installed eight pieces of 724 cable of different lengths to connect the supergroups in the Los Angeles office (Tr. 573, 577). Then the installer would perform certain tests on the equipment (MCI Ex. 7, p. 2). The time required by this step could not be reduced by expedition (Tr. 680 and 711).

32. *Activity 7.* Telephone company plant crews perform tests on the WECO installed equipment to be certain that it works harmoniously with the rest of the office equipment. One week was allocated for this testing (Tr. 577).

33. *Activity 8* describes the work done by the telephone company group which works on the carrier equipment once it receives the detailed circuit design prepared by the AT&T circuit design group in Cincinnati. The specific circuits (channel groups and supergroups) would be assigned within the telephone company office. Various carrier transmission tests would be performed (Tr. 578–579). Some of this work could be started while the previous work in Activity 7 was being done provided the circuits design from the Cincinnati group had been received (Tr. 590). One week was allocated for this work, but expedition might reduce activity 7 and 8 to one week total (Tr. 681 and 711).

34. *Activity 9.* The next step in filling the MCI order is the private line testing by plant groups within the telephone office of each individual circuit. This includes checking terminal equipment and performing dialing tests on the CCSA intermachine trunks. This work could be started as soon as the circuit design order is received

from the Cincinnati group but not completed until Activity 8 is finished (Tr. 589, 591). Two weeks are allotted for this work (MCI Ex. 7, p. 4).

35. *Activity 10* describes the actual work done by the Cincinnati circuit design group and takes 4 weeks. Their work involves checking circuits and equipment existing throughout the network as it appears in their computer data base records. The circuit design engineers then prepare a document called an advance circuit order layout information which is uniquely geared to the Pacific Telephone and Telegraph Co. to alert them to the impending work. They also prepare a regular facility order layout record to distribute to the appropriate offices. Testimony showed that this activity could possibly be reduced to two weeks on an expedited basis (Tr. 618, 620, 721).

36. *Activity 11* is a four week period of time allocated to PT&T in which PT&T analyzes the work from Cincinnati. Testimony indicated that because this was a unique interconnection with an OCC, the circuit design for the intermachine trunks would be somewhat different than the standard Bell design. Therefore, it had to go through PT&T's own computerized system. It would take four weeks for PT&T to do this work even on an expedited basis (Tr. 625, 628, 629, 630).

37. *Activity 12*. Two weeks are allocated for the PT&T circuit bureau to issue circuit order cards to the plant office (MCI Ex. 6).

38. In sum, the testimony showed that AT&T must perform certain steps within its system in order to provide circuits service to a customer when no spare facilities exist. No evidence was introduced to demonstrate industry standards other than the Bell System standards.

B. *Telpak Issue*

39. On April 10, 1975, Knowles, at the direction of an MCI attorney, Laurence E. Harris, mailed a letter to Haynes at the AT&T Long Lines office at Somerset, New Jersey, in which he ordered two Telpak C services under AT&T Tariff No. 260 between Oakland and Los Angeles (MCI Ex. 7, p. 6; Jt. Ex. 1, para. 14).[12] His letter to Haynes read in part as follows (Jt. Ex. 1, para. 14):

> Please provide two (2) Telpak C services from the General Motors Corporation CCSA Switch in Oakland, California to an MCI provided switch on General Motors premises located in MCI Telecommunications Corporation, 666 West Los Angeles Street, Los Angeles, California.
>
> Termination specifications are to be per the attached MCI orders. MCI is ordering as agent for General Motors.

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[12] Dalane conceded that the 20999 settlement agreement did not preclude OCCs from ordering services, rather than facilities (Tr. 293–294).

40. The purpose of Knowles' order was to provide an alternative means of obtaining Bell System facilities or services to meet the July 1, 1975 target date for service to GM's Oakland CCSA switch (Tr. 781).[13] Since each Telpak C service had a voice-grade equivalency of 60 circuits, two such services would have provided more than a sufficient number of voice-grade circuits to meet GM's Oakland requirement (Tr. 781). There is no physical or technical difference between a Telpak circuit and a private line circuit (Tr. 849–850).

41. On November 25, 1974, GM wrote a letter indicating that MCI was acting as its agent for the purpose of ordering telecommunications service. The letter did not discuss the financial arrangement between MCI and GM. The letter authorizes MCI to order changes, additions, removals, rearrangements and other modifications to specific telecommunications services provided to General Motors by other carriers. The authorization was stated to remain in effect until the addressees were otherwise notified (Jt. Ex. 1, Doc. No. 8).[14] At the time of the April 10, 1975 order to AT&T for two Telpak C services, GM did not lease premises from MCI at the 666 West Los Angeles Street address referred to in Knowles letter (Tr. 803–804) and Knowles was unaware that MCI had at any other time ordered services from AT&T as agent for GM (Tr. 801–802). It was MCI's intention to lease to GM facilities in MCI's building in Los Angeles in order to meet the "customer's premises" requirement of AT&T Tariff FCC No. 260 (Tr. 867–868). The Oakland GM CCSA switch was in the AT&T central office and not on GM's premises (MCI Ex. 7, p. 6; Tr. 868–869).

42. On April 15, 1975, Knowles received a call from Haynes who advised him that MCI's request for two Telpak C services from Los Angeles to Oakland was going to be denied on the ground that the request would violate the "customer's premises" restriction in the applicable AT&T tariff.[15] Haynes sent Knowles a letter dated April 15, 1975, confirming the refusal to provide Telpak services (MCI Ex. 7, p. 7; Jt. Ex. 1, Item 16, Doc. 9). Haynes' letter to Knowles of April 15, 1975, contained a suggestion that Knowles should go back to Weaver, the GM National Account Manager, regarding the ordering of private line services (Jt. Ex. 1, Item 16, Doc. 9). Knowles did not reorder Telpak services from the GM/NAM group (Tr. 783). AT&T is not contending that, had Knowles followed Haynes' advice and

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[13] At this time Knowles had not yet been advised that Long Lines would be unable to meet MCI's request for facilities under Tariff 266 (Tr. 780).

[14] The addressees were PT&T, a Bell subsidiary, General Telephone Company of California, and Mountain Telephone and Telegraph Company (Jt. Ex. 1, Doc. No. 8).

[15] Unlike the order for service under Tariff 266, facilities existed to furnish the service under Telpak. AT&T had available 116 spare circuits from Los Angeles to Oakland. In fact, PT&T provided service in that manner to MCI (Tr. 150, 706). AT&T does not claim it did not have the facilities to furnish Telpak to MCI (Tr. 1508–1509).

reordered the two Telpak C services from Weaver's group, AT&T would have agreed to provide the services (Tr. 783).

43. Haynes' supervisor at AT&T, Rolf Dalane was also informed of MCI's order for Telpak circuits between Los Angeles and Oakland. This information came from Walter Kelley, Director of Operations for Long Lines (Tr. 271, 278). On April 21, 1975, Kelley Told Dalane that Larry Harris of MCI had called him to determine whether AT&T would provide Telpak circuits to MCI (Tr. 272). Kelley requested that Dalane review the question and develop a response to Harris (Tr. 272). At approximately 9:10 on that same morning, Dalane telephoned Harris (MCI Ex. 1). Dalane informed Harris that Kelley had asked Dalane to look into the MCI request for Telpak circuits and that Dalane expected to get back to Harris either that day or the following day with an answer whether AT&T would provide Telpak to MCI. Subsequent to that conversation, Dalane spoke with Paul Muench, an AT&T employee whose office was located in AT&T's headquarters at 195 Broadway, and Lee Cutcliff, an attorney with Long Lines (Tr. 313). Both Muench and Cutcliff had been actively involved in the Docket No. 20099 negotiations (Tr. 313). Dalane recommended to Muench and Cutcliff that AT&T refuse Telpak service to MCI because MCI's request was "outside the scope of [AT&T's] tariffs" (MCI Ex. 1). Muench and Cutcliff concurred in Dalane's recommendation but suggested that Dalane confer with Schindele, AT&T's Assistant Vice President for business relations matters, and Kelley prior to responding to Harris. (MCI Ex. 1; Tr. 313). Later that afternoon, Hugh Rails and Jim Corbert, of AT&T's Detroit Sales Office, met with Dalane. (MCI Ex. 1). Rails had contacted Dale Thurman of GM about the premises at 666 West Los Angeles Street in Los Angeles, California. (MCI Ex. 1). Rails was informed that GM did not own or lease space at 666 West Los Angeles Street and that GM did not have a need for switching equipment at that location. (MCI Ex. 1).

44. The following day, i.e., April 22, 1975 Dalane recommended to Kelley that AT&T refuse to provide Telpak circuits to MCI (MCI Ex. 1; Tr. 273). Dalane made this recommendation because the request "clearly did not involve any termination in Los Angeles at a GM premise." (Tr 275, 11. 15–17). Kelley and Schindele concurred in this recommendation (MCI Ex. 1). Thus, at 11:35 a.m., on April 22, 1975, Dalane telephoned Harris and informed him that AT&T would not provide the requested Telpak circuits to MCI (MCI Ex. 1). At no point in his telephone conversation with Harris did Dalane claim that the resale restriction in Tariff No. 260 was the reason for AT&T's refusal to make Telpak circuits available to MCI (Tr. 1039).[16] That afternoon, Dale contacted Patton of AT&T's Detroit Sales

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[16] In fact, Dalane is unclear whether the question of the applicability of the resale restriction ever surfaced in his conversations with Harris (Tr. 1040).

Office, to inform him that AT&T was refusing to provide Telpak circuits to MCI (MCI Ex. 1, p. 2; Tr. 316)

The Customer Premises Restriction

45. AT&T refused to provide Telpak to MCI because of the existence in the AT&T tariff of a restriction whereby AT&T would not provide private line service between two locations unless the party ordering the service maintained premises at both locations and had a regular and continuing requirement to originate and terminate communications at each location (Tr. 276). This restriction, known as the customer premises restriction, was included in Section 2.6.3 of AT&T's Tariff FCC No. 260 (Jt. Ex. 1, Docket No. 10, § 2.6.3; Tr. 200). Pursuant to the customer premises restriction, AT&T would not provide private line service between Cities A and B if the potential customer wished to provide its own communications system between Cities B and C, and City B was merely to be used to connect the AT&T line with the customer's own system (Tr. 205–206). Similarly, AT&T would not provide the circuit between Cities A and B if that circuit were merely to be connected at City B to the circuit of another common carrier between Cities B and C (Tr. 206).

46. According to Howard Nutter,[17] the customer premises restriction was necessary for two reasons: First, AT&T was concerned that a customer might build its own system over a low-cost route and request only the high-cost route from AT&T, with the result that the policy of nationwide average pricing might be upset (Tr. 237).[18] Second, to permit termination of an AT&T circuit at some place other than premises where the customer had a regular and continuing need to originate or terminate communications would deprive AT&T of end-to-end service responsibility (Tr. 237).

47. The customer premises restriction made no distinction between high-cost and low-cost routes. Thus, the customer premises restriction would not permit provision of an AT&T private line to a switch that was not located on a customers' premises even if a non-AT&T carrier were to be providing service over a route which was a higher-cost route when compared to the circuit sought from AT&T (Tr. 239–240). Moreover, the special construction provision of FCC Tariff No. 260 could be used if the customer were requiring AT&T to construct a costly facility between two cities with the intent to

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[17] In 1975, Nutter was Division Manager in the Tariff and Cost Department in AT&T's headquarters at 195 Broadway, New York City (Tr. 199). Nutter participated in drafting the customer premises restriction and had limited responsibility for enforcing that provision (Tr. 201). Nutter, however, did not advise Dalane in determining whether MCI's order for Telpak would violate the customer premises restriction (Tr. 256–257).

[18] There would be no economic harm from terminating a circuit at a switch rather than a customer's premises since there is no significant difference in the cost of providing the two types of termination (Tr. 242–245).

connect that facility to an OCC circuit or private microwave system (Tr. 260).[19] In addition, AT&T has presented no evidence demonstrating economic harm to itself or the public if it were to de-average its prices.

48. If a customer had a need to initiate or terminate communications in three different Cities, A, B and C, the customer premises restriction would not have prevented AT&T from providing circuits between Cities A and B, even if the customer were to obtain circuits between cities B and C either from an OCC or through the use of private microwave (Tr. 241–242). Under such circumstances, AT&T would not have end-to-end responsibility (Tr. 259).

49. Nutter testified that a circuit might not work properly unless AT&T maintained end-to-end responsibility over the entire circuit (Tr. 251). Nutter admitted there are no technical studies which would substantiate that statement (Tr. 258), or which demonstrated any technical (*i.e.*, engineering) harm to the AT&T network in the absence of the customer premises restriction (Tr. 238–239).

50. AT&T's Tariff FCC No. 260 contained a number of exceptions to the customer premises restriction whereby AT&T would provide circuits to certain entities even though those circuits would not be terminated at the customers' premises. AT&T would provide service to the International Record Carriers and terminate that service at any one of five "Gateway" Cities in the United States, even though the ultimate customer (*i.e.*, the IRC's customer) had no premises in that city. Rather, the AT&T service terminated at a switch where the AT&T service was connected to the IRC's overseas circuits (Tr. 207–208). Similarly, FCC Tariff No. 260 permitted the provision of service to an IRC's data message switcher in order to permit the IRC to connect to AIRCON, PLC or ARX service (Tr. 209).[20] This exception also permitted incidental use for connection to other domestic services provided by other carriers (Tr. 210). AT&T would also have provided service to a switch, even if that switch were not located at a customers premises, if the switching equipment were owned by a composite data service vendor and were used for the switching of data messages. Regardless of whether termination were to take place at the customers' premises, AT&T would provide service to the United States Air Force and NASA if the head of those

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[19] Similarly, the special construction provision was available in the case of "churning." "Churning" is described by Nutter as a situation in which a customer requests AT&T to provide service at a point where there was no communication requirement, such as the foot of a microwave tower and then terminates the service after constructing its own system (Tr. 250).

[20] AIRCON, PLC and ARX were the names of computerized message switching services provided by RCA Global Communications, Inc., Western Union International and ITT World Communications, Inc., respectively. These services permitted customers to share the use of computers to switch data and telegraph services. See *American Telephone and Telegraph Company*, 60 FCC 2d. 929, 940 (1976).

organizations requested such service and if the connecting arrangements were provided by the telephone company (Tr. 218–221).

51. Moreover, there was no requirement under FCC Tariff No. 260 that AT&T connect with an independent telephone company, such as the Lincoln Telephone and Telegraph Company, at a customer's premise. Rather, those two companies provided a through service from the customer's premises in the independent company's city to the customer's premises in the AT&T city (Tr. 226–27, 229). Interconnection between Lincoln and AT&T would merely take place at some agreed-upon point between the two cities (Tr. 224, 230).

52. In like manner, interconnection between AT&T and a Bell System Operating Company need not have taken place at the customer's premises. Interconnection could have taken place at a variety of points between the two end cities (Tr. 231). The customer premises restriction would be satisfied merely by the termination of the jointly provided service at customer's premises in both of the end cities (Tr. 231).

53. AT&T created another exception to the customer premises' restriction inasmuch as AT&T provided service between a customer's microwave system and that customer's premises (Tr. 232). This exception, known as the "entrance facility" exception, was limited to the extent that AT&T would only provide a voice grade circuit of 25 miles or less in length for use of an entrance facility (Tr. 232).

54. AT&T would also have provided service between Oakland and a Los Angeles CCSA switch even if that switch were connected with either a private microwave system or an OCC circuit between Los Angeles and Phoenix (Tr. 218). CCSA switches are generally not located at the customer's premise, but are placed at the telephone company office (Tr. 217–218).

55. AT&T officials recognized, three years prior to MCI's request for Telpak, that the economic argument for retaining the restrictions against piece-out may not be supportable. On June 22, 1972, W. J. Schindele signed and forwarded a memo to R. T. Dugan (MCI. Ex. 12). At that time Schindele was an AT&T assistant vice-president for business relations (Tr. 1712). In that capacity, Schindele was in charge of relations with MCI and the other specialized carriers (Tr. 1712). The Schindele memo came about as a result of discussions at AT&T regarding AT&T's response to the request of General Electric (GE) to interconnect facilities owned by GE with certain services offered by AT&T (Tr. 1713). As part of these discussions, Dugan, an AT&T Assistant Vice President, solicited suggestions from 10 or 12 of AT&T's assistant vice-presidents, including Schindele (Tr. 1713–1714). The June 22, 1972 memo is Schindele's response (Tr. 1714).

56. In the course of his memo, Schindele, who was responsible for relations with MCI and Western Union, suggested that AT&T should clarify its tariff as to what constitutes a customer's premises. Schindele explained that this was necessary because:

> Unless this is done, customers will lease space for their switches at carrier premises. Ultimately we will be faced with the question of allowing another carrier to perform the switching function and if we allow a customer to place his switches at a carrier's premises, we will be hard pressed not to allow the carrier to switch there. The result will be our terminating Bell Services at Western Union and MCI offices. (MCI Ex. 12, p. 1).

57. With respect to the question whether AT&T should provide a non-switched connection between customer provided facilities and AT&T services, Schindele suggested that if such a connection were provided to GE, AT&T would ultimately be forced to allow carriers to make the same connection (MCI Ex. 12, p. 2). Schindele recommended the "development of a rational economic argument in favor of keeping the piece-out restrictions" (MCI Ex. 12, p. 3).[21]

> It appears that now is an appropriate time for the development of a rational economic arguement [sic] in favor of keeping the piece-out restrictions. Even assuming that we cannot successfully defend this position, at this point there isn't very much we can lose in defending it. In short, this is the entire piece-out provision which we are considering giving up, and if it is possible to stop it, or at least delay it, then we should attempt to do so

58. James Groves, a subordinate of Schindele, was the author of the Schindele memo (Tr. 1556). Normally, Schindele would review a draft of any memorandum that was to bear his signature and would discuss the draft with the author (Tr. 1563). Groves believes he followed the normal practice and discussed the memo with Schindele (Tr. 1571). Schindele did not suggest any changes in the draft (Tr. 1563). Groves described the memo as a "rather cut and dried request" involving the piece-out regulations in the tariff (Tr. 1571). He wanted to remind Dugan that if AT&T granted GE's interconnection request, it would be difficult to deny a similar request made by a common carrier (Tr. 1572). It is Groves' belief that the customer premises restriction is reasonable and that piece-out would have a detrimental effect on the network technically and would adversely impact the rate structure. He believed that even if AT&T couldn't convincingly articulate its rationale, it should not back away from the restrictions (Tr. 1559–1560, 1582). Groves has no economic background (Tr. 1564). Prior to writing the memo, he did not review any study which addressed economic arguments in favor of keeping restrictions against piece-out (Tr. 1578). Groves did not consider any alternative means of protecting the public interest (Tr. 1565–1566).

59. F. Mark Garlinghouse, who was the AT&T vice-president in charge of the state regulatory department in 1972, was Schindele's direct supervisor (Tr. 1711–1712). He received a copy of the Schindele memorandum at the time it was prepared (Tr. 1713). In Garling-

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[21] Schindele was not called as a witness. The Bureau initially intended to call him but decided against it after discussions with him. The Bureau concluded his testimony would not add anything to the record of any significance other than the fact that he signed the document (Tr. 1709–1710).

house's opinion, the Schindele memorandum did not state policy for AT&T because Schindele was not in a position to do that (Tr. 1712–1713). Garlinghouse considered the language in the memorandum concerning the development of a rational economic argument unfortunate. According to Garlinghouse, Schindele was familiar with the fact that Bell had economies of scale in its intercity facilities (Tr. 1714). He interpreted Schindele's memorandum to mean there was a need to quantify in dollars and cents the impact of piece-out (Tr. 1787, 1802–1803). Schindele's memorandum was not presented to the AT&T executive policy committee although the overall recommendations of the assistant vice-presidents and others were presented (Tr. 1715). The executive policy committee eventually denied GE's request (Tr. 1720, 1722).

60. Garlinghouse testified that whenever there are differences in costs on any two routes and where that difference is accompanied by national average pricing, cream skimming is possible and almost inevitable (Tr. 1759). Garlinghouse further stated that the Commission in 1972 required nationwide average pricing (Tr. 1759). Garlinghouse, however, could not cite any Commission decision requiring nationwide average pricing (Tr. 1762). The Commission stated in its 1971 *Specialized Carrier* decision:[22] "Whereas services may be in direct competition, departure from uniform nationwide pricing practices may be in order, and as such, will not be opposed by the Commission" (Tr. 1763). Garlinghouse also stated that AT&T's Council of Economic Advisors informed AT&T management in 1972 that the elimination of the customer premises restriction would lead to cream skimming (Tr. 1718, 1766). However, the minutes of the meeting of the Council of Economic Advisors at which the customer premises restriction was discussed does not support Garlinghouse' contention. The minutes state:

> Best economic answer to Ge claims would be to change our pricing so as to price on basis of costs on each route. If this were done, there would be no reason to refuse interconnection because each piece we furnish to GE would be profitable and GE would have no motivation to furnish any part of the system unless their costs were, in fact, lower than ours. In other words, there could be no cream skimming.
>
> What is important to determine is what our various costs are and how they compare to someone like GE or MCI. This will be necessary in order to prove cream skimming.
>
> There is no economic justification for refusing to piece-out if each of the elements (trunks, access lines, terminals, etc.) of the system is priced properly. The exception to this would be if a competitor's presence imposes additional costs that our customers have to bear but not their customers.
>
> If we try to go to route pricing and the FCC won't permit us to do so, then we have

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[22] *Specialized Common Carrier Services*, 29 FCC 2d 870, 914–15 (1971), reconsideration denied, 31 FCC 2d 1106 (1971), *aff'd sub nom., Washington Utilities and Transporation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

> a strong argument that entry of GE and others should be restricted in order to protect national average pricing against cream skimming.
>
> If we don't at least try to go to route pricing, we have a weaker argument in that we must say that national average pricing is good and in order to protect it, we must bar entry by GE and others. This is further weakened by the FCC statement in the MCI case to the effect that Bell may need to abandon nationwide pricing (which we have not yet tried to do).
>
> (MCI Ex. 13, p. 1).

Notwithstanding the advice of its Council given in 1971, Bell did not conduct any studies as of April 1975, the date of the Telpak request, quantifying the impact if the piece-out restrictions in Tariff 260 were removed (Tr. 1782–1787).[23]

The Resale and Use Restrictions

61. In the course of his testimony in this proceeding. Dalane stated that AT&T could not have provided Telpak to MCI in 1975 because of the existence of the resale restriction in Tariff No. 260 (Tr. 278).[24] This restriction stated: (Jt. Ex. 1, para. 16):

> Private line service shall not be used for any purpose for which a payment or other compensation shall be received by either the customer or any authorized or joint user, or in the collection, transmission, or delivery or any communications for others . . . .

Essentially, the resale restriction meant that AT&T would refuse to provide service to a customer because that customer was not the ultimate user of the service (Tr. 300).

62. The use restrictions of AT&T Tariff FCC No. 260 complemented the resale restriction (Tr. 281). Those restrictions limited the purposes for which the services included in Tariff FCC No. 260, such as Telpak, could be used (Tr. 279). The purpose of the use restrictions was to ensure that such services could not be resold (Tr. 281, 284).

63. Generally, Tariff No. 260 services could be used for "the transmission of communications to or from the customer and relating directly to the customer's business." (Tr. 283, 11. 10–12) Dalane testified, however, that MCI's resale of Telpak would not comply with this use provision because the communications which would be placed over the Telpak circuits would be the communications of MCI's customers rather than of MCI itself (Tr. 288). AT&T would make Telpak circuits available to MCI if MCI did not use them to provide service to their customers (Tr. 299). There is no engineering reason for making the content of the communications the

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[23] AT&T called as witnesses Hrishikesh Vinod and George E. Mandanis. They are economists who did studies demonstrating that economies of scale exist in the Bell system (Tr. 1614, 1652). Their studies do not mention the customer premises restriction or deal with the impact from piece-out (Tr. 1617, 1631, 1635, 1673).

[24] As noted *supra*, Dalane conceded that the question of possible resale by MCI was not considered by AT&T in rejecting MCI's request for Telpak (Tr. 325).

criterion for determining whether Telpak circuits would be provided (Tr. 284). Rather, the reason for making the distinction in the content of the communications was merely to ensure that a carrier would not resell the Telpak circuits (Tr. 284, 298).

64. AT&T's rationale for imposing the resale and use restrictions was to prevent OCCs from using private line services to develop their own message telecommunications network (Tr. 298). AT&T was concerned that the private line service could be bought at preferential (*i.e.*, bulk) rates and resold at rates which were lower than the rates which it had established for message service (Tr. 281). Similarly, the reason why AT&T eliminated Telpak after the Commission's decision in the Docket No. 20097 *Resale And Share Use* decision was because of the fear that reselling of Telpak would undercut AT&T's rate for individual private lines (Tr. 342–343).

65. The resale and use restrictions were not applied to the independent telephone companies. If, for example, the Lincoln Telephone and Telegraph Company desired to provide bulk discount service to its customers between Lincoln Nebraska and a city serviced by AT&T, Lincoln and AT&T would each provide a portion of the service and AT&T would not invoke the use or resale restrictions (Tr. 292). AT&T would not, however, make a similar exception for MCI. If MCI were to provide a link from City A to City B, and requested AT&T to provide a link from City B to City C, the request would be denied (Tr. 293).

66. If, however, Lincoln were to provide a communications link from Lincoln, Nebraska, to a city beyond its franchise area, *e.g.*, St. Louis, Missouri, AT&T—invoking the restrictions in Tariff FCC no. 260—would not have provided Lincoln Telephone with a communications circuit from St. Louis to Chicago (Tr. 336–337). No engineering justification existed for such discrimination (Tr. 338). AT&T's rationale was that the economic arrangements it had with the Independents would be upset if it permitted Lincoln to operate outside its normal operating area (Tr. 339).

67. Furthermore, an AT&T customer could band together with others in the same general line of business and receive or transmit communications which related to matters of common interest (Jt. Ex. 1, Doc. 11, § 2.2.1.(B)). Tariff FCC No. 260 services could also be used for the transmission of communications relating directly to the business of a subsidiary corporation over which the AT&T customer possessed more than 50 percent of the voting stock (Jt. Ex. 1, Doc. 11, § 2.2.1(c)). These two provisions acted to expand the general use provision by laying down general rules permitting communications beyond those set forth in the general use provision (Tr. 294).

68. Subsections D through J of Section 2.2.1 of AT&T's Tariff FCC No. 260 created exceptions to the general use provision by creating narrow classes of customers who could engage in communications not contemplated by the general use provision (Tr. 294).

Thus, the departments and agencies of the United States government could transmit or receive communications to or from any section on a service furnished to that department or agency when the head of that department or agency notified AT&T in writing that the use were intended only for government business (Jt. Ex. 1, Doc. 11, § 2.2.1(D)). If the customer was an organized stock or commodity exchange, Tariff FCC No. 260 services could be used for the transmission of communications to or from an exchange member located on the floor of such exchange if the communication related directly to the business of the member (Jt. Ex. 1, Doc. 11, § 2.2.1(E)).

69. Similarly, where the use of the service related to coordination or exchange of electrical pooled power, Tariff FCC No. 260 services could be used for the transmission of communications between any two or more stations of such service or similar services furnished to others who were parties to the coordinating or exchange arrangement (Jt. Ex. 1, Doc. 11, § 2.2.1(F)).

70. Tariff FCC No. 260 services could also be utilized for the transmission of communications to, from, within and between air carriers, where the customer was an aeronautical communications company licensed to operate stations in the aeronautical mobile and fixed services (Jt. Ex. 1, Doc. No. 11, § 2.2.1(G)). Communications could also be transmitted to or from any station on a service furnished to the United States Postal Service for providing facsimile mail service (Jt. Ex. 1, Doc. No. 11, § 2.2.1(H)). If the United States Government ordered the service for it, any state or local government agency could use any Tariff FCC No. 260 service (Jt Ex. 1, Doc. No. 11, § 2.2.1(I)). Finally, if a composite data service vendor were the customer, Tariff FCC No. 260 services could be used for the transmission of switched data communications for its patron if the communications related directly to the business of such patron, or for composite data service or hybrid data processing rendered by a patron. Engineering considerations were not the controlling reason for permitting these exceptions to the use provisions (Tr. 294). AT&T was responsible for revising the tariff to permit these exceptions (Tr. 295).

71. In addition to general use restrictions, AT&T also carved out exceptions to the resale restriction. AT&T customers who were parties to arrangements for the coordination or exchange of electrical pooled power could resell Tariff FCC No. 260 services (Jt. Ex. 1, Doc. 11, § 2.2.3; Tr. 300–301, 304). The United States Postal Service was explicitly permitted to resell Tariff FCC No. 260 services if such services were used for Facsimile Mail Service (Jt. Ex. 11, Doc. 11, § 2.2.3; Tr. 300–01, 304). Additionally the resale restriction did not prohibit customers and authorized or joint users from sharing the cost of private line service (Jt. Ex. 1, Doc. 11, § 2.2.3; Tr. 301–301). An exception was also drawn for resale of certain Tariff FCC No. 260

services if they were to be used to provide public telegram message service (Jt. Ex. 1, Doc. 11, § 2.2.3).

72. In each case, the exception to the resale restriction came about as a result of a request from a party outside the Bell system (Tr. 304). In some cases, AT&T denied these requests (Tr. 321). For example, AT&T denied such requests from the American Trucking Association, the National Association for American Railroads and certain press organizations (Tr. 321–322).

73. Until 1973, AT&T also made Telpak available to Western Union at an additional discount (Tr. 322). Pursuant to this arrangement, AT&T provided Telpak to Western Union and Western Union then provided Telpak service to its own customers (Tr. 322–323). Western Union was provided the service at a rate less than the Telpak rate on file with the Commission (Tr. 1043).

C. Damages

74. Unable to obtain facilities from AT&T under Tariff 266 within the required time and having been refused Telpak service under AT&T Tariff 260, MCI obtained the required facilities from PT&T under Tariff 126 (Findings, para. 18). The total charges for which PT&T billed MCI for the 116 voice-grade circuits between Los Angeles and Oakland were $1,163,006.79 (Jt. Ex. 1, para. 22; MCI Ex. 11, Att. A). MCI actually paid PT&T the sum of $320,000.00 for the facilities provided in the period from July 7, 1975 through June 27, 1976 (Jt. Ex. 1, paras. 21 and 23). MCI claims damages in the amount of the difference between the charges for PT&T's circuits and the amounts which MCI would have paid AT&T under Tariffs 260 and 266 (MCI Ex. 11).

75. The parties have stipulated the number of circuits provided to MCI by PT&T on the various dates (Jt. Ex. 1, para. 21). The number of circuits were then used to calculate the total charges under various AT&T and/or PT&T tariffs (MCI Ex. 11, p. 3, Attachment A and B; Jt. Ex. 1, para. 22). The method of calculation was essentially a multiplication process. The numbers of circuits were multiplied by the appropriate tariff rate and totalled for the entire period. Equipment charges were added where appropriate (Tr. 1387, 1401). The tariff rates were not adjusted or changed in any way (Tr. 1294–95). The circuit charges under various tariffs or combinations of tariffs are shown below:

	Charges	*Tariff*	*Locations*
1.	$1,163,006.79	PT&T 126	LA - OAK
2.	283,730.00	AT&T 260	LA - OAK
3.	270,536.37	AT&T 260 and PT&T 126	LA - OAK LA - OAK
4.	231,126.64	AT&T 260 and AT&T 266	LA - OAK PHOE - OAK

5.	554,477.25	AT&T 266	PHOE - OAK

76. The first amount ($1,163,006.79) represents the amount PT&T has charged MCI for service ordered and provided to MCI during the 1975–1976 time frame (Jt. Ex. 1, para. 6 and 18).

77. The second amount ($283,739.00) is the amount Telpak C service would have cost MCI under AT&T Tariff No. 260 if the facilities had been available on July 1, 1975. MCI's request for Telpak C service (Jt. Ex. para. 14) was denied by AT&T (Jt. Ex. 2, para. 16).

78. The third ($270,536.37) and fourth ($231,126.64) amounts represent MCI's costs if it had been able to combine the best cost per circuit features of AT&T tariff 260 (Telpak) and PT&T tariff 126 or AT&T tariff 266, respectively (Tr. 1398–99).

79. The fifth amount ($554,477.25) represents the amount MCI would have been charged under their first order dated March 31, 1975 (Jt. Ex. 1, para. 7) for facilities from Phoenix to Oakland as of July 7, 1975 pursuant to AT&T tariff 266. This order was cancelled by MCI in a letter dated May 1, 1975 (Jt. Ex. 1, para. 13).

80. In addition, the following are the total circuit charges that would have been made had MCI transferred the circuits in question from PT&T tariff 126 (LA to OAK) to AT&T tariff 266 (PHOE to OAK) on various dates:

Charge	*Date of Change (From PT&T to AT&T)*
$746,991.61	9/10/75
766,616.47	9/16/75
808,675.80	10/01/75
821,627.40	10/06/75
824,084.21	10/07/75
847,316.98	10/17/75

81. The figures indicate that the sooner MCI had transferred its circuits to AT&T facilities the lower the total circuit charges would have been (Tr. 1397–98). The option of transferring from PT&T facilities to AT&T facilities would have been available under a 25-week normal interval once a firm order had been placed with AT&T (Jt. Ex. 1, para. 10), subsection (c)).

CONCLUSIONS

25 Week Issue

82. The record calls for a determination whether and to what extent AT&T's response to MCI order for 116 voice-grade circuits from Phoenix, Arizona to Oakland, California was unjust, unreasonable or otherwise in violation of Section 201(b) or 202(a).[25] The Designation Order notes that AT&T had previously provided an

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[25] Section 201(b) makes unjust and unreasonable practices and regulations unlaw-

explanation for the 25 weeks period claimed necessary to meet MCI's service requirement with the OCC tariff, but that the explanation was unsupported. It concluded that "MCI should have the opportunity to develop facts which might demonstrate that AT&T's treatment of its OCC order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act" (85 FCC 2d 1001). MCI has failed to develop facts demonstrating that AT&T's treatment of its tariff order was unreasonable, discriminatory or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act. Since MCI failed to meet its burden of proof, AT&T is not liable for damages under this issue.

83. The findings make clear that AT&T did not have 116 circuits idle and available for use. MCI suggests in its findings that AT&T should have investigated the possibility of providing 116 circuits on a voice grade level through Los Angeles. Even assuming the availability of the 116 Phoenix - Los Angeles circuits, the suggestion is not reasonable. As testified by Lambert, implementation of such a proposal would have tied up too much equipment. More important utilizing two sets of 116 circuits on a back-to-basic would have been unacceptable to MCI. MCI required "direct" circuits between Phoenix and Oakland (Tr. 801). In handling MCI's request, AT&T followed its standard procedures for handling requests involving a large number of circuits. For orders of seven circuits or less the AT&T sales person handling the order would fix a firm date with the customer and issue an order. However, a request for circuits greater than seven triggered the ISC procedures calling for the creation of a project team to handle the orders. MCI offered no evidence to indicate that the MCI order was the only OCC order handled in this manner. The uncontroverted facts show that this policy was universally applied to all orders for circuits greater than the seven in number.

84. AT&T's quotation in April 1975 of a 25-week interval was based on the general knowledge and experience of AT&T engineers employed in the Western Area Engineering Department. The 25 week normal interval which was quoted involved an assessment of how the two Super Group slots were configured and what Western Electric work would be required. Koch and Cullen determined that two Super Group slots were available between Phoenix and Los Angeles which could be connected to two Super Group slots between Los Angeles and Oakland. AT&T's report prepared in 1976 detailing the components of the various intervals totalling 25 weeks substantiated the correctness of the earlier judgment. The findings require the conclusion that AT&T's quote of 25 weeks to provide the facilities required by MCI was entirely reasonable. If anything, the

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ful. Section 202(a) makes it unlawful for any common carrier to unreasonably discriminate with respect to its charges, practices, regulations, facilities and services.

25 week schedule was ambitious. MCI has not offered any evidence requiring a different conclusion.

85. The 25 week period envisioned "normal" time intervals. Normal time intervals mean following regular engineering procedures. It does not contemplates extraordinary efforts such as treating a particular job on a priority basis. The time interval quoted by AT&T took into consideration that AT&T had other customers besides MCI and that all customers would be treated on a first come first serve basis. Indeed, if AT&T had shown preference to MCI in filling its order it might be concluded that AT&T had discriminated against its other customers in favor of MCI. Although the Commission has not had occasion to comment on AT&T's method of handling orders from customers for large numbers of circuits, it has noted that in a case where simultaneous demand cannot be accommodated, the provision of service "on a 'first come first served' basis is not unreasonable or unduly discriminatory within the meaning of Section 201 and 202 of the Act." *Metrock Corp.*, 73 FCC 2d 802, 46 RR 2d 711, 714 (1979). See also *Spanish International Network, Inc. et al.*, 78 FCC 2d 1451, 1465–66 (1980).

86. The procedures for processing OCC requests was the subject of discussion in the Docket 20099 settlement negotiations. MCI participated in these discussions. Docket 20099 provided for expedition of the normal time intervals at the customer's request. The findings show that some of the activities which AT&T had to perform to fill MCI's order could have been expedited. However, MCI never requested expedition. It is doubtful even assuming that expedition had been requested, that MCI's time constraints could have been accommodated. In any event, it is unnecessary to discuss the possibility of expedition since, as noted, MCI never requested expedition of the normal time intervals.

87. MCI argues in its Proposed Findings that the pertinent facts regarding the Bell System in 1975 was uniquely within the knowledge of AT&T and PT&T, that they had the obligation of preserving all pertinent evidence and that they had the burden of presenting it into the record. MCI's position is erronous. MCI has overlooked the fact that it, rather than AT&T, had the burden of proof. As noted in the Designation Order, while the carrier has the burden of proving the reasonableness of an increased charge in a rate investigation, the customer bears the burden of proving unreasonableness in a complaint proceeding (85 FCC 2d at 999). Further, MCI has never sought to shift the burden of proof to AT&T and PT&T and its attempt to do so in the post-hearing phase of this proceeding comes much too late. In addition, MCI's claim that AT&T denied it access to relevant documents and employees is completely unsubstantiated. AT&T's reply to MCI's findings completely rebut the contention. According to AT&T, during the discovery phase MCI was provided with substantial documentation which MCI chose not to use in this

proceeding. In this connection, MCI was given a copy of Koch's handwritten notes describing his research and excerpts from AT&T's internal documents setting out the relevant intervals. As pointed out by AT&T, its circuit availability reports are updated and superceded on almost a daily basis with only year end reports retained. The 1974 and 1975 year end reports, which are stored on computer tape were offered to MCI but MCI declined the offer (AT&T reply, para. 44). In addition, AT&T's reply also makes clear that MCI was not denied access to any AT&T, PT&T or Western Electric employee. In this connection, MCI never requested a subpoena to compel an employee's testimony. In light of the foregoing, the decisions cited by MCI for the proposition that AT&T must assume the burden of proof because of AT&T's failure to produce relevant documents are inapposite.

Telpak Issue

88. The issue calls for a determination whether AT&T's refusal to accept MCI's April 10, 1975 order of two bundles of Telpak C offerings from Oakland, California to Los Angeles, California was unjust, unreasonable or otherwise in violation of Sections 201(b) or 202(a) of the Communications Act. The Designation Order recognized that the Commission's 1976 decisions found the customer premises[26] and resale[27] restrictions to be unlawful. The Designation Order, however, rejected MCI's argument that it was entitled automatically to a judgment in its favor simply as a result of these decisions. It pointed out that the issues in MCI's complaint for damages are different from those in the policy making investigations and "there may be changes in circumstances or defenses available to AT&T which would justify a different result" (85 FCC 2d at 999). The Designation Order also rejected AT&T's contention that MCI should be denied an award for damages because the customer premises restriction was a legally effective provision in AT&T's Tariff 260 in 1975. It stated that carrier-initiated tariff provisions may be subject to a damages award if the provisions are later found to be unlawful citing *Arizona Grocery Atchison, T & S FR Co.*, 284 U.S. 370 (1932). It further stated that "AT&T's customer premises and resale restrictions plainly were never approved or prescribed by the Commission; they were merely initiated by AT&T and permitted to become effective" (85 FCC 2d at 1000). Therefore, damages may be awarded as a result of those restrictions "if they are found to have been unlawful at the time and circumstances in which they were applied" 85 FCC 2d at 1000. It is concluded that MCI has met its burden of

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[26] *AT&T Restrictions on Interconnection of Private Line Services*, 60 FCC 2d 939 (1976).

[27] *Resale and Shared Use Decision*, 60 FCC 2d 261 (1976).

proving that the customer premises and resale restrictions were unlawful in 1975.

89. AT&T has raised certain threshold questions which must be disposed of before the findings supporting this conclusion are considered. AT&T argues that MCI is precluded from bringing this action by its agency relationship to General Motors. AT&T rests this contention solely on the fact that MCI's April 10, 1975 order for Telpak service stated that MCI was ordering as agent for GM. The Commission previously considered and rejected AT&T's contention in its Memorandum Opinion and Order released October 25, 1979 (74 FCC 2d 184, 192). The Commission stated:

> "In response to a request for information from the Bureau staff, MCI indicated in its Amendment To Complaint that it offered to GM an end-to-end from Oakland to Chicago and Detroit. This was listed in MCI's tariff FCC No. 1. Thus, MCI was not acting as a purchasing agent for GM in the sense that it would locate circuits for GM's needs and pass these charges on to GM. Rather, GM was purchasing its communications needs from MCI, and MCI was using AT&T and PT&T lines, in part, to provide service to GM. In other words, MCI was acting as a reseller of AT&T's Telpak services."[28]

Although, the Designation Order vacated the Commission's denial of MCI's formal complaint, it did not modify its ruling on AT&T's agency argument. AT&T has not submitted any evidence in this proceeding which would disturb the conclusion that MCI's relationship to GM was that of carrier and customer. On the contrary, the findings establish that AT&T clearly understood that the Telpak services though ordered in GM's name were clearly intended for the use and benefit of MCI in meeting its July 1, 1975 target date for providing comprehensive services to GM. AT&T had itself been an unsuccessful competitor for the GM contract and was thoroughly familiar with its details. The agency designation which AT&T required in no way misled it as to the relationship between MCI and GM or the purpose of MCI's order. In view of the actual relationship between MCI and GM and the purpose for which the Telpak order was placed, it is clear that MCI had an interest in the Telpak transaction sufficient to entitle it to sue.

90. AT&T also states that MCI was barred from ordering Telpak by the Docket No. 20099 Settlement Agreement (see 52 FCC 2d 727, 738 (1975)). According to AT&T, MCI was bound by the terms of the Settlement Agreement to order all its interstate facilities pursuant to Tariff 266 and all its intrastate facilities pursuant to the appropriate Bell System Operating Company tariff. AT&T's contention is rejected. AT&T ignores the fact that while Telpak rates were

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[28] The Commission also noted: "In order to ascertain the nature of the agency relationship between MCI and GM we do not look to what AT&T claims it should have been. Rather, we look to what MCI says it actually was, and MCI states it would have billed GM for service from the midwest to Oakland" (74 FCC 2d at 192, footnote 14).

discussed at the negotiations, the parties "agreed not to agree" on the Telpak question (Tr. 898). Paragraph 15 of the Settlement Agreement (52 FCC 2d at 742) specifies that "the provisions of AT&T Tariff FCC No. 260 were not included among the matters designated for investigation in FCC Docket No. 20099." Paragraph 6 of the agreement, cited by AT&T, which makes no mention of Telpak or the customer premises or resale restrictions, clearly does not bar MCI from requesting Telpak. Accordingly, the Agreement does not contain any provisions for or restrictions against the OCC's subscribing to Telpak service. In addition, the Agreement does not compel MCI to take facilities only under the tariffs filed as a result of the Agreement.[29] In other words, the Settlement Agreement does not purport to contain the exclusive terms and conditions under which the OCCs could take facilities or services from the Bell System. Rather, MCI was free to choose the tariff schedule which most suited its needs. The cases cited by AT&T concern power utility companies which had contracted with customers for service at particular prices. The power companies attempted to override these contracts by filing tariffs. MCI was not bound by such a contract. It had no pre-existing obligation to AT&T not to order circuits under Telpak. In the absence of some specific provision in the Settlement Agreement binding the OCCs to order facilities or services exclusively pursuant to the tariff referenced in the Agreement, the Settlement Agreement did not bar MCI from ordering Telpak service.[30]

91. Turning to the substantive matters raised by the issue, the findings establish that AT&T denied MCI's Telpak request on the basis of the customer premises restriction contained in Tariff 260. Dalane admitted that the resale restriction was not considered in evaluating MCI's order. Nevertheless, in the course of his testimony, Dalane asserted that MCI's use of Telpak to provide service to GM would violate the resale restriction contained in that tariff. The lawfulness of AT&T's action denying MCI's Telpak request turns on the lawfulness of these restrictions.

92. The customer premises or "piece-out" provision included in Section 2.6.3 of Tariff 260 restricted interconnection of private line services to premises where the customer had a regular and continu-

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[29] Implicit in AT&T's argument is the assumption that Tariff 260 and 266 (which was filed as a result of the Settlement Agreement) are mutually exclusive. However, Dalane, Manager of business relations for AT&T's Long Lines Department conceded that there was no language in Tariff 260 which would prevent an OCC from ordering facilities under that tariff and instead require the OCC to order facilities under Tariff 266. The tariffs are independent of one another (Tr. 326, 327).

[30] In the Appendix to its proposed findings, AT&T reasserts its contention that the doctrine of *res judicata* bars MCI from receiving damages in this proceeding. AT&T's contention was considered and previously rejected for the reasons stated at the hearing conference held July 9, 1981 (see Tr. 970–974). AT&T's Appendix provides no basis for reconsidering the ruling.

ing requirement to originate or terminate communications. Pursuant to the customer premises restriction, AT&T would not provide private line service between Cities A and B if the potential customer wished to provide its own communications system between Cities B and C and City B was merely to be used to connect the AT&T line with the customer's own system. Similarly, AT&T would not provide the circuit between Cities A and B if that circuit were merely to be connected at City B to the circuit of another common carrier between Cities B and C. However, the tariff contained exceptions to the customer premises restriction for several classes of customers. Thus, AT&T provided service to the international record carriers (IRC) for use by the IRC's customers, even though the service did not terminate at the customer's premises. AT&T also supplied service to an IRC's data message switcher in order to permit the IRC to connect to AIRCON, PLC or ARX services even though a customer's premises was not involved. Similarly, AT&T would have provided service to a switch, not located on a customer's premises, if the switch were owned by a composite data service vendor and were used for the switching of data messages. AT&T ignored the customer premises restriction if an agency of the U.S. government needed service. AT&T also made an exception to the restriction if an entrance facility connection were involved. In addition, AT&T did not require that the interconnection take place at a customer's premises if the connection were to be between AT&T and either a Bell System operating company or an independent telephone company, such as the Lincoln Telephone and Telegraph Company. Thus, the tariff in 1975 discriminated among various classes of customers. In addition, AT&T's OCC tariff, No. 266, offered to other common carriers in 1975 the same facilities which MCI sought pursuant to the Telpak tariff but without the customer premises restriction and at a higher price. Therefore, it must be concluded that the Telpak tariff discriminated in connection with the provision of like communications services. AT&T has not justified the discriminatory treatment.

93. AT&T contends that the customer premises restriction was necessary for the following reasons: (a) AT&T's alleged need to protect itself from economic harm resulting from impairment of its nationwide average pricing scheme; (b) "churning" and (c) to prevent technical harm to the network.

94. AT&T asserts that carriers such as MCI will choose to provide their own facilities for the high density, low cost portion of the overall route, while leasing only the low density high cost portions from AT&T. This allegedly undermines AT&T's nationwide average pricing scheme which is based on the average costs for high density and low density routes. AT&T's claim, however, is undercut by the fact that the tariff restriction made no distinction between high-cost and low-cost routes. The restriction was based on the type of termination, not on the type of route. Thus, the restriction acted to

prevent the interconnection of high-cost OCC or private microwave routes with low-cost AT&T routes just as much as it served to prevent the converse situation. Moreover, the fact that the restriction focused on interconnections rather than the routing meant that the restriction did not necessarily prevent a customer from linking high-cost AT&T routes with low-cost OCC and private routes. As long as the customer had a need to originate and terminate communications at the location which linked the routes, the customer premises restriction would have permitted the interconnection. Further, AT&T has presented no evidence to document economic harm to itself or to the public if it were to de-average its prices. Prior to 1975, the Commission rejected arguments relying on nationwide average pricing. In its 1971 *Specialized Carrier* decision, *supra*, the Commission considered permitting the entry of specialized common carriers into private line markets. AT&T specifically alleged that the entry of specialized common carriers into private line markets would "seriously undermine the policy of uniform interstate rates" 29 FCC 2d 870, 876. The Commission found that argument to be outweighed by the public interest in favor of the entry of new carriers in the specialized communications field to meet the demand for new and diverse sources of supply and competition, 29 FCC 2d 870, 920. The Commission also made clear that it would not object to AT&T's departure from the uniform nationwide rate policy. Significantly, AT&T was advised in 1972 by its Council of Economic Advisors that the best economic answer to cream skimming is not to prohibit piece-out but to abandon nationwide average pricing and to price each route according to its costs. If such pricing were used, according to the Economic Advisors, there would be no economic justification for refusing to piece-out. Thus, the economic rationale advanced by AT&T in support of its customer premises restriction was belied by its own Council of Economic Advisors.

95. Another aspect of AT&T's economic harm rationale for the customer premises restriction is the alleged danger of "churning", *i.e.*, the creation of superfluous or redundant facilities, resulting in an economic penalty to AT&T. This argument suffers from the same basic defects as the nationwide average pricing argument. In other words, AT&T has presented no specific factual evidence to prove that churning would result from the provision of MCI's requested service or that AT&T would suffer specific financial harm. Moreover, to the extent that AT&T is concerned about recovering the costs of facilities constructed for a specific customer, there are other means by which it can protect itself. For example, the Telpak tariff contains a provision for special construction charges. Such a charge might be designed to reasonably protect against a legitimate economic burden generated by a facilities request unique to a customer.

96. AT&T's end-to-end responsibility rationale is similarly unsupported, and without merit. AT&T made the bare assertion that

unless one carrier or an individual has responsibility for the entire thing, the probability of it not working properly is very high (Tr. 251). However, AT&T offered no evidence in support of its contention that harm to the network or technical difficulties would result if piece-out was allowed. Indeed, AT&T admits there are no technical studies to support its theory of harm to the network if the customer premises restriction were not in effect. In this connection, as noted by the Commission in the "Piece-Out" decision, which has not been rebutted by AT&T, "[n]o greater potential for technical or engineering harm to AT&T's network results from termination of Tariff 260 services at the premises of OCCs than results from termination of like circuitry obtained under AT&T 266 and B.O.C. Tariff 3 at the premises of OCCs" (60 FCC 2d at 945). In the absence of a showing of specific technical harm to the network, a restriction on customer interconnection is unlawful. *Hush-a-Phone Corp.* v. *U.S.*, 238 F.2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420, 423 (1968), *recon. denied*, 14 FCC 2d 571 (1968). In *Carterfone*, the Commission rejected as unreasonable

> ". . . AT&T's position that because AT&T cannot control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system . . . without regard to the actual harmful effects." 14 FCC 2d 571, 572.

97. It is concluded, that MCI has met its burden of demonstrating that AT&T's refusal to accept its Telpak Order on the basis of the customer premises restriction was unjust, unreasonable and unduly discriminatory in violation of Section 201(b) and 202(a) of the Communications Act. Likewise, for the reasons discussed *infra*, a refusal to accept MCI's Telpak Order on the basis of the resale restrictions would also be violative of Section 201(b) and 202(a) of the Act.

98. Essentially, the use restriction meant that AT&T would refuse to provide service to a customer because that customer was not the ultimate user of the service. The use restrictions of AT&T Tariff 260 complemented the resale restriction. These restrictions limited the purposes for which the services included in Tariff 260, such as Telpak could be used. The purpose of the use restriction was to ensure that such services could not be resold. AT&T asserts that the restrictions were needed to prevent the establishment of a message telecommunications (MTS) type of service and to prevent the undercutting by a reseller of AT&T's unit rates for message and private line service. Neither of these reasons can justify the imposition of the resale and use restrictions.

99. AT&T's claim that its resale and use restrictions were necessary to prevent the establishment of an MTS-type service pursuant to established Commission policy is both factually and legally irrelevant in the context of this case. The record here is clear that MCI wanted circuits to provide CCSA service to GM. The

Commission has already ruled that CCSA was a private line service. See *Bell System Tariff Offerings*, 46 FCC 2d 143 (1974), *aff'd*, *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1975), *cert. denied*, 422 U.S. 1026, *recon. denied*, 423 U.S. 886 (1975). Furthermore, contrary to the premise of AT&T's rationale for the restrictions, there was no legal prohibition against the provision of MTS-type service by MCI at the time of the GM circuit order. See *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (1977), *cert. denied*, 431 U.S. 1040, mandate enforced, 580 F.2d 590, *cert denied*, 439 U.S. 980 (1978). In addition, AT&T's rationale that the resale and use restrictions were necessary to prevent the reseller from undercutting AT&T's rates is actually evidence that the restrictions were unlawful. *Interstate Commerce Commission* v. *Delaware, Lackawanna and Western Railroad Co.*, 220 U.S. 235 (1911).

100. In addition to being unjust and unreasonable, the resale and use restrictions were also discriminatory. AT&T carved out numerous exceptions to these restrictions. Pursuant to these restrictions, electrical companies, aeronautical communications companies, the United States Postal Service and public telegram message service carriers could all resell Tariff 260 services. Customers and authorized or joint users could share such services. Stock exchange, electrical companies, aeronautical communications companies, the United States Postal Service, United States government agencies, composite data service vendors and other entities could all use Tariff 260 services despite the restriction that such services could only be used for "the transmission of communications to or from the customer and relating directly to the customer's business." Ironically, MCI itself could have used Tariff 260 services, but only if the communications placed over the AT&T circuits were MCI's internal communications. MCI could not use such circuits to serve its own customers. Also, discrimination existed with respect to AT&T's treatment of MCI as compared to the independent telephone companies and AT&T's own operating companies. AT&T could connect with the independents and the operating companies at any point within the franchised territory of the operating company or independent company and then, through the creation of a joint service permit the operating company or independent company to sell that service to its customers. AT&T would not invoke the use or resale restriction. If MCI, however, sought to act in the manner of an operating or independent company, AT&T would not have provided the circuits. Thus, AT&T clearly discriminated against MCI in its application of the resale and use restrictions.

Damages

101. MCI is entitled to damages resulting from AT&T's unlawful refusal to provide Telpak circuits. Because of AT&T's unlawful act, MCI was forced to order circuits from PT&T under Tariff FCC No.

126. PT&T billed MCI $1,163,006.79 under FCC No. 126 for the 116 voice grade circuits between Los Angeles and Oakland. MCI has paid PT&T $320,000. MCI was only required to pay $231,126.64. The Presiding Judge agrees with MCI that its measure of damages is the difference between the charges for PT&T's circuits ($1,163,006.79) and the amount which MCI would have paid under Tariff 260 and under Tariff 266 at the per-line rate were less expensive than Telpak ($231,126.64). MCI has not offered any evidence which would permit the conclusion that PT&T acted improperly in providing service under Tariff 126 or played any part in AT&T's refusal to provide service under Telpak. MCI's damages stem solely from AT&T's unlawful refusal to provide Telpak circuits. AT&T is therefore, ordered to pay MCI $931,880.15 in damages.

102. The Common Carrier Bureau argues that MCI should not be awarded damages for the period between July 7, 1975 and October 2, 1975. The rationale for this argument is an assumption that no Telpak circuits would have been available during that time due to the 25 week normal interval involved in providing new circuits. The Bureau overlooks the fact that the only record evidence dealing with non-availability of circuits concerned MCI's request for circuits between Phoenix and Oakland. MCI's request for Telpak was for circuits between Los Angeles and Oakland. It has not been alleged that there was a shortage of circuits between Los Angeles and Oakland. In fact, AT&T does not claim that it did not have the facilities to furnish Telpak to MCI. MCI's Telpak order would not have required the wiring of AT&T's Phoenix - Los Angeles to AT&T's Los Angeles - Oakland circuits, as would have been the case with the circuits ordered under Tariff 266. Rather, MCI's circuit would merely need to be terminated at the appropriate facility for connection to the Los Angeles - Oakland circuits. This is precisely what was done when MCI obtained circuits under PT&T's Tariff 126. These circuits were all obtained in time for the cut-over date of the CCSA switch in July 1975. Dalane admitted that AT&T would use PT&T circuits if necessary to fill an order (Tr. 336). Accordingly, contrary to the Bureau's contention, circuits were, in fact, available to meet MCI's Telpak request. There is, therefore, no basis to limit MCI's damages to the period of October 2, 1975 to June 27, 1976, as suggested by the Bureau.

103. The Bureau also urges that AT&T should reimburse PT&T, rather than MCI. However, the issues call for a determination of damages to be awarded to MCI. The Commission did not include an issue and PT&T has not sought enlargement of the issues so as to permit reimbursement to PT&T. Moreover, as noted by MCI in its findings, PT&T has filed a civil action in the United States District Court for the Southern District of California seeking to collect the difference between the amount which MCI paid PT&T and the amount which PT&T claims it was entitled to under its tariffs.

Under the circumstances, it is appropriate that the question of reimbursement by MCI to PT&T should be decided in that forum.

104. AT&T contends that MCI failed to meet its burden of proving damages. It argues that, as a matter of law, the difference between PT&T Tariff 126 rates and Telpak rates is not legally sufficient proof of damages, citing as its authority *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U.S. 385 (1973). According to AT&T, MCI must prove that the PT&T rates were unreasonable and that the Telpak rate would have been reasonable if the customer premises and resale prohibitions were removed, citing, in addition to *Campbell*, *Baer Bros.* v. *Denver, R.G.R.R.*, 233 U.S. 479 (1974) and *Arizona Grocery*, *supra*. AT&T further argues that to award damages requires the same findings as a prescription for the future.

105. Campbell does not, as AT&T suggests, preclude the possibility that the rate discrepancy may sometimes be the measure of damages. As noted by MCI, courts both before and after *Campbell* have found the difference between rates to be an accurate measure of damages. *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412 (1915); *States Marine Lines, Inc.* v. *Federal Maritime Commission*, 313 F.2d 906 (D.C. Cir. 1963). In *Campbell*, the Court held that where discrimination is charged, damages are not presumed. There must be proof of specific pecuniary loss.[31] "Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted" (289 U.S. at 390). MCI has satisfied these evidentiary requirements. The damages which MCI requests are not hypothetical or speculative. MCI demonstrated that it was billed by PT&T for $1,163,006.79 for circuits ordered solely as a result of AT&T's unlawful actions. Thus, MCI has demonstrated actual damages in the amount of the difference between the charge for PT&T's circuits and the amount which MCI would have paid AT&T if AT&T had not acted in violation of the Communications Act of 1934, as amended.

106. Similarly, *Baer Bros* and *Arizona Grocery* does not stand for the proposition that MCI must demonstrate the reasonableness of the Telpak rate and the unreasonableness of the PT&T rate. In fact, those cases hold that the complainant is not required to make such a showing. In *Baer Bros.*, for example, the Supreme Court had before it a claim from a carrier that in awarding damages upon a complaint, the regulating agency must demonstrate the reasonableness of the rate which the complainant alleged it should have been charged. The Supreme Court found that the carrier's claim confused the distinction between a complaint and a ratemaking proceeding, a confusion which has permeated AT&T's Proposed Findings. The point missed by AT&T but clearly enunciated in *Baer Bros.*, is that the reason-

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[31] See *Hughes Sports Network*, 25 FCC 2d 550, 555 (Rev. Bd. 1970).

ableness of Telpak would need to be proven only if MCI were seeking to have that rate prescribed for the future. MCI did not request such a prescription in this proceeding.[32] Similarly, AT&T is confused with respect to MCI's burden concerning PT&T Tariff FCC No. 266. MCI is not alleging that the PT&T rate is discriminatory vis-a-vis the Telpak rate. Rather, MCI is contending that the PT&T rate is part and parcel of the measure of damages since it is the PT&T rate which MCI was forced to pay as a result of AT&T's unlawful refusal to provide Telpak.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276,[33] MCI IS AWARDED damages of $931,880.15 for the unlawful acts of AT&T found under issue (a) and DENIED damages under issue (b).

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

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[32] The Designation Order citing *Baer Bros.* and *Arizona Grocery* spelled out the difference between damage and rate fixing cases (85 FCC 2d 998–1000).

[33] In the event exceptions are not filed and the Commission does not review the case on its own motion, this Initial Decision will become effective fifty (50) days after its public release as prescribed by Rule 1.276(d).

Common Carrier
Common Carrier, Rates, Charges
Reports Required to be Filed

> Notice of Proposed Rulemaking adopted proposing a plan for the Commission to monitor the effects of interstate access charges and various rate changes on the availability of local service.
> *–MTS/WATS Market Structure (Phase IV)*
> CC Docket No. 78–72

FCC 83-254

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MTS AND WATS MARKET STRUCTURE	CC Docket No. 78–72, Phase IV

NOTICE OF PROPOSED RULEMAKING

(Adopted: May 26, 1983 Released: June 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT; COMMISSIONER SHARP ABSENT.

I. INTRODUCTION

1. In the *Third Report and Order* (*Order*) in this proceeding, we stated our intention to "monitor the effects of the implementation of end user access charges" during the transition period described in the *Order*.[1] We directed the Common Carrier Bureau to prepare a monitoring plan and to present it to us within ninety days of the publication of the *Order*. This *Notice* describes the preliminary plan developed by the Bureau and seeks comments on that plan. We have also attempted to incorporate the concerns voiced by the Federal-State Joint Board Members in this plan, particularly the effects of separations changes and the high cost factor.

2. *The Third Report and Order*, among many other fundamental changes, has mandated end user access charges. These charges will be paid by all telephone subscribers to recoup the costs assigned to the interstate jurisdiction through the separations process. The rate structure decisions made in the *Third Report and Order* represent a fundamental change in the way exchange carriers are compensated

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[1] *MTS/WATS Market Structure Inquiry*, 48 F.R.10319 (March 11, 1983), par. 196.

for the use of their facilities. We have strived to ensure that the changes which we have ordered will benefit telephone users and that we have properly allowed for all contingencies. However, because of the fundamental changes the industry is undergoing, we recognize that unforeseen consequences may arise. One of the important expressed goals of the *Third Report and Order* is universal service.[2] We therefore have an obligation to carefully follow the effects of our decision. We believe that the most skillfully crafted plan can only be successful with the full assistance and consent of the principal actors in this industry. The comments on this *Notice* will serve as the basis for our future activities. We also believe that a frank dialogue on the available data, analytical methods and the expected (and reachable) results is essential. We want the best possible valid information which will be acceptable to all interested parties.

3. Members of the Joint Board (Docket 80–286) have expressed concern about the impact of access charges and jurisdictional separations changes on telephone subscribers. Their concerns are very similar to ours in the *Third Report and Order*. In that *Order*, we established the Universal Service Fund which would offset the costs of providing service in certain areas. The means of funding this is a charge from all toll users, as outlined in the *Order*. The level of funding for the Universal Service Fund and the targetting of rate support are being established by the Joint Board through operation of the high cost factor. We understand the mutual interests of State and Federal regulators lie in the maintenance of the nationwide availability of telephone service at reasonable rates. Through the monitoring plan developed in this proceeding we hope to develop information that will answer our common concerns.

II. The Access Monitoring Plan

A. Summary of the Monitoring Plan

4. We propose to collect information in two major related areas: rates and the number of residential access lines. This information will be collected annually for seven years. Some information will be gathered from all telephone companies while more detailed information will come from a sample of companies. The staff of the Common Carrier Bureau will analyze the information and report to the Commission each year.

5. The rate information described below will tell the Commission how rates are changing, e.g., how quickly some rates are increasing, whether a "lifeline" or "dial tone" rate is being offered, and will attempt to show why rates are changing. The access lines information will tell us whether the number of access lines is increasing or decreasing. However, these direct measures are not sufficient to

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[2] *Order*, pars. 363, 366.

address the fundamental question of what changes are occurring in the residential penetration rate; that is, the percentage of households with telephones (or excess lines). While the number of lines may increase or decrease, the number of residences may be increasing or decreasing at a different rate. If this is so, the mere counting of lines would be misleading. As an elementary example, if the number of access lines stayed constant but the number of residences increased, the portion of residences that would be subscribing to telephone service would fall. It is not our objective only to be concerned with the number of residential access lines. Instead, we must focus our attention on whether the portion of potential users willing to pay for service has changed.

6. This interpretive function is clouded by the fact that the data concerning residences (households) is not kept on the same basis as telephone industry information. Demographic information[3] is usually kept on the basis of political subdivisions (e.g., states, counties) whereas industry data is kept on bases (e.g., exchange or company level) which do not correspond to political subdivisions. It is this inconsistency which is the crux of the analytical problems discussed in this *Notice*.

7. We believe that we can learn much from the behavior of prices, the quantity of lines demanded, and the causes for such changes over the next few years. This value is not diminished by problems in reconciling demographic and industry data. However, when it comes to estimating penetration rates at the company, or lower level, which are the elementary measures of changes in the availability of service, we note the problems with the accuracy of the data and the issues involved in analyzing it. As one known, accurate measure, we propose to use penetration data from the Current Population Survey. The sample from which this data is collected is designed to be accurate only to the state level. Further disaggregation is a question upon which we seek comments. The most important goal of this *Notice* will be to determine from the comments whether an acceptable estimate or indicator of telephone penetration levels can be found and at what level of aggregation (eg., exchange, county, company, state) we can successfully measure changes in service and meet our objectives listed below.

B. Objectives

8. The primary purpose of the Access Monitoring Plan is to track the availability of basic residential telephone service over the seven-year access charge transition. We want to know whether the availability and use of residential service is being affected, how

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[3] Besides the number of households, we would expect to use other data representing factors that would affect the purchase of residential service. For example, we would review the consumer price index (a measure of inflation), unemployment, income, and other statistics.

prices are changing and why. This effort will encompass service in the various states, districts, territories and possessions of the United States; that is, the areas which are subject to the *Access Charge Order*. While we stated in the *Access Charge Order* that we were concerned with the effects of the newly instituted end user access charges, it is clear that many factors will have an effect on residential access line penetration.[4] Because so many changes that will affect local rates are occurring simultaneously, we cannot ignore other factors in our analysis.[5] We are interested in the larger question of the availability of service. Therefore, another goal of the project will be to gather information on the components of local service rate increases and analyze these changes in concert with the shift to end user access fees. We would like to focus on changes in local rates due to changes that may be made in the current jurisdictional separations formula, the deregulation of CPE, changes in depreciation rates, and the amortization of inside wiring investment, among others.

9. The jurisdictional separations system will change substantially in the next few years. It is anticipated that the major effect on rates will be felt in the gradual movement away from the subscriber Plant Factor (SPF) to the new base and high cost factors. Coupled with the introduction of the high cost factor, significant shifts will likely occur in the amount of funds flowing to particular local areas. It is uncertain how and whether these changes will affect rates to residential telephone customers. The Universal Service Fund is intended to be a safeguard against abrupt changes in the highest cost areas. Nevertheless, the possibility exists that this safeguard may not sufficiently protect ratepayers to the extent anticipated by the Joint Board. We share the Board's expressed desire that vigilance is necessary. We wish to cooperate with the States in assuring that appropriate data are collected to meet their concerns. To this end, we invite comments that address the question of whether data collected herein will address the potential effects of the Joint Board's actions on rates and service availability as well as assuring that the entire system of explicit subsidies does not overburden those providing the funds for the subsidy.

10. Because it is likely that local tariffs will be restructured significantly over the next few years, we will pay particular attention to the lowest rate at which a subscriber can receive service.

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[4] The terms "residential access line," "residential main station" and "residential telephone service" are used interchangeably in this *Notice*.

[5] This point is well recognized. See *The Petition of the State of Michigan and Michigan Public Service Commission for Institution of an Inquiry and/or a Rulemaking Proceeding to Protect Universal Service* (MPSC Petition) and the Comments on that Petition. We plan to act on this Petition in the near future. One option under active consideration is whether to merge the Michigan PSC's request with this proceeding.

We want to know whether local suscribers are being offered a lifeline rate which would allow them to maintain connection to the telephone network. We also want to understand how our policies affect such an offering.

11. Another closely related objective is to develop information concerning actions at the state level that may affect telephone penetration. Besides lifeline rates, we want to be aware of new intrastate access charges and other actions which could also affect residential telephone penetration.

12. In all, we wish to create a picture of the various forces affecting local residential rates and basic telephone service. While the Commission is certainly concerned with other events resulting from the *Access Charge Order*, they will not be the subject of the surveys and analyses undertaken as a result of the adoption of this plan.[6]

C. Information To Be Collected

13. We plan to collect the information which we need by the use of two surveys. One data inquiry will contain a few pieces of information and will be put to all telephone companies. The second, more detailed inquiry will be sent to a representative sample of companies. We considered getting all the data from a sample of companies rather than from all carriers. However, we concluded that getting the most basic data from all companies will allow us to be certain that we would be able to monitor the basic changes in the entire industry and avoid the possibility that important changes in even the smallest companies would be missed.

14. The amount of data needed to support the objectives of this project is substantial. With over 1,400 companies, over 10,000 exchanges and 3,137 counties, one piece of information collected quickly metamorphoses into a large scale collection effort. We have already stated our intention "to place as little a burden as possible upon the small businesses which constitute the overwhelming majority of our nation's telephone systems".[7] Further, we want a plan which is manageable and can give us usable results in a reasonable amount of processing time. We have attempted to balance these considerations with the need to develop information which is as accurate and detailed as possible. We are open to ideas which would reduce the size of this effort yet support our fundamen-

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[6] As an example, we expect that the adoption of end user access charges will result in decreases in certain interstate rates. Such changes can be monitored successfully within the Common Carrier Bureau. The changes in the level of OCC payments to local companies can be gathered directly at the Federal level either through a formal information request or informally. We expect that the OCCs' will inform us of such changes in one forum or other. Information on the "competitiveness" of the interstate market will also be examined.

[7] *MTS/WATS Market Structure Inquiry*, 48 F.R. 10319 (March 11, 1983) par. 196.

tal objectives. Any alternative approaches which still would measure changes in the availability of basic service will be considered.

15. There are two basic approaches outlined here. The first approach would be to collect penetration data directly from telephone companies using their estimates of the numbers of residences in their service areas. This may be somewhat inaccurate and will require the companies to report the counties they serve and also to estimate the number of residences in counties where they only serve a portion of the county.

16. The other approach would be to begin with state information from the Current Population Survey see para. 18, *infra*. Once each year, we could know fairly reliably the residential penetration by state. This measure would be associated with demographic characteristics, as described below. The penetration data would then be examined to determine the characteristics of those disconnecting. The next step could be one of several options. As one option, statistical analyses could be performed to determine what portion of the change in residential penetration was attributable to rate changes with the implicit assumption that managing other changes is beyond our control. This implies that a state-wide rate index be prepared. To do this, companies would have to report all residential rate options and the number of subscribers to each. (This also has the advantage of allowing us to construct other rate indices for levels of service; for example, the cost of making twenty phone calls a month, which would indicate changes in rates over time and overcome analytical problems in accounting for changes in rate options). Once the effect of rate changes is known, we can look among the reporting companies in each state for rate changes of sufficient magnitude to cause disconnects (thus eliminating companies where rate effects were insubstantial), identify specific deleterious changes and proceed to contact the companies directly to ascertain the characteristics of the affected companies (amount of high cost factor, level of access charges per customer and other characteristics). Another option would be to compare the statewide changes with access line data provided by the companies, paying particular attention to reductions over the course of a year. Those companies indicating absolute decreases would be contacted directly by the staff to ascertain what caused the drop in access lines.

17. Under any approach chosen, individual companies subject to rapid changes in their customer base would be welcome to come forward with information at any time.

1. *Current Population Survey (CPS) Data*

18. The Current Population Survey is a large, general purpose survey conducted monthly by U.S. Census Bureau. The major purpose of the CPS is to collect labor force participation data used to develop unemployment statistics. About 58,000 households are

interviewed from a sample of street addresses. Data on employment status, age, race, sex, education, marital status among others, are collected monthly. Each year, during the March survey, each household is asked for additional information concerning income for the previous year. As part of the survey, interviewers have routinely asked if the respondents had a telephone at which they could be reached. This last question is really not very useful for our purposes because a positive response does not mean that the an individual has a telephone in his or her residence. However, since March, 1983 the CPS has asked whether the respondent has a telephone in his or her dwelling—precisely the information which we would need to develop residential penetration figures. This data would be reliable on a country-wide level each month and down to a state level on an annual basis. Unfortunately, these are less reliable below the state level. The counties sampled account for over 85% of the U.S. population but only one third of the U.S. counties are surveyed and while they are represented in the "probability proportionate to size" sample design, very few sparsely populated counties are included. Specific information for areas below the state level and for territories and possessions would have to be collected directly by the FCC.

19. We propose to use the CPS data as the primary measure in our analysis. We need not be restricted by the information now collected by CPS. The CPS will ask nearly any question which can be justified as a portion of their survey and payment made on a cost-incurred, reimbursable basis. The CPS data has many advantages, not the least of which are reliability, speed and compatibility with other demographic data. If we can develop a price index for residential service (which requires information from all companies in a state on the number of subscribers to each rate option), we can relate changes in the economy, prices and demographics to changes in penetration, at least in a level as aggregated as a state. Because the CPS will ask different questions on a reimbursable basis, we also seek comments on whether we should contract with CPS to ask questions in addition to that already asked.

20. This leaves the question open whether we should go to a lower level of aggregation in the development of penetration figures. As we discuss elsewhere in this *Notice*, the reliability of these figures declines as we move to the company and exchange level, mainly because of the incompatibility of industry and demographic data. We will collect rate data, access line data and use the CPS data. The issue is whether we will compel companies to provide penetration data in each survey period or whether we will rely on the companies to come to us with data only when a change occurs at the local level. In the second instance we would assume that the state-wide data was a sufficient measure for continuous monitoring purposes.

21. Therefore, we have the following options:

Option 1: All companies report data on the number of subscribers to all residential rates by state (for the purpose of constructing a statewide price index). This would include, then, information listed here such as lifeline or "dial tone" rates and the components of rates. Companies would develop and report penetration data to us only when measurable drops in residential access occurred.

Option 2: All companies report data on selected rates and supply us with penetration figures by operating areas as part of the regular reporting cycle. In this manner, complete information on penetration will be available for comparison. A disadvantage of this approach would be that we would have to average demographic data over the counties served and that demographic data may not be current.

2. Information to be collected from all companies.

22. As we stated, an important piece of information to be developed will be the measure of changes in residential telephone penetration; that is, the percentage of households with telephones (or access lines). Ideally, we would collect such information for each exchange or service area from the local company. This would correspond to the rate information which is available. However, it is uncertain that many local telephone companies could provide us with information on the number of households in each exchange or rate area.[8] It is critical that we get all of our information at the same level of aggregation to be certain that all the information is comparable and that our analytical techniques validly can be applied. We know that we can get state-wide data from the CPS as described above. The question is whether individual companies can provide reliable penetration data and whether we should go to this level (or even a county level) in our analyses.

23. While some companies track the number of building permits and the types and locations of local construction projects for planning purposes, even these may not know the total number of existing, occupied residences.[9] If the companies cannot provide these data by exchange we would have to find another source and take that information on whatever basis it is available. Adjustments to the data would have to be made. The main source of these data is the Census Bureau. Even the census data have drawbacks. The Census Bureau collects the number of households per county in the decennial census only. However, it does collect valuable data in the Current Population Survey (CPS) discussed above. The CPS is the basis of annual population data developed by the Census Bureau. We or the companies could use the average population per household for each county from the 1980 census and divide it into the annual population figures to get an annual number of households. This

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[8] By this we mean an exchange or group of exchanges which have the same rates.

[9] The Rural Electrification Administration (REA) requires companies to perform an area coverage design (ACD) when they apply for their first loan. The ACD could give information on residences with and without service. In theory, this is kept up to date by the borrowers for planning purposes and to support future loan requests. This could be a valuable source of data on small companies.

requires an assumption that the population per household will remain reasonably constant over the period. As another source, there are commercial services that provide household and other demographic data by county for each year.[10]

24. A problem here, of course, is that the boundaries of franchise areas do not typically follow local political boundaries. This could cause some severe analytical problems. Absent a better proposal, we would collect the number of residential mains (or residential access lines) by service area or, alternatively, by county To develop the penetration information, it will be necessary to have the surveyed telephone companies list the counties and the respective exchanges they serve in their initial responses so that we may know which data has been combined by the companies or which we will have to aggregate. We realize that this is an imperfect proposition and it will entail a great deal of analytical effort. We want to minimize the error in any estimates, of course, but it appears that some will have to be tolerated. This means that we may not be able to discern very small changes in telephone penetration using this method.

25. In summary, the ideal measurement point would be the exchange, but we think that most companies would not have information on the number of households in their exchange areas. Without the number of households, it is difficult to determine a meaningful measure of service availability such as the penetration rate at the company level. Therefore, this argues in support of a "top down" type of analyses where state-wide figures are used as the major indicator. Nevertheless, even at the company or county level, the key aspect of the penetration rate will be how it changes over time. Precision in its definition and the initial estimation of the rate is important but not as critical as consistency over time. We are not taking a census. We want to measure how the penetration rate changes over the transition period. The fact that different companies may count residential mains or housing units differently is not as important as having each company count the same way each reporting period. Because of this, it is not necessary to develop completely precise definitions.[11]

26. Another major piece of information which we want from all companies is the lowest rate at which service is available. If the company has different lowest rates in different rate areas (e.g., based

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[10] Another potential source of household data is that used by television rating services. The number of TV households is updated annually, based on estimates supplied by the commercial services.

[11] There may be other, very different workable approaches than those mentioned here, but the ones which we examined appear costly, imprecise or both. One proposal would have the companies survey customers who disconnect on the reason they disconnected. Because customer churning is high this would require a large number of responses. Further, many individuals would be involved in carrying out the survey and there would be significant expense involved.

on different exchange sizes), we will need them all with some indication of why they differ. The value of this information is high. If subscribers are not willing to pay this rate, they disconnect. We also will need to know the composition of this minimum rate. In other words, what portions of the rate are for interstate access, intrastate access, and so forth and whether any usage is included? If we get the information necessary to compile price indices, we will not need to collect this information separately because it will already be included in the rate schedule information used to develop those indices. The size of the exchange(s) to which the rate applies will also be reported, with size measured by the number of telephones. Companies will also be asked to note the "changes from last year" in the lowest rate, and there will be an inquiry on the form asking whether they have such a "lifeline" rate and whether they have a request for one pending before their state commissions. The final pieces of information which we will seek from all local companies are the average residential expenditure which indicates what individuals are actually paying and the level of any access charges and how they are billed (how much as a flat rate and how much for usage).[12]

3. Information to be collected from sample companies.

27. The Common Carrier Bureau staff will also draw a stratified sample of telephone companies representative of the various sizes of companies and reflecting their various cost characteristics (e.g., high cost). These companies will provide us with the information above plus certain detailed data which will help us ascertain the causes of local rate increases and give us a better picture of trends at the local level. We will have the sample companies report information concerning their rate increases. In particular, we will ask these companies to provide, on a per residential access line basis, the amount of rate increases attributable to changes in separations, depreciation, access charges, the phase-out of embedded CPE, and the amortization of the capitalized station connection costs. Further, if complete data on the number of subscribers to all rates are not collected from all companies, these sample companies will report the number of subscribers to their lowest cost service, the modal rate (the rate plan chosen by the greatest number of residential subscribers), the portion of subscribers subscribing to the "typical" rate, and the local flat unlimited calling rate on the same basis which it reports the information required in the "all companies" section listed above. The companies will eventually report the amount per line which is offset by (or the cost per line of) the high cost factor.[13]

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[12] We wish to know the business and residential flat rates and the per minute (usage) amounts. This will assist us in gauging the "smoothness" of the transition.

[13] The Exchange Carrier Association will also be used as a source of data concerning collections and disbursements for the Universal Service Fund.

28. The detailed information will aid in determining the causes of rate increases, and shifts to the lowest priced service. It will also provide a data series on changes in today's most common residential rate, the flat rate, unlimited calling service. The information will aid the FCC and the Joint Board in isolating the effects of the Universal Service Fund subsidy.

D. Reporting Frequency

29. As soon as the Commission receives the appropriate clearances from the Office of Management and Budget, we will send out the first inquiry to all telephone companies. This will establish the baseline information. A few months later, we will begin the regular reporting cycle with all reports due sometime early each year. The Common Carrier Bureau will analyze the data and make reports on an annually.

30. Because of the import of this monitoring effort and the fact that annual reports may not capture rapidly deteriorating situations, if any occur, we contemplate that persons will bring information concerning such situations to the attention of the Chief of the Common Carrier Bureau. The information should be consistent with that gathered in the normal course of this effort along with further data necessary to support whatever relief is sought.

E. Regulatory Flexibility Analysis and Applicability of the Paperwork Reduction Act of 1980.

31. In the *Access Charge Order*, we certified that the Regulatory Flexibility Act did not apply to the rules adopted.[14] That same analysis applies here. Exchange carriers, even small ones, are dominant monopolies in their exchange areas. Because that is so, they would not fall under the definition of a "small entity." While the Regulatory Flexibility Act does not apply to carriers which will be affected by this plan, we have attempted to minimize the information burden on the companies while carrying out our public interest responsibility to ascertain the effects of our decisions on local service. We will assure that data requests which will support the final plan are made in accordance with the Paperwork Reduction Act (P.L. 96–511, 44 U.S.C. § 3501 *et. seq.*).

F. Other Questions.

32. Commenting parties should address the data collection requests outlined here and whether they meet our objectives and in general support our public interest determination that we monitor changes caused by our *Access Charge Order*. We also seek comments on the burden being placed on various companies by our plan or alternative proposals that may be less burdensome and still satisfy

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[14] *MTS/WATS Market Structure*, 48 F.R. 10319 (March 11, 1983), paras. 358–362.

our information needs. Parties familiar with the Joint Board's activities should comment on the consistency between this plan and the monitoring activities contemplated by that body. If any group other than the FCC can collect some of the data (*e.g.* the states or the National Association of Regulatory Utility Commissioners), we will entertain such recommendations.

33. For the purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered in a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever occurs earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation, and that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

34. Accordingly, IT IS HEREBY ORDERED, that comments may be filed on the issues and proposals discussed herein no later than thirty days after the release of this *Notice* and that replies may be filed no later than fifteen days after the filing of comments. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs or comments, or replies, shall be filed with the Federal Communications Commission, Washington, D.C., 20554, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's, Washington, D.C. offices. In reaching its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance thereon is noted in the Order.

35. IT IS FURTHERED ORDERED, that pursuant to 47 U.S.C. § 154(i), 154(j), 201, 202, 218 and 403, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules,

in accordance with the discussion and delineation of issues in this *Notice* and on the basis of previous notices and filings in this proceeding.

36. IT IS FURTHER ORDERED that the secretary shall send copies of this Notice to the Regulatory Commissions of the various states, districts, territories and possessions which will be affected by this Notice.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Separate Statement
of
Commissioner Henry M. Rivera

In the Matter of MTS and WATS Market Structure CC Docket No. 78–72, Phase IV (Access Monitoring Plan).

This action reaffirms our commitment to universal service. It initiates a serious effort to develop a plan which will quickly alert us to any disruptive or deteriorating effects upon the network or universal service. The staff realistically recognizes the problems involved. Several alternatives have been proposed. We earnestly request the comments and assistance of all parties. Participation by state commissions would be most welcome.

Common Carrier
Declaratory Ruling

> Petition for declaratory ruling seeking clarification of determination which precludes states from imposing alternative regulatory schemes upon carriers to assure the continued availability of CPE to all subscribers granted to an extent and otherwise denied. Adoption of *Second Computer Inquiry*, 77 FCC 2d 384, preempts application of petitioner's proposal to any carrier subject to structural separation rules.
> *-NARUC*

FCC 83-222

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

National Association of Regulatory Utility Commissioners Petition for Declaratory Ruling that State Commissions Have Authority to Require Exchange Carriers to Provide and Maintain Basic Telephone Instruments and Associated Inside Wiring

MEMORANDUM OPINION AND ORDER

(Adopted May 12, 1983 Released May 27, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING; COMMISSIONERS FOGARTY AND JONES DISSENTING AND ISSUING STATEMENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

INTRODUCTION

1. In the *Second Computer Inquiry*,[1] this Commission determined that provision of customer premises equipment (CPE) and related installation and maintenance services were not common carrier services that exchange carriers must provide under tariff. We now have before us a Petition for Declaratory Ruling filed on December

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980) (Reconsideration Order), *further reconsideration*, 88 FCC 2d 512 (1981) (Further Reconsideration Order), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3614, 3615 (U.S. Feb 9, 10 1983) (Nos. 82-1331 & 82-1332).

17, 1982 by the National Association of Regulatory Utility Commissioners (NARUC) seeking clarification of the extent to which that determination precludes states from imposing alternative regulatory schemes upon carriers to assure the continued availability of CPE to all subscribers. In its petition NARUC proposes a specific plan to govern when and how exchange carriers would be required to provide basic telephone equipment, inside wiring and related installation and maintenance services to their subscribers. NARUC seeks a declaratory ruling that there is no conflict between Commission decisions reached in the *Second Computer Inquiry* and a state commission's adopting the NARUC plan to require exchange carriers to act as "suppliers of last resort" to their subscribers requesting basic equipment. For reasons set forth below we are authorizing state commissions to adopt a slightly modified version of the NARUC plan on an experimental basis for a period of two years, but are requiring that its application be restricted to companies not subject to the structural separation requirements now imposed upon the Bell Operating Companies in the *Second Computer Inquiry*.[2]

BACKGROUND

2. In its petition, NARUC proposes that a state utility commission be authorized to require exchange carriers operating within its jurisdiction to provide and maintain upon subscriber request basic one-line telephone instruments[3] and associated inside wiring[4] under the following terms and conditions:

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[2] Under the terms of the Modification of Final Judgment entered in United States v. American Telephone and Telegraph Co., 522 F. Supp. 131 (D.D.C. 1982), *aff'd, sub nom.* Maryland v. United States 51 U.S.L.W. 3628 (U.S. Feb. 28, 1983) (MFJ), AT&T must divest itself of all the BOCs except Cincinnati Bell Inc. (CBI) and Southern New England Telephone Company (SNET). Because of the changed circumstances created by the MFJ we recently concluded that there is no longer a need to require CBI and SNET to establish separate subsidiaries for providing CPE. *See* Motion of Cincinnati Bell Inc. for Declaratory Ruling to Remove Uncertainty of its Status Under the Commission Decisions in the Second Computer Inquiry (Docket No. 20828), FCC 83-74, released Feb. 25, 1983. The MFJ has also caused us to question whether after divestiture there will be need to require the remaining BOCs to provide CPE only through separate subsidiaries. *See* Notice of Proposed Rulemaking in Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies, CC Docket No. 83-115, FCC 83-71, released March 4, 1983. If we conclude that these structural separation requirements should no longer be imposed on the BOCs, state commissions choosing to do so could then apply the provider of last resort requirement to these companies for the prescribed period of time also.

[3] NARUC defines "basic one-line telephone instruments" to mean: the type of basic two-way switched telephone instrument which the State Commission determines is necessary to access the network and utilize basic services in nationwide telecommunications. Petition for Declaratory Ruling of the National Association of Regulatory Utility Commissioners (NARUC Petition) at n. 1.

[4] Inside wiring was explicitly excluded from the category of equipment affected by

> 1. Exchange carriers must provide basic instruments and, if deregulated, inside wiring[5] as well as related installation and maintenance services on a detariffed basis to any subscribers requesting such equipment or services;
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> 2. Regulated services may in no way subsidize the cost of providing the instruments, inside wiring and maintenance services;
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> 3. Carriers must file with their state commissions their current maximum rates for providing basic instruments;
>
> 4. Carriers must base their charges for installation and maintenance services on the terms of maintenance contracts or on the actual time expended and materials required. At a commission's discretion, however, travel expenses might be averaged, resulting in a flat charge for all premises' visits;
>
> 5. At a commission's discretion, a carrier must offer its customers the option of returning their telephones to it for repair or of requesting repair service on their premises.[6]

NARUC has asserted that without such authorization, universal service as we know it is endangered. It predicts that those dwelling in rural or economically depressed areas and those relying on party-line service may be unable to rely solely on the marketplace to provide the equipment and services they will need to be linked to the public switched network. Because its plan would neither require that the equipment be tariffed nor permit regulated service revenues to subsidize these detariffed offerings, NARUC concludes that its provider of last resort requirement is compatible with our decision that competition rather than traditional rate of return regulation should determine the availability of customer premises equipment and related maintenance services.

3. Sixteen organizations filed comments on the NARUC proposal: American Telephone and Telegraph Company and the Bell System Companies (AT&T); Communications Workers of America (CWA); Computer and Business Equipment Manufacturers Association (CBEMA); Continental Telecom, Inc. (Continental); Centel Corporation (Centel); Florida Public Service Commission (FPSC); Florida Telephone Association (FTA); GTE Telephone Companies (GTE); International Business Machines Corporation (IBM); Illinois Commerce Commission (ICC); Maine Public Utilities Commission (MPUC); Michigan Public Service Commission Staff (MPSCS); North

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the decisions reached in the Second Computer Inquiry. The Commission has taken no action in that or any other docket that would preclude states from exercising the authority over inside wiring that NARUC proposes. In CC Docket No. 79-105, we are weighing whether the public interest would be furthered by our requiring that inside wiring no longer be offered under tariff. It would, however, be premature at this time even to attempt to determine the effect of such a conclusion upon state authority to regulate how and by whom inside wiring is offered. For this reason in the remaining paragraphs of this order we discuss only the facets of the NARUC proposal relating to terminal equipment offerings.

[5] See n. 4 supra.

[6] We shall refer to these conditions collectively as the provider of last resort requirement.

American Telephone Association (NATA); United Telecommunications, Inc. (United); Vermont Department of Public Service (VDPS); and United States Independent Telephone Association (USITA). AT&T, FPSC, MPSCS and NARUC filed reply comments.[7] In their comments the state commissions and CWA urged this Commission to declare that provider of last resort requirements like those NARUC proposed were consistent with the regulatory scheme adopted in the *Second Computer Inquiry*. They echoed NARUC's concern that without such requirements party line users and those living in rural or economically depressed areas could be denied access from their homes to the public switched network and denied that the requirements conflicted with the pro-competitive policies that impelled our actions in the *Second Computer Inquiry*. In their comments, industry associations, telephone companies, and their competitors in the terminal equipment market agreed that provider of last resort requirement posed a substantial threat to the continuing development of competition in that market, albeit for different reasons. They urged this Commission to deny the NARUC petition on procedural and substantive grounds. We now consider the issues raised by these comments and respond to the question presented by the NARUC petition itself.

DISCUSSION

4. Before we consider the substantive issues raised in this proceeding, we first address the procedural issues raised by some commenting parties. FTA and GTE have joined AT&T in asserting that with respect to customer pemises equipment, the NARUC petition is, in fact, not a petition for declaratory ruling but rather an untimely petition for reconsideration of policies adopted in the *Second Computer Inquiry* and should be denied. They claim that declaratory relief is inappropriate here because NARUC presents neither new matter nor a controversy to resolve. We disagree. We note that under our rules, we may issue a declaratory ruling to resolve a controversy or to remove uncertainty. *See* 47 C.F.R. § 1.2. We conclude that in this case a declaratory ruling will remove the uncertainty surrounding whether the provider of last resort requirement NARUC proposes would be in conflict with decisions reached in the *Second Computer Inquiry*.

5. In the *Second Computer Inquiry* we did not preempt all forms of regulation of terminal equipment by the states. We preempted states' attempts to regulate terminal equipment only to the extent that they conflicted with the new regulatory scheme we adopted to replace traditional tariff regulation. That new regulatory scheme has two facets: first, the removal of traditional rate-of-return regulation over CPE and, second, the requirement that if carriers of

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[7] Detailed summaries of these comments and replies appear in Appendix A.

the Bell System choose to provide CPE, they do so through a separate corporation satisfying the structural separation requirements of Commission Rule, 64.702, 47 C.F.R. § 64.702. We explicitly reserved judgment on the legality of future attempts by the states to regulate terminal equipment in ways that they perceived to be consistent with our decisions in the *Second Computer Inquiry*, preferring to address such regulatory attempts on an *ad hoc* basis as they appeared. 84 FCC 2d at 103. NARUC has presented us with such a proposal. We must now determine whether the NARUC plan would be in conflict with the regulatory scheme that we have adopted because it appears best able to assure reasonable, efficient communications service in an evolving competitive marketplace.[8]

6. In the *Final Decision* of the *Second Computer Inquiry*, we concluded that provision of terminal equipment, including NARUC's "basic one-line telephone instruments," was not a common carrier service and should be offered separate and apart from a carrier's tariffed services. Henceforth subscribers would rely upon the marketplace to meet their CPE needs. Recognizing that this would substantially alter the way that most telephone users would obtain this equipment, we have remained determined to protect the residential subscriber from any significant temporary dislocation created by this change. To achieve this goal, in the *Final Order*, we had proposed to require that carrier-provided residential CPE continue to be offered at pre-deregulation rates that would be fixed for the life of the instrument. On reconsideration, however, we concluded that an alternative scheme could simultaneously protect residential subscribers and better advance the pro-competitive policies underlying our detariffing decision. We created a "bifurcated" transition plan under which regulatory bodies, telephone companies and, most important, subscribers could adapt to the new environment. Under the plan, we separated CPE into two categories, new and embedded. New CPE, which included all basic one-line telephone instruments acquired by a telephone company or manufactured by its affiliate after January 1, 1983, could not be offered under tariff. Carriers might continue to offer embedded CPE, which

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[8] We find it both unnecessary and inappropriate to delay issuing our ruling until a state commission actually adopts the NARUC proposal. *See* Telerent Leasing Corporation, 45 FCC 2d 204, 213 (1974), *aff'd sub nom.* North Carolina Utilities Commission v. FCC, 537 F.2d 787 (1976). We note that at least two states have already imposed a duty to provide CPE upon local carriers withing their jurisdiction. *See* Order No. 11345 in Adoption of Rule 25–4.345, Provision of CPE and inside wire maintenance. Amendment of Rule 25–4.17, Uniform System and Classification of Accounts and Rule 25.469, Maintenance of Plant and Equipment. Repeal of Rule 25–4.222, Station Connections, Fla. P.S.C. Docket No 810235-TP(RA), issued Nov. 22, 1982, and Order in Pa. PUC Docket NO. M-820334, entered Jan. 13, 1983. The Florida Commission's proposal is the subject of a Petition for Declaratory Ruling filed with this Commission by the Florida Telephone Assocation on December 22, 1982 upon which we also act today. See FCC Public Notice, Mimeo NO. 1644 released January 4, 1983.

included all basic instruments located on a customer's premises or in company inventory on January 1, 1983, under tariff until the end of the transition period.[9]

7. Parties opposing the petition assert that the NARUC plan is clearly inconsistent with the regulatory scheme adopted in the *Second Computer Inquiry*. They point to language in the orders issued in that docket indicating that carriers should have the same status in marketing CPE as that enjoyed by any other equipment vendor, including the right to select those CPE markets, if any, in which they will compete. *See, e.g.*, Comments of GTE at p. 6. We continue to believe that this is the ideal toward which we should strive, and it is an ideal with which the NARUC plan would admittedly conflict. Throughout the *Second Computer Inquiry* we also expressed our commitment to the belief that marketplace forces can ensure that ample CPE is available to all. *See, e.g., Final Decision*, 77 FCC 2d at 446; *Further Reconsideration Order*, 88 FCC 2d at 524. We continue to believe that this will prove to be the case. In the transition period during which responsibility for regulating the terms and conditions under which CPE passes from regulatory commissions to market forces, however, there may be isolated areas in which the dissolution of the traditional relationship between a local carrier and its subscribers raises the potential for selected dislocation that can readily be remedied. We have repeatedly emphasized that:

> This Commission is extremely sensitive to the need to minimize the *potential* for significant dislocations as we proceed to implement our Computer II decision. In going forward with the transition to a deregulated CPE environment, we are mindful of our statutory res[p]onsibilities to protect the interests of the communications ratepayer. (emphasis supplied).

Further Reconsideration Order, 88 FCC 2d at 524.

8. When we ordered that CPE attached to residential party-line service be deregulated, we anticipated future examination of possible network and subscriber safeguards for party line CPE. 84 FCC 2d at 70. Subsequently, however, we concluded that the benefits of further federal intervention in this area, including expansion of our Part 68 Registration Program,[10] were significantly outweighed by the concomitant administrative costs, the increased potential for harm to the network and the declining number of party-line users. See

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[9] The length of this transition period is one of the issues that was to be resolved in the proceeding begun to develop the transitional mechanisms for deregulating embedded CPE. *See* Notice of Inquiry in Porcedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, 89 FCC 2d 694 (1981).

[10] The Commission's Part 68 Registration Program, 47 C.F.R. Part 68, sets the technical and procedural standards with which vendors of terminal equipment must comply before their products may be attached to the nationwide telephone network.

Petitions seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, CC Docket No. 81–216, FCC 82–495, released November 12, 1982 (hereinafter "Party Line Order") at para. 98. We determined that standards and conditions governing the interconnection of customer provided equipment to party-line service should remain an issue to be resolved jointly by telephone companies and their state regulatory commissions. *Id.* at para. 100. Having reached this decision, we recognized that if a local carrier and its state commission have not agreed on interconnection conditions or standards and if that carrier were no longer providing CPE to new party-line subscribers or old subscribers needing additional equipment, those subscribers may be unable to satisfy their CPE needs. Concern for such subscribers and the possibility of competitive forces' inability to meet other consumers' CPE need in isolated areas cause us to conclude that we should authorize states perceiving a need to do so to impose the NARUC provider of last requirement for a period ending no later than June 30, 1985 upon carriers not subject to the structural separation requirements of Rule 64.702, 47 C.F.R. § 64.702. Thus would be but one more transitional mechanism that we are employing to protect consumers from any temporary inconveniences that accompany our continuing effort to complete the deregulation of CPE. For reasons that we shall subsequently discuss, we conclude that NARUC's provider of last resort requirement does conflict with the structural separation requirements we imposed upon Bell System Operating Companies in the *Second Computer Inquiry*. See para. 10, *infra*.

9. In their oppositions to the NARUC plan, United and NATA have attempted to compare the provider of last resort requirement to the primary instrument concept that we considered several years ago. *See Implications of the Telephone Industry's Primary Instrument Concept (PIC)*, 68 FCC 2d 1157 (1978). We find such comparisons inapposite. In the *PIC* proceeding, we rejected the idea advanced by the telephone companies that telephone service must be completed through a carrier-supplied telephone handset rather than a handset provided by an independent vendor. In *PIC* we acted to eliminate tariff provisions that would restrict consumers ability to attach non-carrier provided CPE to the network. Acceptance of the primary instrument concept would have compelled a customer, regardless of his personal preference or need, to attach at least one handset provided by his local company. In contrast, the proposal now before us would compel a carrier to provide a handset to a customer because of that customer's preference or need.

10. A more reasonable concern of parties opposing the NARUC plan is that it will permit *de facto* tariff regulation of carrier-provided CPE. Comments had been particularly critical of the requirement that companies file the maximum rates they are

currently charging to provide and maintain CPE. Parties were concerned that state regulators might interject themselves into the decision making process when a carrier concluded that it needed to raise the maximum rates. See, e.g., AT&T Comments at p. 9. We believe that requiring a telephone company to files its maximum rates for CPE with the state Commission is unlikely to offer any real benefit or protection to residential customers. It does, however create at least the potential danger that states could interject themselves into a carrier's CPE pricing decisions. Such state action would clearly conflict with our decision in the *Second Computer Inquiry* that the price of all new CPE should not be subject to regulation by the states. Concluding that the danger of such quasi-tariffing outweighs any benefit that might arise from such informational filings, we shall not permit state commissions to impose this requirement upon carriers in their capacity as providers of last resort even on a transitional basis. We also emphasize that the limited authorization we grant today should not be interpreted as permission for states to impose *de facto* tariff or "quasi-tariff" regulation upon carriers providing CPE. Moreover, because carriers may fulfill their obligations as providers of last resort by reselling the products and services of others (with prices increased to reflect their transaction costs), the requirements should not be too onerous or administratively burdensome.

11. We have already explained why we perceive no inherent conflict between the modified NARUC plan, as a transitional mechanism to be employed in the deregulation of CPE, and the first facet of our scheme. We do perceive a conflict, however, between the NARUC plan and the second facet. Under the *Second Computer Inquiry*, if a BOC (other than CBI or SNET) participates in CPE markets, all of its activities associated with the marketing and provision of such equipment and related services must be conducted through a subsidiary separate from its public utility operations. We have recognized only two narrow exceptions to this rule in order to permit BOC to offer on an unseparated basis new specialized CPE needed by handicapped persons, and CPE required by the Department of Defense. *See American Telephone and Telegraph Company*, FCC 82-580, released January 25, 1983, and *American Telephone and Telephone Company*, FCC 83-143, released April 12, 1983. Beyond this, states are clearly precluded from requiring carriers subject to structural separation requirements to provide new CPE. *Further Reconsideration Order*, at 528. Consequently we find that the regulatory scheme adopted in the *Second Computer Inquiry* preempts the application of the NARUC proposal to any carrier subject to structural separation rules.[11] This conclusion should not result in dislocation or inconvenience to the customers of the BOCs

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[11] We note that the *Second Computer Inquiry* does not preclude states from

because these companies have indicated on the record that they remain ready and able to meet their single-line subscribers CPE needs until January 1, 1984, and that after this date, American Bell Inc. will be prepared to do the same. *See* AT&T Comments at pp 5–7. We shall decide well before that date whether the divested BOCs must continue to comply with the separate subsidiary requirements of the *Second Computer Inquiry*. *See* n.2, *supra*. If we conclude that the divested BOCs need no longer comply, a state commission could then apply its provider of last resort rule to a BOC also. If we do not lift the structural separation rules from the divested BOC's, we shall revisit the need to impose some form of a provider of last resort requirement upon these companies also.

12. Parties opposing the NARUC petition have also pointed to the lack of evidence supporting NARUC's conclusion that without state authority to impose the provider of last resort requirement, universal service is endangered. Indeed available information seems to offer more support for the position of parties like Continental who assert that the market place can met subscriber needs.[12] Centel notes the favorable reaction of customers served by its Illinois and Nevada subsidiaries to those carriers' decision to restrict their participation in the CPE market. In predominantly rural Iowa, the state commission recently announced its decision that carriers must proceed to detariff embedded CPE and related services on an expedited basis. *See Iowa Commission Deregulates All Terminal Equipment As Soon As Tariffs Effective*, Telecommunications Rep., Feb. 28, 1983, at 10. Implementation of the NARUC plan under the terms we have set forth provides a reasonable transition mechanism to insure that competition will successfully replace tariff regulation.

ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 154(j), section 554(e) of the Administrative Procedures Act, 5 U.S.C. 554(e), and Commission Rule 1.2, 47 C.F.R. § 1.2, the petition of the National Association of Regulatory Utility Commissioners IS GRANTED to the extent reflected herein and is OTHERWISE DENIED.

14. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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requiring the Bell Operating Companies to modify under tariff a terminal device that a subscriber has purchased in the market place in order to make the device compatible with the local network. *See* Party Line Order at para. 100.

[12] See Further Reconsideration Order, 88 FCC 2d at 524, n.16 and 528, n.22.

Appendix A.

Comments

American Telephone and Telegraph Company (AT&T) and the Bell System Companies (BSCs)

1. According to AT&T and the BSCs, the NARUC petition is an untimely request for partial reconsideration of the *Second Computer Inquiry*. The NARUC proposal would undo a major component of *Computer Inquiry II* by authorizing extensive regulatory control over the market for single-line CPE.

2. AT&T and the BSCs assert that NARUC provides no evidence to support its claim that rural and depressed areas will not attract terminal equipment competitors. Pointing to the many existing outlets for CPE available to all, AT&T and the BSCs claim that unregulated CPE suppliers can be expected to serve customers throughout the country. They add that since the NARUC proposal would not control CPE prices, it will not increase the availability of CPE.

3. AT&T and the BSCs note that party-line service continues to decline. Moreover existing Bell Company supplies of equipment that can be used on party lines are extensive. They observe that nothing prevents state commissions and telephone companies from starting to develop party-line standards. They suggest that if the need for party-line equipment should still arise, commissions might be authorized to require a telephone company to provide customers with a list of suppliers of CPE compatible with its party-line requirements.

4. AT&T and the BSCs assert that incentives already exist for vendors to provide installation and maintenance services of high quality and availability; electricians could fill any void. They note that the NARUC proposal would do nothing to limit charges for these services.

5. According to AT&T and the BSCs, the NARUC provider of last resort requirement would continue regulation of the CPE marketplace. If telephone companies must file their current maximum rates for providing CPE and maintenance, this would give state regulators power directly or indirectly over the prices charged for CPE. The NARUC proposal would burden companies not planning to offer CPE or those allowed to do so only through a separate subsidiary. It would give state regulators control over CPE market entry and prices without imposing the obligation they bear under tariff regulation to insure that the regulated firm has the opportunity to recover costs and to earn a fair rate of return on his investment.

6. AT&T and the BSCs describe as economically unsound, the NARUC proposals to give customers the option of requiring premises visits by repair technicians and to permit state regulators to require a flat premises visit charge. They note that the NARUC proposals lack standards to determine when the provider of last resort requirement is needed and a sunset provision. They conclude that for all these reasons the petition should be rejected.

Communications Workers of America (CWA)

7. Characterizing the NARUC proposal as imposing only modest requirements on local telephone companies, CWA expressly supports the NARUC petition. CWA agrees that installation and maintenance charges should be based on maintenance contracts or time and material expended, with travel time for customer premises visits averaged to achieve a flat-rate charge for subscribers in a given franchised area. CWA shares NARUC's concern for subscribers in rural and depressed areas and residential subscribers with non-modular CPE. It finds the conditions NARUC would have imposed on a telephone company supplying CPE and inside wiring to be neither anti-competitive nor monopoly-directed. CWA urges prompt action on the petition to assure that the telephone companies have the time to maintain equipment inventories

and work forces adequate to provide the limited offerings described by NARUC. CWA finds it unlikely that the divested BOCs will seek to re-enter the CPE business, and believes that this will impose hardships on many residential users because no competition in their areas is likely. It notes that NARUC's PLR proposal is like the provider of last resort amendment in H.R. 5858, which CWA describes as "an expression of sound public policy made by a responsible entity of our Government."

Computer and Business Equipment Manufacturers Association (CBEMA)

8. CBEMA asserts that the requirements of the NARUC PLR proposal would directly conflict with policies established in the *Second Computer Inquiry*. It agrees that a declaratory ruling on the lawfulness of such state action is now appropriate to avoid the possibility of state agencies adopting such regulatory programs.

9. CBEMA notes earlier FCC findings that tariff regulation has a negative effect on competition in the CPE market generally and has caused competition to fail to develop in some market segments. Under the NARUC proposal, carrier provision of CPE would be only nominally detariffed. The PLR requirements constitute *de facto* tariff regulation and restrict a carrier's ability to respond to competitive initiatives. The proposal that one entity must provide CPE "flies in the face" of many FCC decisions to the contrary.

10. According to CBEMA, NARUC's suggestion that subscribers in rural and depressed areas need the protection of its proposal is unfounded. NARUC has not shown why the CPE marketplace will not be equally effective in serving such citizens. CBEMA claims that the NARUC proposal is unnecessary to achieve the objectives it seeks. Because such a program would also burden the competitive marketplace so much that would impede federal regulatory goals it must be preempted.

11. CBEMA asserts that the NARUC plan would not serve the public interest. The Commission should declare that adoption of this or analogous regulatory actions by state agencies would be unlawful.

Continental Telecom, Inc. (Continental)

12. The provider of last resort requirement is inconsistent with the *Second Computer Inquiry* because it would impose *de facto* state regulation on exchange carrier provision of CPE and would impair the development of a truly competitive CPE industry. Since the PLR requirement would not lower rural subscriber prices, it offers no public interest benefits. It would, however, either force an exchange carrier to enter a market in which it has concluded it cannot make a profit or would impose immeasurably higher costs on carriers that might have entered the market without the requirement.

13. NARUC Continental claims that there is no basis for NARUC's assumption that telephone companies will be able to provide equipment and services to rural subscribers at affordable prices without a subsidy if competitive suppliers cannot do so. If the marketplace can meet rural subscribers' needs, NARUC's plan is not needed; if the marketplace cannot do so, the plan is a totally ineffective substitute. Continental believes that most rural subscribers will be able to buy equipment and inside wiring by mail order, with do-it-yourself installation. Local electricians can also do installation. Continued regulation of embedded CPE during a reasonable transition period and joint ventures like that of American Bell Inc. and Sears Roebuck should protect rural subscribers.

14. According to Continental, NARUC also overstates the problems of party- line users and underestimates the ability of competitive suppliers to serve rural subscribers. Continental predicts that these suppliers can cope with problems posed by the lack of technical standards by working with telephone companies and state commissions during the transition period.

15. The provider of last resort requirement would impose substantial administrative costs on carriers complying with all the conditions in the NARUC proposal. These conditions are also unnecessary. Requiring filing of maximum rates for CPE might result in state commissions using these schedules to justify lower allowed rates of return. Requiring averaging of travel time costs subsidized customers generating above average travel time costs, an unjust and probably unlawful discrimination.

Centel Corporation

16. The Commission should deny the NARUC petition because the ruling sought would be inconsistent with a fundamental objective of the *Second Computer Inquiry*. The Commission has already considered customer service requirements in concluding that customers should obtain CPE through the competitive market. Centel states that through retail and mail order services, every market is served by multiple vendors. It notes that its customers have reacted favorably to its restricting its role as a CPE provider.

17. The Common Carrier Bureau's public notice concerning CPE deregulation recognizes that the FCC has established for telephone companies the right to compete or not to compete on an equal basis with all other vendors. The PLR requirement conflicts with this policy and would impede the transition to a fully competitive CPE market.

18. The request for the ruling concerning inside wiring is premature.

Florida Public Service Commission (PFSC)

19. The FPSC supports the NARUC petition. It finds the PLR requirement substantially similar to the primary instrument requirement it recently adopted. (Its primary instrument rules require carriers to provide CPE under tarriff for five years.) Both are justified under the universal service mandate and are consistent with the *Second Computer Inquiry*. If the FCC finds the NARUC proposal more acceptable, the FPSC would reform its primary instrument rule to conform to that proposal. It fears that the required transfer of embedded CPE from the BOCs to AT&T will thwart the safeguards of the *Second Computer Inquiry's* bifurcated transition. It notes that other carriers have already depleted their CPE inventory. Florida's large elderly population and rural customer base requires a smooth transition. The FCC should allow state commissions to require optional leasing of basic sets for at least a transitional period to provide a slow withdrawal of the safety net.

Florida Telephone Association (FTA)

20. Because there is no new matter or controversy to resolve, the FCC should dismiss the NARUC petition. The petition seeks reconsideration of decisions reached in the *Second Computer Inquiry* based upon arguments already considered and rejected by the FCC and the appellate court.

GTE Telephone Companies (GTE)

21. GTE opposes the NARUC petition. The petition is an untimely petition for reconsideration of policies adopted in the *Second Computer Inquiry* even before they have been implemented. Those parts of the petition concerning inside wiring should be treated as late-filed comments in CC Docket No. 79–105. There is no controversy or uncertainty, the FCC has expressly rejected the provider of last resort requirement in the *Second Computer Inquiry*.

22. NARUC would impose an "obligation to serve" on all telephone companies, a basic element of utility regulation. The FCC has said that carriers should have the same status in marketing CPE as any other equipment vendor. The FCC considered the situation of rural subscribers and rejected it as a basis for continuing regulation of CPE. The FCC has made clear that carriers are not required to furnish CPE, its

installation or maintenance ubiquitously. NARUC's proposal would require such ubiquitous service.

23. NARUC assumes, without demonstrating, that available inventory will not meet subscriber need for party-line equipment until necessary state commission action can be implemented.

IBM

24. The NARUC petition seeks to reopen the decision to deregulate CPE, lacks merit and should be denied. In the *Second Computer Inquiry* NARUC also opposed CPE deregulation based on its adverse impact on universal service and residential subscribers. The power NARUC seeks for state commissions is meaningful only if coupled with the power to require reasonable rates. NARUC claims not to seek the latter. The informational carrier rate filings required by the NARUC proposal could be a surrogate for a real tariff, which is clearly at odds with the *Second Computer Inquiry*.

Illinois Commerce Commission (ICC)

25. Dissolution of the relationship between telephone companies and their customers may occur before competitive suppliers of CPE, and related installation and maintenance have developed in some areas. Without commenting on the merits of the NARUC plan, ICC supports a ruling that would give state commissions the flexibility to respond with a provider of last resort plan suited to its jurisdiction. The FCC should grant the NARUC petition without prejudice to alternative plans consistent with federal policy.

Maine Public Utilities Commission (MPUC)

26. States need the authority described in the NARUC petition to protect rural subscribers without convenient sources of basic equipment and related services. The MPUC predicts that competitive equipment vendors may never serve these areas and, given the choice, many telephone companies may discontinue providing CPE, inside wiring and related repair services. While permitting competition to work where the marketplace permits, the provider of last resort requirement will protect universal service.

Michigan Public Service Commission Staff (MPSCS)

27. MPSCS supports the NARUC petition. The NARUC proposal sets forth the minimum conditions needed to insure universal, reasonable service during the transition to full deregulation of CPE. Michigan has rural areas that have not and will not for some time attract CPE vendors and in which the telephone companies wish to discontinue (at least to newcomers) services covered by the petition. New customers will thus experience delay in obtaining CPE and all customers will face repaid delays as embedded supplies are depleted. Without standard for party-line equipment, the PLR requirement is necessary because competitors will be unable to meet the existing, widely varied technical conditions that such equipment must satisfy.

North American Telephone Association (NATA)

28. According to NATA, the NARUC petition is premature. There is no factual support for NARUC's statements concerning the unavailability of CPE, inside wiring and related installation and maintenance services for subscribers in rural or depressed areas. There is evidence that it is in the carrier' interest to see that telephones remain available. Even if there are no local suppliers, mail order sales and service are available, and inside wiring can be handled by electricians. With respect to the charge for installation and maintenance, there is no evidence of the effect of a flat premises visit charge. NATA fears that this flat charge could be an incentive for cross subsidization from monopoly service revenues.

29. If the alleged problem did arise, the NARUC proposal is unlikely to solve it. Without control of the price that a carrier charges for equipment and related services, there is no guarantee of universal availability.

30. NATA opposes the petition as an attempt to dilute the FCC's policy decisions reached in the *Second Computer Inquiry*. Granting the petition would encourage other *ad hoc* exceptions to the basic competitive framework of those decisions.

United Telecommunications, Inc.

31. The NARUC petition is inconsistent with the *Second Computer Inquiry* and otherwise without merit. Under the NARUC proposal, state commissions would regulate new CPE acquired by telephone companies after January 1, 1983. The FCC has preempted such regulation. The NARUC proposal is based on the same concepts as PIC, except for its applying only at the customer's option. It is objectionable for the same reasons the FCC earlier rejected PIC. Because the bifurcated approach to CPE deregulation will protect customers, the provider of last resort requirements is unneeded.

32. The installation and maintenance requirements proposed by NARUC are inconsistent with the concept of deregulated CPE. They foreclose customer opportunity to obtain competitive maintenance from other suppliers and impose an unfair burden on local carriers trying to compete against totally unregulated vendors. The petition should be rejected.

Vermont Department of Public Service (VDPS)

33. VDPS supports the NARUC petition. It fears that unless some action is taken, party-line service will be eliminated. VDPS predicts that the option of party-line service will become even more important in the future. But without registration guidelines, non- Bell CPE cannot be connected to the network. There is insufficient assurance that without the provider of last resort requirement, party-line CPE will remain available in rural states like Vermont. The FCC should at least require telephone companies to modify CPE on request to make it suitable for party-line service.

United States Independent Telephone Association (USITA)

34. USITA opposes the NARUC request for four reasons. First, the independents intend to compete in the CPE market but have no wish to be the source of CPE when no one else is interested. Second, the request would handicap telephone companies in the competitive marketplace. Competitors could use the "no subsidy" rule to embroil local carriers in regulatory proceedings, while having to average travel time places these carriers at a competitive disadvantage in less rural, more densely populated areas. Third NARUC's concern about equipment and service unavailability is not founded in fact. By itself the telcos' pure self-interest (based on investment in telephone plant in service) would compel them to assure that their customers could find needed CPE. Finally, the powers NARUC seeks are expressly preempted by the Commission's *Computer Inquiry - II* decision; which when read with the *Telerent Leasing* and *CPE Registration* orders unquestionably establishes the principle of federal preemption in this area.

REPLY COMMENTS

American Telephone and Telegraph Company (AT&T)

35. AT&T asserts that NARUC does not support the FCC's policy to meet the public's need for CPE by opening the CPE marketplace to competition. It notes that others commenting agree that the petition is a procedurally unsound attempt to have the FCC reconsider its procompetitive policy before it has a chance to work. It also asserts that there is no evidence to support the suggestion that competing suppliers

will not serve consumers. It notes that ABI is already marketing CPE to customers in urban, suburban and remote rural areas and adds that business incentives will compel local telephone companies to offer CPE if no one else does. (p. 3)

36. According to AT&T, the NARUC proposal will not increase the availability of CPE, but will impose unnecessary burdens on exchange carriers. In particular the plan to require installation and maintenance visits on subscriber request and to bill for travel time on a flat basis is economically unsound. The petition should be rejected.

Florida Public Service Commission (FPSC)

37. The FPSC distinguishes its "optional" primary instrument plan from the mandatory primary instrument plan rejected in the past by this Commission. Since the FPSC plan was not expressly addressed in the *Second Computer Inquiry*, the FCC can find the plan consistent with the *Second Computer Inquiry* and justified on public policy grounds. It notes that no one has produced evidence of any damage resulting from the FPSC rule. It adds that the public benefits of the transitional "CPE cushion" created by its rule outweighs any alleged detriment to the *Computer II* deregulatory scheme. Restating arguments made in its earlier comments, the FPSC concludes that its rule is a rational, consistent extension of the FCC's concern for transistional continuity. The FPSC cautions that the FCC must be sensitive to avoid chilling legitimate state action with regard to CPE.

Michigan Public Service Commission (MPSC)

38. According to MPSC, because it is limited to the provision of only basic single-line instruments, the NARUC proposal would not thwart competition; it would only assure residential subscribers at least one easily accessible source for customer premises equipment. NARUC's concern is for those areas that vendors of telephone equipment will not target. The NARUC proposal would not continue CPE regulation because all new equipment would be provided on a deregulated basis, state commissions would be setting prices for no equipment and monopoly services would not subsidize the carriers' CPE business.

39. The MPSC notes that as soon as February, 1983 the embedded inventory of many Michigan telephone companies will be depleted. The MPSC questions whether the states can set standards for CPE to be attached to party lines when the FCC could not do so. It assets that a provider of last resort requirement for party line CPE is necessary when there are no likely vendors for such equipment other than the telephone company, and adds that many Michigan residents can only be served by party lines.

40. According to MPSC, the NARUC proposal is not an attempt to create incentives for customers to use telephone company CPE, but only an effort to assure that such service is available. If independent suppliers can offer that service for less, the customer should be the beneficiary. (p. 3)

41. MPSC notes that the premises visit charge covers only travel costs, not repair costs. The difference between the average cost charged and the actual cost incurred for a premises visit would be recovered from other customer premises visits. It adds that average prices are much easier to administer and would probably be preferred by most companies. The MPS believes that denying the petition will not enhance competition and granting it would not seriously jeopardize this goal and would assure universal service, a principle that the Commission must enforce and therefore with which the *Second Computer Inquiry* must be consistent. The Commission should grant the petition.

National Association of Regulatory Utility Commissioners (NARUC)

42. The NARUC asserts that ready availability of CPE posited by opponents to the NARUC petition is refuted by their suggestion that subscribers obtain CPE and

related services through mail orders. Mail order service, with the inevitably accompanying delays, is an inadequate substitute for a present vendor. During the delay in their receiving either their new or repaired CPE, subscribers depending exclusively on mail order service would be denied access to the network.

43. Those opposing a flat premises visit charge ignore its benefits and suggest only problems that need not occur. NARUC does not propose to subsidize travel costs by monopoly revenues, and emphasizes that only travel costs could be subject to the averaging requirement. NARUC finds opponents' concerns about the effect of the maximum charge list excessive and misplaced. If it would allay their fears, NARUC would amend its language to say that maximum rates changes may be filed "when the company determines them to be necessary." The lists' purpose would be solely to provide information.

44. NARUC believes that the provider of last resort option would ensure the ready availability of products and services essential to access of the telephone network. It would neither impede CPE competitors from entering any market nor would it subject the prices telephone companies charged for these services and equipment to regulation. The petition should be granted.

DISSENTING STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In Re: National Association of Regulatory Utility Commissioners Petition for Declaratory Ruling that State Commissions Have Authority to Require Exchange Carriers to Provide and Maintain Basic Telephone Instruments and Associated Inside Wiring.

The Commission's decision is a classic profile in lack of courage. And, it is wrong. Under mounting political pressure, the Commission has capitulated to previously rejected arguments. In so doing, the Commission has adopted an order which contradicts its stated policy of promoting full and fair competition in the customer premises equipment (CPE) market. To permit the States to require independent telephone companies[1] to be providers of last resort will place on the affected companies an intolerable burden. Moreover, this order will send the public the wrong signal as to whether or not the Commission really believes in its competitive policies and is willing to pursue them in the face of controversy.

In the *Final Decision* in the *Second Computer Inquiry*, this Commission made a public policy determination to deregulate CPE based on a finding that tremendous benefits would accrue to the public from a competitive marketplace.[2] In order to implement this policy and avoid the cross-subsidies and other predatory activities that could thwart competition, as well as to make available to the consumer lower-cost, more innovative CPE, we found "that a carrier should have the same regulatory status in marketing CPE as any other equipment vendor and this should be reflected in our regulatory scheme."[3] Additionally, we stated that "the separation of CPE from common carrier offerings and its resulting deregulation will provide carriers the flexibility to compete in the marketplace on the same basis as any other equipment vendor."[4] We reiterated these points on further reconsideration where we reaffirmed that "[t]he provision of new CPE is not a continuation of a common carrier public utility service. Common carrier obligations do not attach to the offering of such equipment."[5]

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[1] Although this decision at present applies only to independent companies, I anticipate that after the Commission resolves the pending Inquiry in *American Telephone and Telegraph Company*, FCC 82-580, released January 25, 1983, the rule will apply to the divested BOCs as well.

[2] *See Final Decision, Second Computer Inquiry*, 77 FCC 2d 381, 438 (1980).

It is a non-sequitur for the Commission now to conclude that the flexibility granted the States under the provider of last resort doctrine is consistent with Commission policies because that equipment would not be tariffed. Under *Computer II* all CPE vendors are to compete on an equal basis. However, under the NARUC plan only independent telephone companies would be subject to the tremendous burden of having to be the provider of last resort and would be denied the flexibility that the Commission found to be so important.[6] None of their competitors will be so burdened and constricted.

This decision has been justified on the grounds that it is transitional and that there will be no burden on the companies because they will not have to maintain an inventory. First, it is not at all clear that the decision is merely transitional. In 1985, the Commission will be subject to the same pressures to which it has surrendered in this instance. Consequently, the real possibility exists that, faced with such demands, the Commission will find sufficient "good cause" to extend the grant of permission to the States.

The burden issue is even more troubling. Some assert that there will be no requirement for the companies to maintain an inventory. Instead, they suggest that when requests are received a telephone company can simply purchase retail CPE and then resell it on a marked-up basis to a consumer. It seems odd that the Commission would encourage sale of marked-up CPE to consumers when these consumers could procure the same CPE from the same source as the telephone company but at a lower price. This is unrealistic. In order to meet their regulatory-imposed obligation, providers of last resort will have to maintain costly inventories that they would not have otherwise maintained. In all probability these telephone companies will not be reimbursed for all the costs connected with this service. This obligation will prove to be one more obstacle in the path of independent telephone companies striving to compete with their unfettered competitors. The fact that the rule may be transitory is unimportant. By the end of the first transition period, these competitors will have had two more years to devote all their resources to the development of their competitive position, while the independents will be forced to divide their resources in an uneconomic fashion—an anticompetitive result contrary to our *Computer II* policies.[7]

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[3] *Final Decision* at 446.

[4] *Final Decision* at 447.

[5] *Further Reconsideration Order, Second Computer Inquiry*, 88 FCC 2d 512, 528 (1981).

[6] *See Final Decision* at 446.

It should not be forgotten that under the NARUC plan States will be encouraged to force the independent companies to use basic services and equipment to subsidize last resort services and CPE in order to keep the rates for these services and equipment low. Otherwise, the provider of last resort concept makes no sense because it is clear that a consumer willing to pay any amount can get CPE.

The truth is that for the first time the Commission here has realized the enormity of the *Computer II* decision. Out of an abundance of fear, the Commission will signal the Congress, the courts and the public that we are not at all certain what the impact will be on the public. However, it is too late to retreat. Confusion now will result only in hampering telephone company-based competition and will encourage the reconsideration of a host of questions decided long ago. If, on the other hand, the Commission is serious about reconsidering the impact of CPE deregulation, then we should require those States that adopt the provider of last resort rule to apply it to all CPE suppliers, not only to the local exchange carriers.

If we have the courage of our convictions, we should move forward to full competition and full deregulation. This order implements no transition as suggested. In my last effort at didacticism here at the Commission, I point out that the word "transition" comes from the latin verb "transire" which means to pass over from one place to another. By the adoption of this order we are not passing over, we are retreating in full public view. A sorry precedent is established here which the Commission will come to regret.

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[7] I question the legality of the Commission's action on another ground as well. Since the Commission has declared that the provision of CPE is no longer subject to Title II of the Communications Act and that national policy requires that CPE providers not be subject to regulation, it is clear, based on *GTE Service Corp.*, that the Commission would lack authority to order carriers to provide unregulated CPE. *See GTE Service Corp. v. FCC*, 474 F.2d 724, 733 (1973). Consequently, it is uncertain in light of the Commission's abolition of regulation on national policy grounds, that the States could order carriers to provide equipment where the FCC could not. Further, in *Commercial Communications, Inc.*, the Commission struck down an Oklahoma Corporation Commission rule which would have permitted the Oklahoma Commission to determine what area or segment of the State unregulated CPE suppliers—like the independents—could serve, as well as the practices the suppliers could use. *See Commercial Communications, Inc.*, 81 FCC 2d 106 (1980). The rule that we adopt in this order would, in essence, permit the States to exercise such power, at least with respect to telephone companies.

This in all probability is the final chapter in my commentary on the evolution of competition in telephony. I think it proper, therefore, to use one last line in the FCC Reports to express my gratitude and appreciation to my staff and to the staff of the Common Carrier Bureau for their challenging assistance during my tenure on the Commission.

DISSENTING STATEMENT
OF
COMMISSIONER ANNE P. JONES

IN RE: National Association of Regulatory Commissioners Petition for Declaratory Ruling that State Commissions Have Authority to Require Exchange Carriers to Provide and Maintain Basic Telephone Instruments and Associated Inside Wiring.

I strongly dissent from the Commission's action approving the "carrier of last resort" proposal for customer premises telephone equipment. I see nothing here that shows a need for this action, and I fear that it will send an unfortunate signal that this agency is not committed to its decision to encourage development of a CPE market free from unnecessary regulatory intervention.

The majority's decision purports to be a "transitional" mechanism that will "protect" the public until the states can feel secure that CPE is widely available from sources other than the phone company. I do not believe that such a transition is necessary. It is apparent to me, if not to my colleagues, that independent sources of CPE are readily available to any telephone user. Quite apart from the fact that telephones are available in retail outlets ranging from specialty shops to supermarkets, phones also are available through catalogs to anyone who can receive mail. Thus the assumption that underlies the states' insecurity, that subscribers will not be able to obtain phones unless telephone companies are forced to supply them, is pure nonsense. Moreover, it is contrary to the specific finding made by the Commission in the *Computer II* decision "that there has now developed a strong viable market for equipment which assures users a wide range of competitive alternatives." *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II Final Decision*), 77 FCC 2d 384, 453 (1980).

The majority's decision also contradicts *Computer II* in a much broader sense. In *Computer II* the Commission attempted finally to sever the terminal equipment market from basic telephone service. It concluded that the public interest would be served best if the CPE market became fully competitive. To accomplish this, the *Computer II* rules sought to remove all unnecessary regulatory presence in that market and ensure that carriers "should have the same regulatory status in marketing CPE as any other equipment vendor .

. . " 77 FCC 2d at 446. The majority's decision backs away from that resolve.

This decision permits state regulators to reverse the business decision of a carrier not to enter the CPE market. I see no basis for believing that such regulation will produce public benefit. If a carrier has decided that it should not participate in the equipment market, presumably its decision was based on its conclusion that such participation would not be profitable. Thus, if forced by the state PUC to participate in the CPE market, contrary to its business judgment, the carrier will either offer the equipment to the customer at a price that the customer is unlikely to accept or offer it below cost and attempt to camouflage the subsidy it must derive from its other services. The "high price" option will not make telephone equipment any more available to the public and the "below cost" option is inimical to the development of a fully competitive CPE market. Neither alternative will protect the public, and the latter will surely harm it.

Because I see only negative potential in this decision, I must dissent.

Hearing, Necessity for
Ownership and Management, Integration of
Reconsideration, Petition for, Denial of
Review by Review Board

Review Board denied petitions for reconsideration and affirmed Decision granting FM broadcast application. Applicant permitted to substitute the deceased principal's son, who had been previously proposed for less than full-time integration, into the father's full-time role. Petitioners raised no new facts requiring additional hearing.
–*Peoples B/cing Corporation*
BC Docket No. 78–243

FCC 83R–33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

PEOPLES BROADCASTING CORPORATION Indianapolis, Indiana	BC Docket No. 78–243 File No. BPH-9958
RADIO CIRCLE CITY, INCORPORATED Indianapolis, Indiana	BC Docket No. 78–244 File No. BPH-10014
MEDIACOM, INC. Indianapolis, Indiana	BC Docket No. 78–245 File No. BPH-10036
RADIO CORPORATION OF INDIANA Indianapolis, Indiana	BC Docket No. 78–246 File No. BPH-10047
INDIANAPOLIS COMMUNICATIONS CORPORATION Indianapolis, Indiana	BC Docket No. 78–247 File No. BPH-10066

For Construction Permit for a
New FM Broadcast Station

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983; Released: May 3, 1983)

BY THE REVIEW BOARD:

1. In a Decision released on January 25, 1983 (FCC 83R-5, 92 FCC 2d 1255) (hereinafter "Decision"), this Board affirmed the ALJs' final choice (Initial Decision, FCC 82D-39, released May 18, 1982) (hereinafter "*ID.*") and granted the application of Peoples Broadcasting Corporation for authority to construct a new FM broadcast station to operate on Channel 300 at Indianapolis, Indiana. Now before the Board for consideration are: (a) petition for reconsideration, filed February 24, 1983, by Mediacom, Inc.; (b) petition for reconsideration, filed February 24, 1983, by Radio Corporation of Indiana (hereinafter "RCI Br."); (c) partial opposition to (a) filed March 21, 1983, by Radio Corporation of Indiana; (d) partial opposition to (b) filed March 21, 1983, by Mediacom, Inc. (hereinafter "Mediacom Opp."); (e) opposition to (a) and (b) filed March 21, 1983, by Peoples Broadcasting Corporation; (f) motion to strike portions of (d) filed March 28, 1983, by Peoples Broadcasting Corporation; (g) opposition to (f) filed April 8, 1983 by Mediacom, Inc.; (h) reply to (c) and (e) filed March 31, 1983 by Mediacom, Inc.; (i) reply to (d) filed March 31, 1983 by Radio Corporation of Indiana; (j) petition for leave to amend filed February 7, 1983 by Peoples Broadcasting Corporation; (k) opposition to (j) filed February 14, 1983 by Radio Corporation of Indiana; (1) petition for leave to amend filed January 18, 1983 by Radio Corporation of Indiana; and (m) petition for leave to amend filed April 26, 1983 by Peoples Broadcasting Corporation. For reasons that follow, the Board will deny the petitions for reconsideration and affirm its *Decision* granting the application of Peoples Broadcasting Corporation. Also, we grant the Peoples and RCI petitions for leave to amend because they timely report changes in information furnished to the Commission in compliance with 47 CFR § 1.65, and do not affect the comparative position of the applicants. Finally, although Peoples has motioned to strike portions of Mediacom opposition on technical grounds, we will deny its motion and consider Mediacom's points as decisional.

2. In their requests for reconsideration, petitioners raise arguments, most of which have been thoroughly considered and resolved by the Board. Because it is well-established that reconsideration is not available "merely for the purpose of again debating matters on which the [deciding body] has once deliberated and spoken, "*WWIZ, Inc.*, 37 FCC 685, *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), we decline to rehash the issues again. *Ad abundantiorem cautelam*, we will take the opportunity to illuminate the arguments directed to crediting Peoples with the integration of Daniel Cantor as a substitute for his deceased father. It is upon such integration credit that petitioners

aim the vortex of their fire, and it is upon such credit that this case may turn.

3. Our *Decision* (at paras. 26–31) traced the circumstances of Peoples' proposed integration model and noted that its principal owner (45.5%) and president, Joseph Cantor, had passed away in the midst of this proceeding. By operation of the *post-mortem* arrangements following the death, his son, Daniel Cantor, who was initially figured to hold a 42% interest in Peoples and to be, *inter alia*, a company director[1], came into certain of his father's interests sufficient to raise the son's current holding in the applicant to (at least) his deceased father's level, *i.e.*, 45.5%.[2] Although originally specified as a full 42% owner, Daniel Cantor was not slated—as was his father—for full-time integration into the management of the station. *I.D.*, para. 93; *Decision*, para. 31. Thus, the ALJs found that Daniel Cantor would "integrate a minimum of 30 hours per week to the proposed radio facilities and is prepared to spend up to 60–70 hours a week should his responsibilities require it." *I.D.*, para. 93. This finding was based on Daniel Cantor's testimony that he was "prepared to devote as many as 70 hours, 60 variable with need." *Decision* at n.29, *quoting* Tr. 904.[3] Whereas a 40 hour per week commitment is necessary for full-time integration credit, *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1495 (Rev. Bd. 1979), and 20 hours

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[1] *See I.D.*, paras. 85, 90.

[2] *Decision*, para. 27. Another proposed integrated owner of Peoples, Andrew C. Johnston, held a 10% interest prior to Joseph Cantor's death, *I.D.*, para. 85; but, as a result of *post-mortem* option agreements, Johnston increased his interest to 46.5%. *Decision*, para. 27. While taking reporting notice of Johnston's increase in ownership, the Board refused to raise Peoples' overall integration credit from its originally proposed 58% so as not to permit a comparative "upgrading." *Id.*, at n.30.

[3] At the time of the hearing (1979), Daniel Cantor was a 24 year old M.B.A. candidate at Indiana University. *I.D.*, para. 90. He was, however, slated even then to be assistant treasurer and a director of Peoples. *Id.* Although the value of Daniel Cantor's proposed integration was questioned at hearing on the ground that he might be too young and inexperienced to play any meaningful managerial role, *see Decision*, para. 31, we found that none of the parties specifically challenged his hourly commitment *per se*. *Id.*, at n.29.

RCI now submits that Daniel Cantor's hourly commitment was challenged, citing to "ICC Exceptions at 6, RCI Exceptions at 12 n.11." RCI Br. at n.4. We have examined those exceptions, just as we did prior to our *Decision*, and (again) find that neither exceptor factually challenged the ALJs' finding that Daniel Cantor was prepared to devote 60–70 hours per week. Parties are entitled to a "reasonable opportunity" to file exceptions to an initial decision, 5 U.S.C. § 557(c); but, "[a]ny objection [to an initial decision] not saved by exception . . . is waived," 47 CFR § 1.277(a). While ICC did contend that a grant of credit beyond 30 hours to Daniel Cantor would be gratuitous, ICC Exceptions at 6, it pointed to nothing on the record (or elsewhere) that cast doubt on Daniel Cantor's larger commitment. ICC's complaint was, therefore, hardly a cognizable exception which "point[ed] out with particularity alleged material errors in the decision . . . [or] contain[ed] specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based." 47 CFR § 1.277(a).

per week delineates part-time participation which entitles the applicant to only a slight credit, *id.* at 1495 & n.10, a 30 hour commitment is considered "substantial." *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 n.33 (Rev. Bd. 1980); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 41 (Rev. Bd. 1977) ("30 hours per week constitutes a *substantial* amount of time on a daily basis and is therefore entitled to credit") (emphasis added); *see also Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 956 (Rev. Bd. 1982) (a 30 hour commitment is entitled to "disproportionate significance" in evaluating integration credit). However, by a series of amendments filed in the fall of 1981, Peoples notified the Commission of the death of Joseph Cantor, the ownership changes indicated above, the election of Daniel Cantor to succeed his father as Peoples' president and chief executive officer, and of its intention to substitute the son as a full-time integrated owner in lieu of his father. *Decision*, para. 27.

4. Relying on a general line of Commission precedent which, in the case of the death of an applicant principal occurring during the pendency of a proceeding, permits the transfer of the deceased principal's interest to another principal so long as no comparative "upgrading" occurs,[4] the Board permitted the substitution of Daniel Cantor to allow Peoples to merely maintain its originally proposed 58% full-time integrated ownership structure.

5. On the other hand, the Board would not (1) permit Peoples to retain a 42% part-time credit for Daniel Cantor's originally proposed "substantial" integration (*see Decision* at n.30) while at the same time claiming his father's full-time position (*id.*); or (2) permit Peoples to increase its full-time integration credit above its originally proposed 58% by dint of Andrew C. Johnston's *post-mortem* increase in ownership from 10% to 46.5% (*see id.* and *supra* note 2). In this posture, then, Peoples was neither penalized in full-time credit because of the elder Cantor's death nor was it "upgraded." However, Joseph Cantor's death did degrade Peoples' integration credit somewhat: it cancelled the additional 42% part-time credit for Daniel Cantor which Peoples would have garnered had Joseph

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[4] *See Decision*, paras. 28–30, *citing Mid-Florida Television Corp.*, 76 FCC 2d 158 (1980); *Rose Broadcasting Co.*, 68 FCC 2d 1242 (1978); *Azalea Corp.*, 38 FCC 2d 95 (Rev. Bd. 1972).

In *Mid-Florida*, the latest of the so-called "death" cases, the Commission permitted two originally slated principals to acquire the interest of a principal who died while the proceeding was before the Board. Although the expired principal was specified throughout the hearing as the station's full-time manager, the Commission permitted the *post-mortem* substitution by the other principals so that the applicant could maintain its overall level of integrated ownership. 76 FCC 2d at 163. Noting that the *Mid-Florida* applicant had been degraded qualitatively with respect to its integration (a result inuring to Peoples in this case, *see infra* para. 5), the Commission allowed a different principal to claim the role of station manager and to succeed to (part of) the interest of the deceased principal without further evidentiary hearing. 76 FCC 2d at 164.

Cantor lived; and, it extinguished the additional enhancing credit Peoples would have been due for Joseph Cantor's history of civic activities in Indianapolis.[5]

6. Despite the fact the permitted substitution of Daniel Cantor for his late father did not "upgrade" Peoples pre-existing 58% full-time integration proposal, and petitioners were in no way blind-sided or prejudiced in confronting Peoples as a 58% integrated competitor, petitioners object to the posthearing substitution for several reasons. First, it is claimed that because Daniel Cantor initially proposed "a minimum of 30 hours per week," he may not be permitted to now claim a full-time role. In support, petitioners rely on *Midwest Broadcasting Co., supra.*[6] Second, petitioners submit that allowing Daniel Cantor full-time credit after the conclusion of the hearing denies them due process and the collateral right to cross-examine the son on his commitment. In that connection, petitioners go so far as to contend that even though Daniel Cantor was thoroughly cross-examined on his 30-plus hours per week commitment, *see, e.g.*, Tr. 902-906, their questioning of him might have been somehow different had that commitment been for 40 hours.[7]

7. Astonishingly, and despite their instant protests on the

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[5] The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) affords extra comparative credit for the integration of individuals who have a laudable record in the civic affairs of the proposed community of license on the logical premise that such persons already have a demonstrated commitment to the problems and activities of the very community to which the licensee must direct its attentions.

[6] RCI Br. at 6–7; Mediacom Opp. at 4. We do not view *Midwest* as squarely relevant to the question before us. It is true that in *Midwest*, which was not a "death" case, the Review Board refused to credit the part-time integration proposals of several principals who testified to a commitment of "10–20 hours per week." 70 FCC 2d at 1495 & n.11. The Board stated:

> Where the work proposals are stated in terms of a minimum and a maximum amount of time to be devoted to the station, *e.g.*, 10–20 hours per week, only the minimum or lesser amount of time will be credited, since the commitment can be met with the lesser number of hours.

Id., at n.11. Ordinarily, of course, that rule is sound. However, the operative question before the Board right now is whether, in light of the equitable imperatives of *Mid-Florida, supra* note 4 (and other "death" cases), it is reasonable to infer from the pre-existing record evidence that Daniel Cantor can and will devote the 40 hours. Whereas the principals in *Midwest* proposed their 20 hours per week as a "maximum" integration, and the variable less, Daniel Cantor stated his 30 hours as a "minimum", with a variable of 60–70 hours per week. *See I.D.*, para. 93; *Decision*, para. 31 & n.29.

[7] RCI complains: "The considerable difference in those proposals would clearly necessitate cross-examination of a substantially different nature." RCI Br. at 6. *See also* Mediacom Opp. at 8. A similar argument was made and rejected by the Commission in *Mid-Florida*. There, the parties claimed that they would have cross-examined the substitute station manager differently at hearing. 76 FCC 2d at 164. Noting that the substitute had already been examined at hearing and that nothing appeared to impair the substitute's ability to fulfill the role of the deceased principal, the Commission gainsaid the need for further hearing. *Id.*

grounds that the posthearing transposition of credit denied them their rights of cross-examination of Daniel Cantor on this matter, petitioners assert that a remand for further evidentiary hearing over this would be wasteful. Thus, RCI states:

> At this late date, four years after the hearing, it is beyond dispute that holding further evidentiary hearing would unduly disrupt this proceeding and prejudice the other applicants by requiring them to expend additional time and expense and delaying grant of the construction permit.

RCI Br. at 10. Likewise, Mediacom stipulates:

> As to the possibility of remand and reopening the record to take new evidence on these factual questions, the disruption, expense and delay of that approach is evident. No applicant has deemed such a reopening to be the best way to resolve the substitution issue, nor have the ALJs or the Review Board considered it advisable. Mediacom agrees with that assessment.

Mediacom Opp. at 5.

8. The distillation of petitioners' position is accordingly: (1) they do not allege, even in the barest form, that Daniel Cantor will not commit (at least) the 40 hours his unchallenged hearing testimony clearly purports; (2) that a remand for hearing on this question would be undesirable; and (3) that, notwithstanding (1) and (2), Daniel Cantor should not be credited for full-time integration in place of his deceased father and that Peoples should forfeit entirely the major portion of its integration because of Joseph Cantor's death. That position is inequitable, illogical, and untenable. *See generally Rose Broadcasting, supra*; *Mid-Florida Television, supra*; *Azalea Corp., supra*. We suppose that irrespective of petitioners' express disinclination, a remand on the question of Daniel Cantor's hourly commitment could be ordered just as a matter of form. As a matter of fact and as a matter of law, no further hearing is really warranted.

9. As a matter of fact, and as suggested above, petitioners did not, at hearing, seriously challenge Daniel Cantor's representation that he was "prepared to devote as many as 70 hours, 60 variable with need"; they did not, in their exceptions to the initial decision, directly challenge the ALJs' finding that the younger Cantor would "integrate a minimum of 30 hours per week to the proposed radio facilities and is prepared to spend up to 60–70 hours a week should his responsibilities require it" (*see supra* note 3); and, even to this day, petitioners do not allege by way of knowledge, information and belief, rumor, or paranatural divination that Daniel Cantor will be unable to devote, or will not devote, 40 hours weekly to station operation.

10. As a matter of law, it is important to reflect that the standard utilized in assaying an applicant's integration profile is merely whether the evidence provides "reasonable assurances" that a certain integration level will be met. *New Continental Broadcasting Co.*, 88 FCC 2d 830, 838 (Rev. Bd. 1981). And, the Commission

does not question the quantitative integration representations of an applicant's principal unless there surfaces contradictory evidence tending to impeach such representations. *See, e.g., New Continental Broadcasting Co.*, FCC 83–159, released April 13, 1983, at para. 5, *remanding on other grounds* 88 FCC 2d 830. In general also, parties to an application proceeding seeking to challenge a grant on factual grounds bear some minimal burden of demonstrating a serious factual question. *See, e.g.*, 47 U.S.C. §309(d)(1) (parties seeking to challenge a license grant must make "specific allegations of fact . . . supported by affidavit of a person or persons with personal knowledge thereof"). Once a case has been submitted, parties desirous of reopening the record for further inquiry must produce facts which are new. *See, e.g., Kern Radio Dispatch*, 29 FCC 1079, 1081 (1960), *aff'd sub nom. Kidd* v. *FCC*, 302 F.2d 873 (D.C. Cir. 1962).[8] As the courts have stated, evidentiary hearings are necessary only where there are seriously contested issues of fact, not merely inferences to be drawn therefrom. *See, e.g., Stone* v. *FCC*, 466 F.2d 316, 322–23 (D.C. Cir. 1972). Even where "[c]ontradictory allegations and affidavits . . . create some possibly unresolved factual issue[s]," an evidentiary hearing is not invariably necessitated. *Broadcast Enterprises, Inc.* v. *FCC*, 309 F.2d 483, 485 (D.C. Cir. 1968). And, "Congress intended to vest in the FCC a large discretion to avoid time consuming hearings in this [licensing] field . . .." *Southwestern Operating Co.* v. *FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965). In exercising such "discretion," the agency's judgment is "paramount." *Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 324 (D.C. Cir. 1974).

11. The instant petitions do not at all contradict Daniel Cantor's testimony quoted at *Decision*, n. 29; if anything is challenged, it is our inference that when Daniel Cantor testified that he could and would devote "70 hours, 60 variable with need," the death of his father supplied that "need." Under any ordinary circumstances, the occasion of a son stepping into his deceased father's shoes as a president of a jointly owned enterprise is, in the course of human events, quotidian. Petitioners allege nothing to suggest that the ordinary circumstances do not obtain in this case or that there is no "reasonable assurance" (*New Continental Broadcasting, supra*) that Daniel Cantor will devote, at least, the 40 hours per week he previously indicated. Conversely, we believe that any fair consideration of the evidence and the exigencies here compels an inference that Daniel Cantor is—without challenge—ready, willing, and able to devote the 40 hours per week requisite to full-time credit.

12. In view thereof, no ostensible purpose would be served by remanding this matter for hearing, a hearing petitioners avidly do

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[8] It should be borne in mind as well that parties seeking reconsideration, as do petitioners here, should demonstrate "manifest error" in the prior decision. *WWIZ, supra*, 37 FCC at 686.

not seek in any event (*see supra* para. 7). And, although petitioners conjecture that they might have examined Daniel Cantor differently at hearing had they known that he was considering full-time (40 hours) integration rather than "substantial" (30 hours) integration, *see Flint Family Radio, supra*; *Radio Greenbrier, supra*, they do not even hint at why, or how, their examination would have differed. Petitioners' suppositions in this respect transcend speculation; they are in the realm of haruspication.

13. In sum, petitioners know of nothing that would impede Daniel Cantor's 40 hour commitment and they also know that they do not want a further evidentiary hearing to test what they do not know. All petitioners know, for certain, is that they do not want Peoples to maintain its *status quo ante* by way of a consubstantial realignment occasioned by Joseph Cantor's death. We will acknowledge that the policy of allowing a posthearing substitution of one proposed integrated principal for a deceased principal is, to some extent, imperfect; it would be ideal if the world stood still while we consummated our frequently lengthy proceedings.[9] But, the ultimate result sought by petitioners under the situation at bar is as illogical as it is unjust. We continue to believe that our actions were realistic, based on reasonable inferences drawn from the pre-existing record, consistent with precedent, and manifestly more just than the relief petitioners solicit.

14. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed February 7 and April 26, 1983 by Peoples Broadcasting Corporation ARE GRANTED, and the amendments ARE ACCEPTED; and

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed January 18, 1983 by Radio Corporation of Indiana IS GRANTED, and the amendment IS ACCEPTED; and

16. IT IS FURTHER ORDERED, That the motion to strike filed March 28, 1983 by Peoples Broadcasting Corporation IS DENIED; and

17. IT IS FURTHER ORDERED, That the petitions for reconsideration filed February 24, 1983 by Mediacom, Inc. and Radio Corporation of Indiana ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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[9] This comparative licensing proceeding to replace the licensee found unfit because of, *inter alia*, political fraud in *Star Stations of Indiana*, 51 FCC 2d 95 (1975), was commenced in 1978. *I.D.*, para. 1.

Financial Qualifications
Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*Rainbow Satellite, Inc.*

FCC 83–191

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of
RAINBOW SATELLITE, INC.

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

File Nos. 1453-DSS-P/LA-82
1454-DSS-P/LA-82
1455-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released August 3, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. Rainbow Satellite, Inc. (RSI) has filed applications to construct and operate a new domestic satellite system. RSI proposes to construct three satellites. It has requested authority to launch two of those satellites. The third would be reserved as an on-ground spare. Public notice of these applications was given on May 12, 1982. Comments were filed by Advanced Business Communications, Inc. (ABCI) and American Satellite Company (ASC). For the reasons discussed below, we grant RSI's applications.

2. RSI, a newly created corporation, is owned equally by Trexar Corporation and Rainbow Communications, Inc.[1] RSI proposes to

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[1] Trexar Corporation is a publicly held corporation which is principally engaged in providing financial services and equipment leasing. Rainbow Communications, Inc. is a California corporation involved in providing telecommunications consulting and engineering services.

launch and operate two satellites in the 12/14 GHz frequency bands. Each satellite will be equipped with 16 transponders. All transponders will have a 54 MHz usable bandwidth. The satellites have a mission design life of at least 8 years. Launches of the operational satellites are scheduled for August and November 1986. RSI does not anticipate service to Alaska, Hawaii or Puerto Rico, but does request the colocation of one of its satellites with the SATCOM III-R domestic satellite at 131° West Longitude. This will allow RSI to also offer cable programming service at 12/14 GHz to those cable television systems that access the SATCOM satellite at 4/6 GHz. RSI also plans to provide business services utilizing customer-provided terminal facilities, such as voice, video, audio and data services. All RSI facilities will be offered on a non-common carrier sale or long-term lease basis.[2]

3. RSI estimates the cost of the space segments to be $217 million, with preoperational expenses of $3.79 million and first year operating costs of $2.33 million for the space segment. It believes that as a new corporation it will have to rely on debt financing. According to RSI, a number of banking and financial institutions have expressed some interest in participating in RSI's financing.

4. In its comments, ASC questions RSI's financial capabilities to construct and operate a satellite system. ASC asks that the Commission establish threshold financial criteria that must be met before an application is approved. This would include a firm funding commitment from an applicant or its parent, supported by verifiable financial statements demonstrating sufficient capacity to go forward on the commitments, or an irrevocable commitment from a financial institution. Under these criteria ASC contends that RSI is, at present, financially unqualified. In response, RSI proposes that each license be conditioned on the satellite being promptly constructed and launched. Failure to comply with this condition would result in automatic forefeiture of all outstanding authorizations for the satellite in question. This, RSI observes, will further the Commission's open entry policy by allowing smaller entities to enter the domestic satellite market. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-186, both adopted today, and we will not repeat that discussion here.[3]

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[2] RSI indicates that it does not contemplate an indiscriminate public marketing of its facilities. It does not, however, supply all the information required in Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982), to allow us to determine that such offering is consistent with that decision. Therefore, RSI must be prepared to offer its services on a common carrier basis until such time that it receives authorization to operate on a noncommon carrier basis.

[3] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz and 12/14 GHz bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domsat services. *See Report and Order, supra*. We are taking these actions to continue the opportunities for initial entry by new companies such as RSI into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all of the applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant it without the need to resort to a comparative hearing. However, we recognize that RSI has not yet been able to adequately demonstrate full financial qualifications to construct and operate its proposed system. We have also addressed this issue in today's *Report and Order, supra*, and have decided that conditioned grants, rather than denial or evidentiary hearings will better serve the public interest in the prompt and efficient supply of domestic satellite services in the future. Consequently, we will issue construction and launch authorizations to RSI conditioned on their demonstrating their full financial qualifications, as set forth in our *Report and Order, supra*, no later than December 31, 1983. In the event that RSI has not fulfilled this requirement by that date, the authorizations will automatically become null and void.

6. Accordingly, IT IS ORDERED that Application File Nos. 1453-DSS-P/LA-82, 1454-DSS-P/LA-82 and 1455-DSS-P-82 ARE GRANTED and Rainbow Satellite, Inc. IS AUTHORIZED to construct three domestic communication satellites in accordance with the terms, conditions and technical specifications set forth in its applications, and the formal instruments of authorization to be issued at a later date.

7. IT IS FURTHER ORDERED that Rainbow Satellite, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

8. IT IS FURTHER ORDERED that these authorizations will become null and void in the event Rainbow Satellite, Inc. fails to demonstrate its financial qualifications by December 31, 1983 in accordance with the policies and criteria specified in the *Report and Order*, FCC 83–184, adopted today in CC Docket No. 81–704.

9. IT IS FURTHER ORDERED that Rainbow Satellite, Inc. shall

Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

comply with all the requirements of the *Report and Order* in CC Docket No. 81-704, FCC 83-184 and *1983 Orbit Assignment Order*, FCC 83-186, both adopted today.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch (No later than)*
RSI I	July 31, 1984	June 30,1986	August 31, 1986
RSI II	November 30, 1984	September 30, 1986	November 30, 1986
RSI III	September 30, 1984	March 31, 1987	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Rainbow Satellite, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83-184, in CC Docket No. 81-704, or *1983 Orbit Assignment Order*, FCC 83-186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. Rainbow Satellite, Inc. is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on maintenance of sufficient traffic fill on the RCA American Communications satellite system. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity.
–*RCA American Communications*

FCC 83–192

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of
RCA AMERICAN COMMUNICATIONS, INC.

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis

File Nos. 1810-DSS-LA-81
604-DSS-P/LA-82
1457-DSS-P/LA-82
1458-DSS-P/LA-82
1459-DSS-P/LA-82
1460-DSS-P-82
525-DSS-ML-83

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above captioned applications submitted by RCA American Communications, Inc. (RCA Americom). The first two are requests to launch and position a fifth 4/6 GHz domestic communications satellite (File No. 1810-DSS-LA-81) and to construct, launch and position a sixth 4/6 GHz domestic communications satellite (File No. 604-DSS-P/LA-82). Public notice of these two applications was given on August 19, 1981 and January 6, 1982, respectively. We are also considering RCA Americom's

request to sell up to three additional transponders on the SATCOM IV satellite.[1] A Petition to Deny Application File No. 1810-DSS-LA-81 was filed by Western Union Telegraph Company (WUTC). Additionally, comments were filed by American Satellite Company (ASC), COMSAT General Corporation (COMSAT), Eastern Microwave, Inc. (EMI), Hughes Communications, Inc. (HCI), Satellite Syndicated Systems (SSS), and Southern Pacific Communications Company (SPCC). Petitions to deny application File No. 604-DSS-P/LA-82 were filed by WUTC and SPCC. Comments were also filed by ASC. The remaining applications are for authority to construct a three in-orbit and one ground spare 12/14 GHz domestic satellite system. Public notice of these applications was given on May 12, 1982. Comments were filed by ASC and Advanced Business Communications, Inc. (ABCI). For the reasons discussed below, we deny the petitions and grant RCA Americom's applications.

2. RCA Americom is currently authorized to operate a four in-orbit domestic satellite system in the 4/6 GHz bands. It is currently assigned the orbital positions of 83 °, 131 °, 139 ° and 143 ° West Longitude, and was also granted authority to construct two satellites as on-ground spares.[2]

3. In File No. 1810-DSS-LA-81,[3] RCA Americom has applied for authority to launch and position its on-ground spare as a fifth in-orbit satellite. It requests the 66 ° W.L. orbital location or any orbital position in the 4/6 GHz band capable of serving the 48 contiguous United States. Construction of the satellite is due to be completed in July 1983 with launch scheduled in August 1983. In application File No. 604-DSS-P/LA-82 RCA Americom has applied for authority to construct and launch a sixth in-orbit satellite. It will accept any orbital location in the 4/6 GHz band capable of serving the contiguous United States. If the Commission should adopt 2 ° or 3 ° spacing then it would like an assignment in the prime are not adjacent to another RCA satellite. Construction of the satellite is due

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[1] File No. 525-DSE-ML-83. An opposition was filed to this request by Satellite Syndicated Systems.

[2] *See* RCA Global Communications, 56 FCC 2d 660 (1975), and RCA Americom Communications, 75 FCC 2d 531 (1979) and 84 FCC 2d 633 (1981). RCA Americom was provided authority to temporarily operate its first two satellites launched during 1976 at 119 ° W.L. and 135 ° W.L. until the non-RCA satellites assigned those orbital positions in 1980 were ready to be deployed. Hughes Communications, which has been allocated the 135 ° W.L. position, will be ready for operation in June 1983. SPCC, which has been allocated the 119 ° W.L. position, will be ready for operation in February 1984. After that time, under its existing authorizations, RCA Americom would be restricted to four orbit locations. Also, RCA Americom has sold one of its four previously authorized satellites to Alascom. *See* Alascom, Inc., FCC 82T-25, released October 25, 1982.

[3] The submission assigned this file number updates the deferred portion of RCA Americom's earlier application assigned file number 1087-DSE-P/LA-80 that was treated in RCA American Communications, 84 FCC 2d 633 (1981). Our action here disposes of that deferred request for launch authorization.

to be completed in April 1986 with launch scheduled for May 1986. The design will be similar to that used for RCA Americom's fifth in-orbit and replacement satellites with the exception of several changes. It will have 24 transponders, each with a bandwidth of 36 MHz. Design changes include solid state amplifiers, more efficient antenna design, elliptic function filters, and increase in power of all transponders to 8.5 watts. This should increase the mission life from seven to ten years. The costs of constructing and launching the two satellites are estimated to be $152.8 million.

4. RCA Americom also requests authority to construct and operate three new satellites in the 12/14 GHz frequency bands and to construct a fourth 12/14 GHz satellite to be used as an on-ground spare. Each satellite will be equipped with 16 operational 20-watt transponders and four back-up transponders. All transponders will have a 54 MHz usable bandwidth. Linear cross-polarization will be employed for dual polarized reception and transmission. Ground coverage will be only of the continental United States with 38–42 dBW EIRP. RCA Americom requests assignment of orbital positions in the eastern arc to ameliorate the adverse impact of precipitation on signals in the Gulf states region. It also requests that these locations be contiguous, or nearly so, to reduce the complexity of spacecraft and system design and operation. Additionally, it would like to co-locate one of its 12/14 GHz band spacecraft with its 4/6 GHz SATCOM IV spacecraft, currently located at 83 ° W.L. The first 12/14 GHz satellite is scheduled for launch in May 1985, with the other two satellites scheduled for launch in October 1985 and May 1987. The ground spare would be available for launch by January 1988. The satellites have a nominal 10 year life span. The estimated cost of the 12/14 GHz satellite system is $393.4 million.[4] According to RCA Americom all of the transponders on the newly proposed satellites will be offered to the public on a common carrier basis. Authority is requested (File No. 525-DSS-ML-83), however, to sell up to three additional transponders on the previously authorized SATCOM IV satellite for a total of eight.[5] These are the only transponders which are currently proposed to be offered for sale on any of the previously authorized or proposed RCA Americom satellites.

5. The comments and petitions regarding these satellite applications focus on whether RCA Americom has demonstrated sufficient traffic requirements to warrant the award of the additional orbital

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[4] The financial qualifications of RCA Americom and its parent to construct, launch and operate the satellites proposed in these applications are a matter of record before the Commission and are not in question in this proceeding.

[5] RCA Americom was previously authorized to sell five transponders on the SATCOM IV satellite. *See* Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982).

position requests. Moreover, several of the parties questioned the Commission's procedures for processing domestic satellite applications if a mutually exclusive situation were to exist. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-185, both adopted today, and we will not repeat that discussion here.[6]

6. In light of the reduced spacing criteria for 4/6 GHz and 12/14 GHz adopted to day in our *Report and Order, supra*, we are able to accommodate all of the applications, including RCA Americom's, in the current processing group under our open entry policies. Because such applications may be granted without the need to resort to a comparative hearing, the only remaining issue raised by these applications is whether RCA Americom has demonstrated sufficient need to warrant these additional orbital locations.

7. In support of these applications, RCA Americom claims to have immediate foreseeable customer needs that cannot be even partially met unless the applications are granted. RCA Americom indicates that it has over 175 outstanding requests for transponder leases for its 4/6 GHz SATCOM satellites. RCA Americom also proposes to offer 12/14 GHz transponder services to a wide variety of users. These include teleconferencing, video and voice distribution to CATV and SMATV systems and DTS/DEMS services. According to RCA Americom, the technical features of these satellites are particularly attractive for these growing markets because of the dimunition of terrestrial radio frequency interference and the ability to use small earth station antennas at 12/14 GHz. To some extent, RCA Americom's traffic projections at 4/6 GHz can be based on the historical development of its services since the the SATCOM satellites were initially launched. However, we recognize that RCA Americom's traffic projections for the 12/14 GHz satellites are significantly more speculative. We also recognize that the long-lead time involved in the construction of a satellite system requires somewhat speculative assessments of the market for domestic satellite services.

8. Consequently, we have no reason at this time to disagree with RCA Americom's assessment of its future capacity needs. Nor are we in a position where we must evaluate the requirements of RCA

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[6] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83-183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83-196, resolves all issues raised by the parties relating to particular orbit assignments.

Americom vis-a-vis another applicant since we can accommodate all orbit requests pending at the time we issued our *1982 Processing Order*, 90 FCC 2d 1 (1982), with additional locations remaining for new entrants or further expansion of authorized systems. Since these satellites can be accommodated in the orbital arc without the need for comparative hearings, we will grant the necessary authorizations. However, as set forth in the *Report and Order* in CC Docket No. 81–704, we are reserving the authority to rectify any orbit use inefficiencies that might result should RCA Americom's traffic projections not materialize. Thus, if RCA Americom's projections of firm customer requirements do not materialize, we will require that any excessive spare satellites be colocated.

9. In addition, for the reasons set forth in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and our decisions in *Domestic Satellite Transponder Sales, supra* note 4, we are providing authority to RCA Americom to sell up to three additional transponders on the SATCOM IV satellite on a noncommon carrier basis.

10. Accordingly, IT IS ORDERED that Application File No. 604-DSS-P/LA-82 IS GRANTED, and RCA American Communications, Inc. is authorized to construct a sixth 4/6 GHz domestic communication satellite in accordance with the terms, conditions and technical specifications set forth in its application and the formal instrument of authorization to be issued at a later date.

11. IT IS FURTHER ORDERED that RCA American Communications, Inc. IS GRANTED authority to launch and operate two additional 4/6 GHz satellite space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

12. IT IS FURTHER ORDERED that Application File Nos. 1457–1459-DSS-P/LA-82, and 1460-DSS-P-82 ARE GRANTED and RCA American Communications, Inc. is authorized to construct four 12/14 GHz space stations in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

13. IT IS FURTHER ORDERED that RCA American Communications, Inc., IS GRANTED authority to launch and operate three 12/14 GHz space stations in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

14. IT IS FURTHER ORDERED that RCA American Communications, Inc., shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, as well as the terms and conditions of all other previous orders and authorizations.

15. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not

constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorizations, and no later than the following dates specified in the applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch no later than*
SATCOM II R	* * *	July 31, 1983	August 31, 1983
SATCOM VI	November 30, 1983	April 30, 1986	May 31, 1986
12/14 GHz I	January 31, 1983	February 28, 1985	May 31, 1985
12/14 GHz II	January 31, 1983	July 31, 1985	January 31, 1986
12/14 GHz III	January 31, 1985	February 28, 1987	August 31, 1987
12.14 GHz IV	February 28, 1985	January 31, 1988	(ground spare)

16. IT IS FURTHER ORDERED that RCA American Communications, Inc. **IS AUTHORIZED** to sell up to three additional transponders on its SATCOM IV satellite as proposed in its application and in accordance with the policies articulated in *Domestic Fixed Transponder Sales*, 90 FCC 2d 1238 (1982).

17. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to RCA American Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83-184, in CC Docket No. 81-704, or *1983 Orbit Assignment Order*, FCC 83-186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

18. IT IS FURTHER ORDERED that the Petitions to Deny filed by Southern Pacific Communications and Western Union Telegraph Company ARE DENIED.

19. RCA American Communications, Inc. is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on maintenance of sufficient traffic fill on the SBS satellite system. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
> –*Satellite Business Systems*

FCC 83–193

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of
SATELLITE BUSINESS SYSTEMS

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

File Nos. 1461-DSS-LA-82
1462-DSS-P/LA-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1.+mThe Commission is considering the above-captioned applications filed by Satellite Business Systems (SBS) to launch a fourth domestic satellite, and to construct and launch a fifth satellite. Public notice of these applications was given on May 12, 1982. Comments were filed by American Satellite Company and Advanced Business Communications, Inc. For the reasons discussed below, we grant SBS' applications.

2. SBS is a partnership of wholly owned subsidiaries of COMSAT General Corporation, International Business Machines Corporation and Aetna Casualty Insurance Company. In 1977, the Commission authorized SBS to construct a domestic satellite system consisting of two in-orbit satellites and one on-ground spare.[1] Subsequently,

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[1] Satellite Business Systems, 62 FCC 2d 997 (1977), *aff'd sub nom* United States v. Federal Communications Commission, 652 F.2d 72 (D.C. Cir. 1980).

launch authority was provided for a third in-orbit satellite[2], and construction authority was provided for a fourth satellite to be used as an on-ground spare.[3] The SBS satellites all operate in the 12/14 GHz bands and presently occupy the orbital positions of 100 °, 97 ° and 94 ° West Longitude. Each satellite contains ten 43 MHz transponders. The SBS satellites have been designed to provide communications services within the contiguous United States. Each of these spacecraft are designed for an operational life of at least seven years. SBS has been offering service on a common carrier basis since March 1981, and now provides voice, data, facsimile and video teleconferencing services to various business and governmental organizations on a tariffed basis.

3. In Application File No. 1461-DSS-LA-82, SBS requests authority to launch and operate its on-ground spare, which is currently under construction, as a fourth in-orbit satellite. The technical characteristics of this satellite are identical to those of SBS' existing three satellites. This satellite is scheduled to be launched in July 1984. In Application File No. 1462-DSS-P/LA-82, SBS requests authority to construct, launch and operate a fifth in-orbit satellite for service beginning by the first quarter of 1986.[4] SBS proposes several design modifications for this fifth satellites. In particular, SBS proposes to add four wideband transponders (110 MHZ bandwidth, with 120 Mbps transmission capacity) transmitting in a vertical polarization through a dual-polarized antenna subsystem, with spare TWTA's to ensure redundancy and reliability, larger fuel storage tanks to permit a 10 year satellite lifetime and an upgraded electrical battery subsystem, utilizing advanced nickel cadmium battery design. SBS estimates the costs of constructing and launching SBS-4 and SBS-5 at $50 million and $60 million, respectively. Annual segment operating costs range between $2.2 and $4 - 8 million.[5] With slight relocations of existing SBS satellites in orbit and the assignment of 92 ° and 96 ° West Longitude to these new satellites, SBS requests five contiguous orbit positions so that it could operate its satellites satisfactorily with only 2 ° orbital separations.

4. The comments question SBS' need for a fourth and fifth

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[2] *See* Satellite Business Systems, FCC 82–489 released November 10, 1982.

[3] Satellite Business Systems, FCC 81–464 released October 5, 1981.

[4] GSAT believes that the SBS amendment to add transponders constitutes a major change, and therefore cannot be considered within the processing group established by Domestic Fixed Satellite Service, 90 FCC 2d 1, (1982). As explained in our *Report and Order* adopted today in CC Docket No. 81–704, FCC 83–184, we find GSAT's position unpersuasive since no new frequency bands or orbital locations are requested.

[5] SBS' financial, legal and technical qualifications to launch and operate communications satellites are matters of record before the Commission, and are not at issue in this proceeding.

orbital location. Parties believe that SBS provided insufficient evidence to substantiate its growth projections.[6] They further argue that the design of SBS' satellites is out-moded and inefficient. With only ten transponders of 43 MHz bandwidth, it is claimed that the fourth satellite should remain as an on-ground spare. The parties also inquire whether the proposed number of spare transponders in the SBS system is excessive. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, both adopted today, and we will not repeat that discussion here.[7]

5. SBS believes that its customer requirements dictate the need for these additional satellites. Furthermore, it believes that it should be allowed to launch its present on-ground spare even though it is not at the vanguard of technological innovation in satellite design. SBS points out that the constant evolution of satellite technology makes it impossible to have each satellites design at the cutting edge of technology. SBS does indicate, however, its intention to improve the efficiency of the design of its proposed fifth satellite. Finally, SBS asserts that its spare transponder plan is not excessive. It has one back up for each operating channel frequency regardless of the number of satellites on which the frequency is being reused. Such reliability is considered crucial to its marketing plans.

6. As a result of our decisions in today's *Report and Order*, *supra*, to reduce orbital spacings in the 12/14 GHz bands, all of the applications in the current processing group can be accommodated under our open entry policies for licensing domestic satellites. Nevertheless, we are somewhat concerned about the relatively low level of utilization presently being made of the three SBS satellites currently in orbit as reflected in data submitted to the Commission. SBS has, however, submitted projections of required transponder capacity that would indicate the need for additional satellites between 1984 and 1986. We recognize that, because of the lead time involved, it is necessary to plan as much as three years into the future if a carrier is to meet its customer requirements at such later dates. We are also concerned about the efficient use of limited orbital

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[6] They point to our 1980 Orbit Assignment Order, 84 FCC 2d 584, 603 (1980), as the appropriate standard.

[7] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

locations by SBS satellites. However, we recognize some of its limitations in improving a satellite design developed a number of years ago and take note of the increased capacity of the SBS-5 modified design.

7. Consequently, we have no reason at this time to disagree with SBS' assessment of its future capacity needs and satellite design and operating decisions. Nor are we in a position where we must evaluate the requirements of SBS vis-a-vis another applicant since we can accommodate all orbit requests pending at the time we issued our *1982 Processing Order*, 90 FCC 2d 1 (1982). Consequently, since these satellites can be accommodated in the orbital arc without the need for comparative hearings, we are going to grant SBS the necessary authorizations to expand its system to five in-orbit satellites. However, as set forth in the *Report and Order*, *supra*, we are reserving the authority to rectify any orbit use inefficiencies that might result should SBS's traffic projections not materialize. Thus, if SBS' projections of firm customer requirements do not materialize, we will require that any excess spare satellites be colocated.

8. Accordingly, IT IS ORDERED that Application File No. 1462-DSS-P/LA-82 ARE GRANTED, and Satellite Business Systems IS AUTHORIZED to construct a fifth domestic communication satellite in accordance with the terms, conditions and technical specifications set forth in its application and the formal instrument of authorization to be issued at a later date.

IT IS FURTHER ORDERED that Satellite Business Systems IS GRANTED authority to launch and operate a fourth and fifth 12/14 GHz satellite space station in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83-186, adopted today.

10. IT IS FURTHER ORDERED that Satellite Business Systems shall comply with all the requirements of the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-186, both adopted today, well as the terms and conditions of all other previous orders and authorizations.

11. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorization for an in-orbit satellite shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in applications for these facilities:

	Construction Commenced	*Construction Completed*	*Launch no later than*
SBS IV	* * *	April 30, 1984	September 30, 1984
SBS V	June 30, 1983	February 28, 1986	June 30, 1986

12. IT IS FURTHER ORDERED that the temporary assignment

of any orbital location to Satellite Business Systems is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

13. Satellite Business Systems is afforded thirty days from the date of release of our *Report and Order* to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Applicant, Financial Qualification
FCC Forms,
Financial Qualifications

> Commission overturned Bureau policy which allowed applicants filing the 1977 version of Form 301 to certify their financial qualifications after being designated for hearing, if they had not demonstrated those qualifications under the old form. Hearing applicants which took advantage of this policy must now show their compliance with standards of old form or have financial issues specified against them.
> –*South Florida B/cing Co. Inc.*
> BC Docket No. 82–731

FCC 83–265

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

SOUTH FLORIDA BROADCASTING COMPANY INC. North Miami, Florida	BC Docket No. 82–731 File No. BPH-810427AJ
UNITY BROADCASTING NETWORK-FLORIDA INC Miami, Florida	BC Docket No. 82–732 File No. BPH-810427AL
RADIOCENTRO BROADCASTING COMPANY Miami, Florida	BC Docket No. 82–733 File No. BPH-810630AJ
FIRST BLACK BROADCASTERS OF MIAMI, INC. Miami, Florida	BC Docket No. 82–734 File No. BPH-810630AK
CONSTANCE J. WODLINGER Miramar, Florida	BC Docket No. 82–736 File No. BPH-810630AT
ONYX BROADCASTING OF MIAMI, INC Miami, Florida	BC Docket No. 82–737 File No. BPH-

	810701AC
Rana Broadcasting Company, Inc. Liberty City, Florida	BC Docket No. 82-738 File No. BPH-810701AE
William H. Hernstadt North Miami Beach, Florida	BC Docket No. 82-741 File No. BPH-810701AK
Southwest Radio Enterprises, Inc. North Miami Beach, Florida	BC Docket No. 82-742 File No. BPH-810701AN
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

(Adopted: May 26, 1983 : Released: June 2, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

1. In our *Revision of Form 301*,[1] we simplified FCC Form 301 for applicants seeking authority to construct and operate new broadcast stations. The new form became effective on December 2, 1981. Prior to that date, applicants for new broadcast stations utilized the 1977 version of the form. The old form required a broadcast applicant to give a detailed itemization of projected expenditures and sources of funds and to provide various documents demonstrating the availability of funds, so that the staff could determine whether the applicant was financially qualified. The new form contains two questions in Section III of the form which are to be answered by filling in "yes" or "no" blocks. Essentially, the form allows the applicant to certify as to whether it has available sufficient funds to construct and operate its proposed station. Thus, an applicant can now certify to its financial qualifications without filing supporting documentation, even though the form states that the applicant must be prepared to make such documentation available to the Commission upon request.

2. In *Minority Broadcasters of East St. Louis, Inc. et al. (East St. Louis)*,[2] the Chief, Broadcast Bureau, issued a Hearing Designation Order in which he noted that the financial certification process was adopted to expedite application processing and that, in the interest of fairness, all applicants should be held to the same standard. Thus,

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[1] 50 RR 2d 381 (1981).

[2] Mimeo No. BC 5092, released July 15, 1982.

the Bureau concluded that applicants filing on the "old" form should be allowed to certify their financial qualifications within 30 days of being designated for hearing if they had not demonstrated their financial qualifications on the old form. The *East St. Louis* Order also provided that, if an applicant cannot certify to its financial qualifications within the stated 30-day period, the Administrative Law Judge must specify an appropriate financial issue against the applicant.

3. We now have before us: (a) an Application for Review of the Hearing Designation Order[3] in this proceeding filed November 12, 1982, by South Florida Broadcasting Company, Inc. (South Florida); and (b) oppositions to that Application for Review filed by Constance J. Wodlinger, Unity Broadcasting Network-Florida, Inc. and the Chief, Broadcast Bureau. Since we shall grant most of the basic relief sought by South Florida, we shall not recite all of its arguments or the counter arguments of its opponents. Basically, South Florida alleges that the Bureau, in following its *East St. Louis* policy, exceeded its delegated authority and improperly changed the Commission's financial qualifications standards for broadcast applicants. South Florida contends that several competing applicants in this proceeding who did not comply with the financial standards of the "old" form should not be permitted to amend their applications by certification and thereby avoid any effective examination of their financial qualifications.

4. Further, South Florida observes that the Commission's opinion in *Mid-Ohio Communications, Inc. (Mid-Ohio)*[4] is in direct conflict with the *East St. Louis* policy. In designating two competing applications for hearing in *Mid-Ohio*, the Commission noted that the original financial showing provided by Metro Broadcasting, Inc. (Metro) had failed to establish its financial qualifications. Although Metro amended its application prior to being placed in hearing to certify its financial qualifications, it did not submit any supporting documentation or specify any changes in its financial proposal. We determined that the certification did not obviate the need to specify a financial issue against Metro, stating:

> "Because the only information on file indicates that Metro is not financially qualified, and because it has not stated that its financial plan has been amended, we cannot credit its certification.[5]

5. The Broadcast Bureau and two of the applicants in this proceeding who were afforded the opportunity of certifying their financial qualifications after being designated for hearing pursuant to the *East St. Louis* policy oppose the foregoing Application for

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[3] Mimeo BC 572, released November 3, 1982.

[4] 90 FCC 2d 114, 121, released June 1, 1982.

[5] *Id.*, at 121 n.9

Review. They allege that the *East St. Louis* policy has not changed the requirement that broadcast applicants be financially qualified, does not amount to an improper revision of the Commission's financial qualifications standards, and does not favor one applicant over any other applicant because the policy's benefits are available to all applicants.

6. We have determined that the *East St. Louis* policy misapplies the certification procedure in a manner inconsistent with its intent. The *Report and Order* instituting the certification procedure makes it clear that the Commission's substantive financial standards have not been changed in that all applicants must be capable of constructing and operating their proposed stations for three months.[6] Thus, when an applicant submits insufficient information to demonstrate its financial qualifications, a substantive and material question of fact arises. The subsequent submission of a certification by the applicant is not sufficient to resolve the factual issue the applicant itself has raised by its prior submission of specific and inconsistent information. Under these circumstances, the certification underlines the question rather than erases it. *See* 47 U.S.C. § 309(e).

7. For these reasons, we grant review and overturn the *East St. Louis* policy. Further, we hereby require all broadcast applicants who are currently prosecuting their applications in hearing proceedings and who initially utilized the 1977 version of Form 301 but subsequently established their financial qualifications pursuant to the new certification procedure, to make the full documentary showing specified in the "old" form within 30 days of the release of this Memorandum Opinion and Order.[7] Although we realize that this requirement will affect not only those applicants who were allowed to certify to their financial qualifications after being designated for hearing pursuant to the *East St. Louis* policy, but also applicants who took advantage of the certification procedure prior to being designated for hearing, it would be unfair and inappropriate to treat these two categories of broadcast applicants in different ways.[8] If an applicant affected by this ruling fails to demonstrate its financial qualifications in accordance with the former requirements within 30 days,[9] the presiding officer shall specify an appropriate

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[6] 50 RR 2d 381, 382 (1981).

[7] *See Mid-Ohio Communications, Inc. supra.*

[8] Although our decision in this case involves only applicantions filed on Form 301, the determination reached here would apply equally to hearing proceedings involving applications filed on any other form, *e.g.*, Form 340 for noncommercial educational broadcast stations, where a question concerning an applicant's financial qualifications has arisen under similar circumstances.

[9] We hereby grant presiding officers authority to grant extensions of the 30-day period, as appropriate, for good cause shown.

financial issue or issues against the applicant.[10]

8. ACCORDINGLY, IT IS ORDERED, That the Application for Review of the Hearing Designation Order[11] in this proceeding filed November 12, 1982, by South Florida Broadcasting Company, Inc. IS GRANTED to the extent indicated in this Memorandum Opinion and Order and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[10] Although South Florida requests immediate specification of such issues, we believe the better procedure is to allow a reasonable period for submission of necessary information, in light of the fact that many applicants have previously relied upon the *East St. Louis* policy in good faith.

[11] Mimeo BC 572, released November 3, 1982.

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

Application to construct and launch an additional space station in Domestic Fixed Satellite Service granted to meet licensees current traffic projections. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
–*S. Pacific Communications Co.*

FCC 83–194

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of SOUTHERN PACIFIC COMMUNICATIONS COMPANY For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis	File Nos. 25-DSS-LA-82 26-DSS-P-82 996-DSS-MP/ML-(4)-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned applications filed by Southern Pacific Communications Company (SPCC)[1] to launch its ground spare as a third in-orbit satellite and to construct a fourth satellite to be used as a ground spare. Public notice of these applications was given on November 21, 1982. A petition to deny the applications was filed by Western Union Telegraph Company (Western Union), and comments were filed by American Satellite Company (ASC), COMSAT General Corporation (COMSAT), RCA

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[1] In 1982, SPCC created a separate subsidiary to hold its domestic satellite radio authorizations known as Southern Pacific Satellite Company (SPSC). Its pending applications were not, however, transferred to the new entity, but were retained by the original applicant, SPCC.

American Communications (RCA Americom) and Satellite Syndicated Systems (SSS).[2] For the reasons discussed below, we deny this petition and grant SPCC's applications.

2. In 1980 SPCC was authorized to construct three domestic communications satellites and to launch and operate two in the geostationary orbit.[3] The first two satellites of this system are scheduled to go into service in 1984. Each of these "Spacenet" satellites, including the current ground spare and the proposed fourth satellite, employs a "hybrid" design. The SPCC satellites contain 12 narrowband (36 MHz) transponders and 6 wideband (72 MHz) transponders operating in the 4/6 GHz bands, and 6 wideband (72 MHz) transponders operating in the 12/14 GHz bands. The satellites are capable of serving the 48 contiguous states with coupled spot beam coverage of Alaska and Hawaii at 4/6 GHz, with coverage of only 48 contiguous states at 12/14 GHz. The satellites have a 7 year minimum lifetime. The projected investment costs for the entire SPCC four satellite system is $302 million.[4]

3. SPCC expects construction to be completed by December 31, 1984 for Spacenet III and June 30, 1985 for Spacenet IV. Spacenet III is scheduled for launch during February 1985. It requests authority to sell ten transponders on a noncommon carrier basis on Spacenet III in accordance with its application for modification of license filed March 15, 1982 (File No. 996-DSS-MP/ML-(4)-82) and the amendment to that application filed July 23, 1982. SPCC requests an orbital position capable of serving all 50 states so that it can meet its increased internal service requirements for its Hawaiian customers.

4. Western Union and RCA Americom argue in their pleadings that SPCC has failed to demonstrate a sufficient need for an additional orbital location. In response, SPCC indicates that all of the transponders on Spacenet I, II and III have been committed for customer use. Therefore, it has ceased to actively pursue additional customers. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-185, both adopted today, and we will not repeat that discussion here.[5]

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[2] We are also considering the applicant's previously deferred request to sell transponders on its third in-orbit satellite on a noncommon carrier basis. *See* Southern Pacific Satellite Company, FCC 82-512, released November 29, 1982. Petitions to deny applicant's request to sell these transponders in File No. 996-DSS-MP/ML-(4) -82 were filed by Wold Communications, Inc. and Satellite Syndicated System.

[3] Southern Pacific Communications Company, 84 FCC 2d 650 (1981).

[4] The applicant's financial qualifications to undertake this project are a matter of record before the Commission, and are not questioned by any party.

[5] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz and 12/14 GHz bands so that additional satellites might be accomodated in orbit to satisfy growing demands for domestic satellite services. As a result of these reduced spacing criteria, we are now able to accommodate all such applications in the current processing group under our open entry policies for licensing domestic satellites. Thus, we are able to grant them without the need to resort to a comparative hearing. As such, the only issue raised by these applications is whether SPCC has demonstrated sufficient need to warrant an additional orbit location.[6] SPCC claims that all of the transponders on the SPACENET I, II and III satellites are essentially committed. Moreover, SPCC projects by 1983 significant increases in internal requirements as well as increased outside demand. We believe that in light of SPCC's successful marketing efforts, a third orbit position is presently warranted to satisfy expected demand for SPCC transponders. Moreover, we reserve authority to require colocation of the company's satellites to reduce or eliminate excess spare capacity if these representations are not fulfilled. Also, in accordance with the criteria set forth in our *Report and Order*, FCC 83–184, adopted today, and in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), we are providing SPCC with authority to sell up to ten transponders on the SPACENET III satellite on a noncommon carrier basis.[7]

6. Accordingly, IT IS ORDERED that Application File No. 25-DSS-LA-82 IS GRANTED and Southern Pacific Communications Company IS AUTHORIZED to launch and operate its previously authorized ground spare satellite in the domestic Fixed-Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

7. IT IS FURTHER ORDERED that Application File No. 26-DSS-P-82 IS GRANTED and Southern Pacific Communications Company IS AUTHORIZED to construct a new domestic communications

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Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

[6] On October 26, 1982, GTE Corporation and Southern Pacific Company applied for Commission consent to the transfer of control of SPCC and SPSC to GTE. This order addresses only the question as to whether SPCC should be authorized to launch a third in-orbit satellite and to construct a fourth. Any issues raised by the GTE acquisition of SPCC and SPSC will be dealt with in the appropriate proceeding, and this action is without prejudice to any action we may take on those applications.

[7] As specified by SPCC in their application, this includes up to eight 72 MHz transponders.

satellite to be used as an on-ground spare in accordance with the terms, conditions and technical specifications set forth in its application and the formal instrument of authorization to be issued at a later date.

8. **IT IS FURTHER ORDERED** that Southern Pacific Satellite Company shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *1983 Orbit Assignment Order*, FCC 83–186, as well as the terms and conditions of all other previous orders and authorizations.

9. **IT IS FURTHER ORDERED** that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in applications for these facilities:

	Construction Completed	*Launch no later than*
Spacenet III	December 3, 1984	March 1, 1985
Spacenet IV	June 30, 1985	(ground spare)

10. **IT IS FURTHER ORDERED** that Southern Pacific Satellite Company **IS AUTHORIZED** to sell up to ten (10) transponders on the SPACENET III satellite as proposed in its application and in accordance with the policies articulated in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

11. **IT IS FURTHER ORDERED** that the temporary assignment of any orbital location to Southern Pacific Communications Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbital spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. **IT IS FURTHER ORDERED** that the Petitions to Deny filed by Western Union Telegraph Company, Wold Communications, Inc. and Satellite Syndicated Systems ARE DENIED.

13. Southern Pacific Communications Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to

decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Financial Qualifications
Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> Applications to construct and launch space stations in Domestic Fixed Satellite Service granted conditioned on demonstration of firm financial qualifications. Proposal consistent with Commission's policies and serves the public interest, convenience and necessity.
> –*U.S. Satellite Systems, Inc.*

FCC 83–195

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of
UNITED STATES SATELLITE SYSTEMS, INC.

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

File Nos. 448-DSS-P/LA-82
449-DSS-P/LA-82
450-DSS-P-82

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned applications filed by United States Satellite Systems, Inc. (USSSI) to construct and operate a new domestic satellite system. USSSI proposes to construct three satellites. Two would be launched and operated in orbit and the third reserved as an on-ground spare. Public notice of these applications was given on December 16, 1981. A Petition to Deny the applications was filed by American Satellite Company (ASC) and comments were filed by Satellite Business Systems (SBS). For the reasons discussed below, we deny the petition and grant USSSI's applications.

2. USSSI is a newly formed corporation created for the purpose of constructing, launching and operating the above-captioned satellite system. It proposes to operate this satellite system (the USAT system) in the 12/14 GHz frequency bands. Each satellite will be equipped with twenty transponders, each with a usable bandwidth of

43 MHz. Ten of the USAT transponders on each spacecraft are designed for complete coverage of the 48 contiguous states, Alaska and Hawaii. USSSI proposes to launch its first satellite in October 1985. The other ten transponders are designed to provide regional and spot beam coverage reaching all of the contiguous 48 states, Alaska and Hawaii. The satellites will be designed for a planned orbit life of eight years.

3. USSSI intends to serve a diverse group of users including such major traffic categories as data communications services, telephony transmission, video conferencing and program distribution services. The company plans to offer service on a common carrier basis but reserves the possibility of engaging in transponder sales.[1] USSSI estimates the cost of its system to be $222 million, with first year operating costs of $8.1 million for the space segment. It has received a $20 million line of credit, and has entered into an agreement with Wang Laboratories to acquire up to 10 percent of USSSI's stock.[2]

4. The comments regarding the USSSI applications generally center on whether USSSI is financially and technically qualified to own and operate a domestic satellite system. ASC and SBS both assert that USSSI has failed to meet the burden imposed by the Commission regarding financial qualifications. More persuasive financial information, as well as operating and marketing plans according to ASC, needs to be submitted before scarce orbit locations are assigned to USSSI. USSSI responds that there is no statutory requirement for a particular measure of financial strength. Marketplace forces, rather than governmental judgments, should be the primary test of capital investment. Thus, USSSI believes that the Commission should grant it a construction permit and simply make it contingent upon commencing construction by a certain date. According to USSSI, personnel possessing the necessary technical and marketing skills are readily available and will be hired at the appropriate time. Other issues raised with respect to this proposal and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-186, both adopted today, and we will not repeat that discussion here.[3]

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[1] USSSI states that it has entered into agreements with NCR Telecommunications Services, Inc. and Wang Laboratories concerning their rights to purchase transponders at a future time. However, USSSI has not yet submitted the information specified in Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982). Therefore, USSSI must be prepared to offer its services on a common carrier basis until such time that it receives authorization to operate on a noncommon carrier basis.

[2] *See* Supplemental Information submitted by letters dated October 26, 1982 and April 20, 1983. Wang and USSSI have also entered into a technical cooperation agreement between the two companies. *See* letter from USSSI to the Commission dated November 24, 1982.

5. In related actions taken today, we have reduced orbital spacings between domestic satellites in the 4/6 GHz and 12/14 GHz bands so that additional satellites might be accommodated in orbit to satisfy growing demands for domestic satellite services. *See Report and Order, supra.* We are taking these actions to continue the opportunities for initial entry by new companies such as USSSI into the domestic satellite market, as well as to provide for the expansion of existing systems already in place. Under these new criteria, we are able to grant all applications in the current processing group under our open entry domestic satellite licensing policies. Thus, we are able to grant it without the need to resort to a comparative hearing. However, despite the progress made by USSSI in establishing the financial base for its proposed system, we must also recognize that USSSI has not yet been able to adequately demonstrate full financial qualifications to construct and operate its proposed system. We have also addressed this issue in today's *Report and Order, supra*, and have decided that conditioned grants, rather than denial or evidentiary hearings, will better serve the public interest in the prompt and efficient supply of domestic satellite services in the future. Consequently, we will issue construction and launch authorizations to USSSI conditioned on their demonstrating their full financial qualifications, as set forth in our *Report and Order, supra*, no later than December 31, 1983. In the event that USSSI has not fulfilled this requirement by that date, the authorizations will automatically become null and void.

6. Accordingly, IT IS ORDERED that Application File Nos. 448-DSS-P/LA-82, 449-DSS-P/LA-82 and 450-DSS-P-82 ARE GRANTED and United States Satellite Systems, Inc. IS AUTHORIZED to construct three domestic communications satellites in accordance with the terms, conditions and technical specifications set forth in its applications and the formal instruments of authorization to be issued at a later date.

7. IT IS FURTHER ORDERED that United States Satellite Systems, Inc. IS AUTHORIZED to launch and operate two space stations in the domestic Fixed Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83–186, adopted today.

8. IT IS FURTHER ORDERED that these authorizations shall become null and void in the event United States Satellite Systems, Inc. fails to demonstrate its financial qualifications by December 31,

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[3] We believe that this decision, along with our decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83–183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83–196, resolves all issues raised by the parties relating to particular orbit assignments.

1983 in accordance with the policies and criteria specified in the *Report and Order*, FCC 83–184, adopted today in CC Docket No. 81–704.

9. IT IS FURTHER ORDERED that United States Satellite Systems, Inc. shall comply with all the requirements of the *Report and Order* in CC Docket No. 81–704, FCC 83–184, and *Memorandum Opinion and Order*, FCC 83–186, both adopted today.

10. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, each of these authorizations shall become null and void in the event the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization, and no later than the following dates specified in the applications for these facilities:[4]

	Construction Commenced	*Construction Completed*	*Launch (no later than)*
USAT I	July 15, 1983	November 15, 1983	February 15, 1984
USAT II	January 15, 1984	May 15, 1986	August 15, 1986
USAT III	July 15, 1984	November 15, 1986	(ground spare)

11. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to United States Satellite Systems, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbital spectrum. Such a change may be ordered *inter alia* to implement uniform 2 ° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83–184, in CC Docket No. 81–704, or *1983 Orbit Assignment Order*, FCC 83–186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

12. IT IS FURTHER ORDERED that the Petition to Deny filed by American Satellite Company IS DENIED.

13. United States Satellite Systems, Inc is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

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[4] USSSI provides construction and launch dates only for USAT I. We have assumed a six month lag in the commencement of construction of the subsequent satellites and use the projected 28 month construction schedule to obtain the necessary milestones for the other USSSI satellites.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Satellite Domestic Communications
Satellite Launch Authority
Satellite Orbit

> Applications to construct and launch space stations in Domestic Fixed Satellite Service is granted to meet licensees current traffic projections. Proposal is consistent with Commission's policies and serves the public interest, convenience and necessity. Previous assignments for Advanced Westar satellites in 86 FCC 2d 196 (1981) are null and void.
> –*Western Union Telegraph Co.*

FCC 83-196

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of

WESTERN UNION TELEGRAPH COMPANY

For Authority to Launch and Operate a Space Station in the Domestic Fixed-Satellite Service and Sell Transponders on a Noncommon Carrier Basis

File No. 723-DSS-P/LA-81

ORDER AND AUTHORIZATION

(Adopted: April 27, 1983 Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission is considering the above-captioned application submitted by Western Union Telegraph Company (Western Union) to launch and position the Westar VI domestic communications satellite. Public notice of this application was given on March 4, 1981. Petitions to deny were filed by Southern Pacific Communications Company and Hughes Communications, Inc. Additionally, comments were filed by RCA American Communications, Inc., American Satellite Company, Continental Telephone Corporation/Fairchild Industries, Inc and Satellite Business Systems. On January 26, 1983, public notice was given of Western Union's amendment to this application proposing to sell ten Westar VI transponders on a noncommon carrier basis. This proposal was opposed by Wold Communications, Inc. in its petition to deny and by Satellite Syndicated Systems, Inc. For the reasons discussed below, we deny the petitions and grant Western Union's application, as amended.

2. Western Union currently operates a domestic satellite system known as "Westar" in the 4/6 GHz frequency bands presently consisting of four satellites. (Westar II, Westar III, Westar IV and Westar V).[1] The Westar II and III satellites contain 12 transponders of 36 MHz and the other two, as well as the proposed Westar VI, contain 24 transponders. Westar VI will be capable of serving Alaska, Hawaii, and Puerto Rico/Virgin Islands, and will have a ten year operating lifetime. Total investment for Westar VI is estimated at $83.252 million.[2]

3. In 1978 Space Communications Company (Spacecom) applied to construct, launch and operate the Advanced Westar satellites.[3] These satellites were to be a part of a dual purpose system. The Tracking, Data and Relay Satellite System (TDRSS) was to be operated by NASA in government frequency bands to replace the current NASA ground satellite network. The Advanced Westar system was to be operated by Spacecom and leased in its entirety to Western Union and American Satellite Company for the provision of their common carrier services. One of the Advanced Westar satellites was to be shared by both TDRSS and Advanced Westar functions, and the other to be used exclusively for commercial domestic satellite services. The Advanced Westar capacity was initially intended to replace the commercial Westar I and II satellites in 1982. When it became apparent that the Advanced Westar satellites would not be available by that time, Western Union procured Westar IV and V as replacements for Westar I and II. *Id.* These satellites were also to provide system expansion since they contained 24 instead of 12 transponders. In *Domestic Fixed-Satellite Service - Orbit Deployment Plan*, 84 FCC 2d 584 (1981), we assigned Western Union two orbit positions at 4/6 GHz for operation of the Westar system and two hybrid positions in both the 4/6 GHz and 12/14 GHz bands to Western Union and Spacecom for operation of the Advanced Westar system.[4] By letter dated January 17, 1983, Western Union informed the Commission that the TDRSS/Advanced Westar program had been restructured so as to remove the commercial aspects of the program, with NASA to have full and exclusive use of the capacity of the satellites. Western Union also stated that it will withdraw from participation in Spacecom.

4. In February 1981, Western Union submitted the application

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[1] *See* Western Union Telegraph Company, 38 FCC 2d 1197 (1973), FCC 79-444 released July 24, 1979 and 86 FCC 2d 196 (1981). Its first satellite, Westar I, was recently retired from service. *See* letter to Commission dated April 8, 1983.

[2] Western Union's financial qualifications are a matter of record before the Commission, and are not at issue in this proceeding.

[3] Spacecom was established as a partnership owned by subsidiaries of Western Union (50%), Fairchild Industries, Inc. (25%), and Continental Telephone Corporation (25%). *See* Western Union Telegraph Company, 86 FCC 2d 196 (1981).

[4] We permitted the applicants to allocate the four satellites among the four positions in any way they deemed desirable.

for the Westar VI satellite. This satellite was to serve as a replacement satellite in case of failure of any of the Westar satellites and as a means to accommodate traffic growth. Construction authority was provided in October 1981 so that the satellite could serve as a ground spare.[5] Action was deferred at that time on Western Union's request for the launch and assignment of an orbital location for Wester VI.

5. The principle question before us at this time is whether or not the orbital assignments intended for the Advanced Westar satellites are still available for new Western Union satellites now that it has announced that it not longer intends to participate in the TDRSS/Advanced Westar system. Other issues raised with respect to these proposals and the processing of these applications are fully resolved in the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and *1983 Orbit Assignment Order*, FCC 83-185, both adopted today, and we will not repeat that discussion here.[6]

6. The orbital assignments made in 1980 did not confer upon Western Union or Spacecom any permanent rights. Moreover, the authorizations were to become null and void in the event the space stations were not constructed and launched and successfully placed into operation.[7] Since Western Union and Spacecom have abandoned their intention to construct, launch and operate the Advanced Westar satellites for commercial domestic satellite services, the hybrid orbit assignments for those satellites are now null and void. Moreover, the only Western Union application presently ready for processing and eligible for assignment of an orbital position is that of Westar VI.[8]

7. In light of the reduced orbital spacing criteria adopted in our *Report and Order*, *supra*, we are able to accomodate all applications in the current processing group under our open entry domestic

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[5] Western Union Telegraph Company, FCC 81-465, released October 6, 1981.

[6] We believe that this decision, along with out decision in Domestic Fixed Satellite Services, 90 FCC 2d 1 (1982), *recon. denied*, and the Memorandum Opinion and Order, FCC 83-183, adopted today, are fully dispositive of any arguments raised with respect to the processing of these applications. This also includes issues raised concerning the application of our *1980 Processing Order*, 77 FCC 2d 856 (1980), and any potential hearing rights that might be granted under the *Ashbacker Doctrine*. *See* Ashbacker Radio Corporation v. FCC, 326 FCC 2d 327 (1945). Moreover, our *1983 Orbit Assignment Order*, FCC 83-196, resolves all issues raised by the parties relating to particular orbit assignments.

[7] Western Union Telgraph Company, 86 FCC 2d 196, 219 (1981). *Cf.* RCA American Communications, Inc., 84 FCC 2d 633 (1981). After SATCOM III was lost, RCA was required to apply for a new orbit position for SATCOM III-R.

[8] Subsequent to *Domestic Fixed Satellite Service*, *supra* note 6, Western Union filed applications for construction and operation of the Westar VII and VIII satellites at 4/6 GHz, as well as a three in-orbit 12/14 GHz band system. These satellites were principally designed to meet projected growth in traffic demands for Westar transponders, as well as replacements for Advanced Westar capacity. However, since they were all filed after May 18, 1982, they are not being considered in the current processing group.

satellite licensing policies and do not have to resort to a comparative hearing. Moreover, we believe that Western Union has made an adequate demonstration of need for this satellite in light of its projected shortage of 14.4 transponders in the third quarter of 1983 prior to the prospective availability of Westar VI. In addition, at this time we see no reason to require Western Union to operate with less than four orbit locations. The Westar III satellite is currently operating at 91° and has at least three years left in its operational lifetime. We do continue to have serious questions about having a 12 transponder satellite occupying an orbit position. However, we do not believe it would serve the public interest if we require Western Union to colocate or turn the satellite off, since it is currently operating near capacity serving a wide variety of customers.[9] In the event Western Union's traffic projections do not materialize, we reserve the authority to require colocation of Westar satellites to reduce or eliminate excess spare capacity.

8. We also find that the sale of up to ten Westar VI transponders is consistent with the policy and legal analysis contained in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982). *See also Report and Order* in CC Docket No 81-704, FCC 83-184 adopted today.

9. Accordingly, IT IS ORDERED that Application File No. 723-DSS-P/LA-81 IS GRANTED, and Western Union Telegraph Company IS AUTHORIZED to launch and operate the Westar VI satellite in the domestic Fixed Satellite Service in accordance with the *1983 Orbit Assignment Order*, FCC 83-186, adopted today.

10. IT IS FURTHER ORDERED that Western Union shall comply with all of the requirements of the *Report and Order* in CC Docket No. 81-704, FCC 83-184, and our *1983 Orbit Assignment Order*, FCC 83-186, both adopted today, as well as the terms and conditions of all previous orders and authorizations.

11. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization to launch and operate Westar VI in orbit shall become null and void in the event the space station is not launched and successfully placed into operation by December 31, 1983 in accordance with the technical parameters and terms and conditions of the radio station authorization for this satellite.

12. IT IS FURTHER ORDERED that Western Union Telegraph Company IS GRANTED authority to sell up to 10 transponders on the Westar VI satellite as proposed in its application and in accordance with the policies articulated in *Domestic Fixed Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

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[9] The Westar II satellite is expected by Western Union to reach the end of its operational lifetime by the end of 1983. Therefore, we see no reason to retain an orbit assignment for its operation beyond that date.

13. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Western Union Telegraph Company is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to the use of the orbitor spectrum. Such a change may be ordered *inter alia* to implement uniform 2° separations, to require colocation of in-orbit satellites in the event of excess spare capacity, or to implement any of the objectives or policies set forth in today's *Report and Order*, FCC 83-184, in CC Docket No. 81-704, or *1983 Orbit Assignment Order*, FCC 83-186. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby.

14. IT IS FURTHER ORDERED that the Petitions to Deny filed by Southern Pacific Communications, Hughes Communications, Inc. and Wold Communications, Inc. ARE DENIED.

15. Western Union Telegraph Company is afforded thirty days from the date of release of our *Report and Order*, *supra*, to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Authorization
Common Carrier, Interconnection, Carrier to Carrier
Competition, Common Carriers
Telex

Memorandum Opinion, Order and Certificate adopted authorizing the Western Union Telegraph Company facilities to provide Teletex service within the United States and between the United States and Germany.
–*Western Union Telegraph Co.*

FCC 83-253

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

THE WESTERN UNION TELEGRAPH COMPANY

Application for authority pursuant to Section 214 of the Communications Act to establish, acquire, and operate facilities for the provision of communications services between the below-named cities and the Federal Republic of Germany and beyond; and between Atlanta, Baltimore, Boston Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Detroit, Houston, Indianapolis, Los Angeles, Miami, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, Portland, St. Louis, San Francisco, Seattle, Tulsa, and Washington, D.C.

File No. I-T-C-82-258

MEMORANDUM OPINION, ORDER AND CERTIFICATE

(Adopted May 26, 1983 Released June 7, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

I. *Introduction*

1. The Western Union Telegraph Company (Western Union) has filed for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to establish, acquire, and operate facilities: (a) for the provision of international Teletex

service between 25 cities in the United States and the Federal Republic of Germany (Germany);[1] and (b) for the provision of domestic Teletex service among the 25 U.S. cities.[2] Western Union has secured an operating agreement with Germany to provide the proposed service to that country.

2. Western Union International, Inc. (WUI) filed comments and requested imposition of certain conditions on Western Union's authorization. Western Union responded to WUI's comments and WUI replied to that response.[3]

II. *The Application*

3. Western Union requests authority to introduce "Teletex" service to the United States public. Teletex is a high speed data service with error correction capabilities. The transmission speed for Teletex is approximately 2400 bits per second (bps). This is almost 50 times faster than the standard Telex transmission speed of only 50 bps. Western Union states that its present facilities are not adequate for the proposed new service. Therefore, in order to provide domestic and international Teletex service, Western Union intends to secure facilities from other carriers and use them in combination with newly established facilities from its own Westar satellite and terrestrial microwave systems.[4] Under Western Union's proposal, the terminals of U.S. Teletex subscribers will be connected by access lines conditioned for data transmission at 3 kilobits per second (kbps) to a local concentrator. From there, high speed trunk lines conditioned for 9.6 kbps transmission will carry the information to a computer located at Western Union's New York operating center. At that point information will be switched to a line that will carry the message to the addressee terminal in the United States or to a line that will connect with an overseas circuit. The outbound international Teletex communications will be routed from the New York switch to an international earth station at Etam, West Virginia, for transmission via a 56 kbps satellite channel to Germany.[5] Inbound international Teletex will follow the reverse route.

4. Western Union also intends to provide subscribers with a

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[1] The U.S. cities are Atlanta, Baltimore, Boston, Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Detroit, Houston, Indianapolis, Los Angeles, Miami, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Portland, St. Louis, San Francisco, Seattle, Tulsa, and Washington, D.C.

[2] Western Union also applied for temporary operating authority to provide service. In light of our action today that request is now moot.

[3] RCA Global Communications, Inc. (RCA) and International Relay, Inc., (International Relay) submitted letters in support of WUI.

[4] See paragraph 24 herein for a list of the facilities that Western Union will use.

[5] Western Union will route international Teletex transmissions from its New York City operating center to the international earth station at Etam, West Virginia. These transmissions will then be routed through an appropriate INTELSAT satellite located over the Atlantic Ocean and will connect with matching circuits

conversion feature that will permit communications between Teletex and Telex subscribers. There will be a switch located at Western Union's New York operating center with the capability of making code, speed and format conversion so that U.S. Teletex subscribers will be able to transmit information to Telex users in the United States and overseas.[6] Messages sent to Telex users that are originated by U.S. Teletex subscribers will be converted to the Telex network in New York and transmitted from there over existing facilities as Telex messages at the Telex speed of transmission. Western Union expects that the German communications carrier will accept Teletex messages from German entities for transmission to U.S. Telex subscribers.[7]

5. In implementing the proposed service Western Union claims it will invest over 38 million dollars within 3 years of operation. By the end of the third year it anticipates net operating revenue of over 11 million dollars.

6. Western Union asserts that approval of its application will serve the public interest by introducing high quality, competitive Teletex service to the U.S. public. It concludes that the introduction of this high speed data service for domestic and international communications will provide business and government with a useful alternative to existing services.

III. *Comments of WUI*

7. WUI, the only party to file formal comments in this proceeding, does not oppose the grant of authority sought by Western Union. However, it seeks to have certain conditions imposed on Western Union's authorization.

8. WUI argues that Western Union's proposed Teletex service, which gives Teletex subscribers the ability to transmit intelligence to Telex users, is subject to the Record Carrier Competition Act of 1981 (RCCA). Therefore, WUI asserts that the Commission must require Western Union to make its Teletex service available both domestically and internationally on an interconnected basis pursuant to the interconnection requirements of the RCCA and the Commission's Orders implementing that Act issued in Docket No. 82-122.[8]

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provided by Western Union's correspondent in the Federal Republic of Germany. Western Union will route the service via an international earth station at Andover Maine if facilities via Etam are not available.

[6] We note that Western Union does not specifically request authorization to provide Telex to Teletex transmission.

[7] Western Union does not specify if conversion switching for incoming Teletex to Telex messages will be done in Germany or in New York. However, CCITT recommendations assume that the conversion facility will be located in the same country as the Teletex machine. CCITT recommendations F. 200. Therefore, we expect that for inbound Teletex to Telex traffic the conversion will take place in Germany.

9. Furthermore, WUI requests that the Commission reaffirm its long standing policy against exclusive arrangements between a carrier and a foreign correspondent. It asserts that the Commission should condition Western Union's application so as to preclude the provision of this new service under an exclusive arrangement. WUI contends that both of the requested conditions are necessary to ensure a competitive international and domestic marketplace.

IV. *Other Pleadings*

10. In response to WUI, Western Union asserts that Teletex is not a "record communications service" within the meaning of Section 222 (a)(3) of the RCCA because it is not a service "traditionally offered by telegraph companies . . . involving an interconnected network of teletypewriters." Western Union argues that Teletex is a new high speed, data oriented service between sophisticated computer/word processing terminals, not teletypewriters. Therefore, it asserts that Teletex is not subject to the interconnection requirements of the RCCA. Rather, it maintains that for purposes of interconnection, Teletex should be treated under the standards and procedures of Section 201(a) of the Communications Act.

11. With respect to WUI's request for a non-exclusivity condition, Western Union argues that WUI has not made any showing that such a condition is required. Western Union maintains that its agreement is not exclusive and that Germany is free to enter into Teletex operating agreements with other U.S. carriers. Western Union asserts that if the Commission finds that a non-exclusivity condition is in the public interest then it should impose such a condition on all certificates.

12. In reply to Western Union's argument that Teletex is not a record communications service within the meaning of the RCCA, WUI points out that in the telecommunications industry, Teletex is frequently described as "super Telex," a description that highlights the similarities of the two services. It avers that the proposed Teletex service is nothing more that an interconnected network of sophisticated teletypewriters which, significantly, have interoperability with Telex machines. It argues that there is no basis for excluding Teletex from the RCCA's interconnection obligations.

13. WUI states that it did not mean to suggest that Western Union's agreement with Germany was an exclusive agreement.

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[8] The RCCA requires interconnection for all "record communications services" and gives the Commission the power to prescribe the terms of such interconnection if necessary. In accordance with its statutory mandate the Commission prescribed interconnection provisions for two such services, "Telex" and "TWX." Interconnection Arrangements, CC Docket No. 82–122, Interim Order, 89 FCC 2d 928 (1982), *review pending*, Western Union v. FCC, D.C. Circuit No. 82–1502, filed May 4, 1982, Order rejecting and prescribing tariffs (Rejection Order) 91 FCC 2d 483 (1982), *reconsideration*, FCC 83–84, adopted March 3, 1983, *review pending* TRT v. FCC, (D.C. Circuit Nos. 82–1658, 82–1698, 82–1699).

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However, it reiterates its position that in order to promote competition, this first application to provide Teletex should be conditioned with a non-exclusivity provision. It states that it does not object to such a condition being placed on all future authorizations, including its own.

V. *Discussion*

14. Upon consideration of the filings in this proceeding we conclude that the public convenience and necessity require grant of Western Union's Section 214 application to provide end-to-end Teletex service (Teletex) within the United States and between the United States and Germany. We find that the public interest will be served by the introduction of this high speed data technology into the U.S. market. At 50 times the transmission rate of Telex, Teletex service will provide a sophisticated alternative to existing services and will better satisfy user needs. Teletex may compete with other services, including Telex and dataphone, and could result in lower rates in substitutable services. Grant of the instant application will foster a more competitive marketplace environment which is conducive to increasing consumer choice and promoting the development of new and innovative services.[9]

15. Below we consider the applicability of the RCCA to Teletex service, WUI's request that we condition any grant of Western Union's application with a "non-exclusivity" clause and particular issues raised by the "conversion" capability of the proposed service offering.

A. *RCCA Issues*

16. In considering the applicability of the RCCA to Teletex

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[9] *See* The Western Union Telegraph Co., FCC 82–378, released August 12, 1982 (authorization of Western Union's entry into the international record services marketplace); The Western Union Telegraph Co., File Nos. I-T-C-82–228, I-T-C-82–233, I-T-C-82–278, released December 30, 1982 (authorization allowing Western Union to provide record service between the United States and a total of 42 overseas points); *Also see* MTS and WATS Market Structure, 81 FCC 2d 177, 200 (1980), (Commission determination that the public interest is served by competition in the provision of message telephone service (MTS), wide area telephone service (WATS) and their functional equivalents); Specialized Common Carrier Services, 29 FCC 2d 870, *on reconsideration*, 35 FCC 2d 1106 (1971), *affirmed sub nom.*, Washington Utilities and Transportation Comm. v. FCC, 512 F.2d 1142 (2d Cir.) *cert. denied*, 423 U.S. 836 (1975) (FCC policies promoting domestic common carrier competition); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 47 FCC 2d 644, (1974), 48 FCC 2d 1077 (1974), 60 FCC 2d 261 (1976), *modified*, 61 FCC 2d 70, *further modification*, 62 FCC 2d 588 (1977), *affirmed sub nom.* American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 878 (1978); International Relay, Inc., 77 FCC 2d 819 (1980) (authorization of new store and forward telex service), *on reconsideration* 82 FCC 2d 41 (1980).

service, we must determine whether Teletex is subject to the same RCCA interconnection requirements as is Telex.[10] In order for the interconnection provisions of the RCCA to apply, the facilities employed must be used primarily to provide a "record communications service."

> Section 222(c)(1)(A)(i) of the RCCA provides:
>
> . . . the Commission shall require each record carrier to make available to any other record carrier upon reasonable request, full interconnection with any facility operated by such record carrier, and used primarily to provide record communications service.

17. The RCCA defines record communications services as "those services traditionally offered by telegraph companies, such as telegraph, telegram, telegram exchange and similar services involving an interconnected network of teletypewriters."[11] The plain meaning of this language as well as the legislative history surrounding the enactment of the RCCA make clear that Teletex is not a "record communications service." Teletex is a new service distinct from traditional Telex service. Teletex employs a transmission speed 50 times the rate of Telex and has error correction capabilities not available in Telex. An examination of the legislative history of the RCCA reveals that the Act was never intended to apply to an end-to-end high speed service such as Teletex for interconnection or for any other purpose.[12] The Committee Report addressing the RCCA specifically states that high speed data services are outside the scope of the legislation.[13] In addition, Teletex service is designed to accommodate interconnection of terminal equipment that is significantly different than traditional teletypewriters. Subscribers to Teletex will utilize terminals which employ computer processing capabilities for data manipulation. Accordingly, we conclude that Teletex is not a "record communications service" within the meaning of the RCCA.

18. Moreover, the rationale underlying the interconnection requirements of the RCCA does not apply to Teletex. Prior to passage of the RCCA, Western Union had a monopoly in the domestic record market but was statutorily prohibited from engaging in international operations in competition with the international record carriers. In order to permit full and vigorous competition in both the international and domestic record communications markets, Congress passed the RCCA, which permits all carriers to compete

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[10] See n. 8.

[11] 47 U.S.C. § 222(a)(3).

[12] Energy and Commerce Committee Report of the House of Representatives, Report No. 97–356, 97th Cong. 1st Sess. (Dec. 3, 1981) (Hereinafter, referred to as Committee Report). Store-and-forward and TWX/Telex Conversion, CC Docket No. 82–122, FCC 83–85, at para. 52, released March 14, 1983.

[13] See Committee Report at p. 10.

both domestically and internationally. In order to ensure that Western Union would not have an unfair advantage by virtue of its prior monopoly position, Congress required universal access to traditionally offered teletypewriter networks. A major reason behind this interconnection requirement was that unless a competing carrier could provide access to Western Union's existing Telex subscribers, it would be nearly impossible to sign up "the first" subscriber on its own network.[14] Because Western Union does not have an existing Teletex base, the protection which the RCCA sought to give to competing carriers for Telex is not needed for Teletex. For the foregoing reasons we conclude that Teletex is not subject to the interconnection provisions of the RCCA. However, we note that as a common carrier Western Union may have certain interconnection obligations imposed on it pursuant to Section 201(a) of the Communications Act.[15]

B. *Non-Exclusive Service to Germany*

19. WUI requests that the Commission condition any grant to Western Union for service to Germany with a "non-exclusivity" clause. We have long had a policy against carriers entering into exclusive arrangements with foreign entities.[16] In the current matter there is nothing in the record to indicate that Western Union and its German correspondent intend to enter into an exclusive agreement for Teletex service. Nevertheless, consistent with our longstanding policy against exclusive arrangements with foreign entities, we are expressly conditioning Western Union's grant with a "non-exclusivity" provision to assure that this policy is implemented. Any grants of similar authority to other carriers will be made subject to the same provisions.

C. *Conversion Features*

20. As indicated in its application, Western Union intends to offer subscribers a conversion feature that will involve the changing of code and format at Western Union's New York operating center. These code and format changes will allow terminals operating

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[14] Committee Report at p. 4–5. It was the intent of Congress however, that once a competitive marketplace in record services developed, carriers should be subject to a minimum level of regulation, because marketplace forces would protect the public. Accordingly, the strict interconnection requirements of the RCCA are scheduled to expire after a three year period from the date of enactment. Committee Report at p. 5–6, 47 U.S.C. Section 222(e)(1).

[15] A hearing is required under § 201(a) to determine if interconnection is warranted and to determine the terms and conditions for interconnection. The specific regulatory scheme of the RCCA would not apply.

[16] *See, e.g.*, Western Union International, Inc., File No. T-C-2528, released March 9, 1973, at para. 9. *See also* Uniform Settlement Rates on Parallel International Communications Routes, 84 FCC 2d 121 (1980).

pursuant to disparate protocols to communicate with one another. Pursuant to our *Computer II* decisions Western Union is free to offer these features as enhanced service outside of Title II regulation.

[17] In offering enhanced services over the transmission facilities for which it seeks Section 214 authorization, Western Union must adhere to the framework set forth in *Computer II* under which ". . . carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms and conditions reflected in their tariffs . . ."[18] Thus, while Teletex and Telex service would be regulated as two separate and distinct basic services, Western Union may offer optional enhanced services on a detariffed basis utilizing these basic services.[19]

D. *Miscellaneous*

21. Western Union has already filed with the Commission a new tariff for Teletex (FCC No. 291) and has filed revisions to its tariffs for Telex Service (FCC No. 240) and International Telex Service (FCC No. 283). Western Union's proposed tariff provisions set forth charges to apply where a Teletex subscriber calls a Telex subscriber overseas. Although Western Union would impose a charge for the international component of the Telex call, it would not have a discrete charge for the domestic component of the Telex service. However, Telex is a record service subject to the RCCA and the interconnection requirements prescribed in the *Interim Order*. Under the *Interim Order*, Western Union is required to charge the domestic Telex component for domestic Telex service interconnected with its international services.

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[17] In our Computer II decisions we determined that "basic" services are common carrier communications services which would continue to be regulated under Title II of the Communications Act, but that "enhanced" services would not be subject to Title II regulation. In offering a basic transmission service, a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with supplied information. Services in which computer processing applications are used to act on the format, content, code, protocol or other aspects of supplied information are enhanced services. Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration* 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC 693 F.2d 198 (D.C. Cir. 1982).

[18] Final Decision 77 FCC 2d 384, 475 (1980). *See also* Reconsideration 84 FCC 2d 50, 75 at n. 19 (1980).

[19] This regulatory structure of course applies solely to Teletex/Telex traffic originated in the United States. For Teletex/Telex service orginated in Germany, the German correspondent will provide the offering under the rules and policies of the Bundespost.

[20] Therefore, Western Union should withdraw its proposed tariff provisions and revise them to be consistent with the Commission's prescription in the *Interim Order*.

VI. *Conclusion*

22. We conclude that grant of Western Union's uncontested application will lead to greater consumer choice and likely result in downward rate pressure in substitutable data services. The regulatory structure which we have adopted for the proposed service is consistent with and will further the goals of the RCCA, our *Computer II* decisions, and our "non-exclusivity" policy.

23. In view of the foregoing, IT IS CERTIFIED, that the present and future public convenience and necessity require that the Western Union Telegraph Company establish, acquire and operate facilities for the purpose of providing Teletex within the United States and between the United States and Germany.

24. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act, that Application File No. I-T-C-82-258 IS GRANTED, and that Western Union is authorized to:

a. lease from AT&T and operate four 56 kbps channels between an appropriate earth station on the east coast of North America and Western Union's New York operating office;

b. lease from AT&T and operate two voice-grade data channels between each of the following pairs of cities:

1.-Charlotte, N.C. and Atlanta, GA
2.-New Orleans, LA and Atlanta, GA
3.-Phoenix, AR and Los Angeles, CA
4.-Portland, OR and Seattle, WA
5.-Tulsa, OK and Kansas City, M

c. lease from RCA American Communications, Inc. and operate one satellite voice circuit between Miami, Florida and New York, New York;

d. lease from Comsat and operate four 56 Kbps satellite channels between the east coast earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar channels between the satellite and an earth station in Germany, furnished by Western Union's correspondent in Germany;

e. utilize previously authorized Western Union facilities to derive the following voice-grade channels:

1.-Satellite Space

No. of Circuits	*Terminal Points*
6	Atlanta-New York
16	Chicago-New York
4	Dallas-New York
4	Los Angeles-New York

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[20] *See* Western Union Telegraph Company, Mimeo 3100, released March 23, 1983 (Com. Car. Bur.) (Infocom/Infomaster 300/1200, Transmittal No. 8011), Petition for Reconsideration filed April 22, 1983.

2	San Francisco–New York
4	Seattle–New York

2.–Microwave

No. of Circuits	*Terminal Points*
2	Baltimore–New York
2	Boston–New York
2	Cincinatti–Chicago
2	Cleveland–Chicago
2	Denver–Chicago
2	Detroit–Chicago
2	Houston–Dallas
2	Indianapolis–Chicago
2	Kansas City–Chicago
2	Philadelphia–New York
2	Pittsburgh–New York
2	St. Louis–Chicago
2	Washington, DC–New York

f. acquire, install and operate additional multiplexed equipment for the facilities in e. above to derive voice-grade channels from these facilities; and

g. use said facilities to provide Teletex service between various points in the contiguous United States and Germany.

25. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure non-discriminatory use of, and equitable access to, the communications satellite system.

26. This authorization is effective on its release date and shall be continued year-to-year, beginning January 1, 1984, unless the Commission notifies the applicant to the contrary and requires a new application by December 1 of the current authorization term.

27. No material changes inconsistent with this or any other relevant Commission Order shall be made before final execution of an operating agreement between Western Union and its correspondent in Germany, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

28. The authority granted herein is conditioned on compliance by Western Union and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

29. Failure to decline the authorization as constituted, within 30 days of this Order, will constitute formal acceptance of the authorization as conditioned.

30. Except to the extent indicated herein, the conditions requested by WUI to be placed on Western Union's authorization ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Intervention, Request for Denied

> Petitioner to intervene was dilatory—he had four years to participate but declined to do so other than as a witness. He will not at this late stage be permitted to attempt to vindicate his private rights.
> –*WKKQ, Inc.*
> BC Docket No. 82-227

FCC 83R-37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WKKQ, INC. WKKQ, Hibbing, Minnesota For Construction Permit	BC Docket No. 82-227 File No. BP-780901AG

MEMORANDUM OPINION AND ORDER

(Adopted: May 11, 1983; Released: May 13, 1983)

BY THE REVIEW BOARD:

1. Two spurious and tardy pleadings have been filed which we will dismiss for the sound procedural reasons contained in the Mass Media Bureau's oppositions filed March 26 and April 6, 1983.

2. In an Initial Decision, FCC 83D-7, released February 4, 1983, Administrative Law Judge Walter Miller granted the application of Station WKKQ, which had sought to improve its facilities in 1977. A hearing was ordered because substantial factual questions had been raised about the accuracy, candor and validity of field strength measurements taken on behalf of WKKQ in May of 1977. *See Designation Order*, 47 Fed. Reg. 23559, published May 28, 1982. Although the ALJ promptly resolved all issues in favor of WKKQ, some of his findings were critical of the station's former consulting engineer who had taken the measurements.

3. On March 7, 1983, more than 30 days after the release of the Initial Decision, the consulting engineer, who had been a witness but not a party to the hearing, filed a petition for extraordinary relief in the nature of exceptions. The Mass Media Bureau filed an opposition which correctly points out that both the Communications Act and the Commission Rules, 47 USC 409(b) and 47 CFR 1.276(a) (1), provide that only a party may file exceptions to an Initial Decision.

Moreover, the consulting engineer had not sought to intervene in the hearing even though the Designation Order, *supra*, placed him on notice that his actions in taking the measurements were in issue in the case. Finally, the Bureau indicated that this is not the type of case which requires the Board to act on its own motion to vindicate the public interest. *See Hanover Radio, Inc.*, 91 FCC 2d 849 (1982); *GSM Media Corp.*, FCC 83R-29, released April 22, 1983, *recon. dismissed*, FCC 83R-34, released May 5, 1983.

4. On March 28, more than 50 days after the release of the Initial Decision, the consulting engineer filed a petition for leave to intervene and a request for oral argument on his "exceptions." In its opposition the Bureau pointed out that the Initial Decision had become final and effective with the passage of time by operation of the Commission's Rules, 47 CFR 1.276(d) and (e). Station WKKQ, in a statement filed April 1, made the same point. The Bureau also indicated that good cause had not been shown for the belated attempt by petitioner to intervene; indeed petitioner "admits in his petition that he *could have* timely filed such a petition but *chose* not to do so." (Bureau Opposition, pp. 3–4.)

5. Congress, the Courts, and the Commission have recognized that reasonable adherence to procedural rules in situations like the present one serves the public interest. See authorities discussed by Chief Judge Spottswood W. Robinson, III, in *Spanish International Broadcasting Co.* v. *FCC*, 385 F.2d 615, 626–628 (D.C. Cir. 1967). Since March 1979, petitioner has been on notice (Broadcast Bureau prehearing inquiry quoted in I.D., para. 18) that his measurement data raised substantial and material questions of fact. These questions eventually required resolution at hearing and have resulted in a seven-year delay before the applicant station could improve its facilities and bring better radio service to the listening public. At last on the threshold of success, WKKQ's proposal is again clouded by the efforts of petitioner, who is not dissatisfied with the grant to WKKQ but rather with subsidiary language in the Initial Decision pertaining to him. Petitioner has had four years to participate in this proceeding, but has declined to do so other than as a witness. At this late date, he will not be heard to claim the status of a party—intervention, exceptions, and oral argument—in order to attempt to vindicate his personal interests. Such dilatoriness cannot be tolerated. *Spanish International, supra*, 385 F.2d at 627–628. Adherence to basic procedural rules and sound administrative practice require that both pending petitions should be dismissed.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed March 7, 1983, and the Petition for Leave to Intervene, filed March 28, 1983 by Robert A. Jones, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WKKQ, INC. WKKQ, Hibbing, Minnesota For Construction Permit	BC Docket No. 82-227 File No. BP-780901AG

Appearances

James P. Riley and *Thomas J. Dougherty, Jr.* on behalf of WKKQ, Inc.; *Richard C. Rowlenson, Arthur Stambler, Robert E. Kelly,* and *Joseph F. Hennessey* on behalf of Hibbing Broadcasting Company;[1] *Jerrold Miller* on behalf of Johnson, Johnson and Laidlaw (KNDK);[2] *Peter Tannenwald* and *Craig S. Iscoe* on behalf of witness Robert A. Jones; and *Arthur I. Steinburg* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

(Issued: January 27, 1983; Released: February 4, 1983)

Preliminary Statement

WKKQ, Inc. (WKKQ) presently operates an AM station in Hibbing, Minnesota on 1060 kHz, with 5 kW power, daytime only. It wants to change frequencies, increase power and become an unlimited time operation in the same community (1080 kHz, 5kW, 10 kW-LS, DA-N, U).

2. The Commission designated WKKQ's application for hearing on April 29, 1982 (see 47 F.R. 23559 published May 28, 1982).[3] The following interrelated issues remain to be resolved:

> 1. To determine the facts and circumstances surrounding the applicant's May 1977 field strength measurements.

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[1] These four attorneys were all members of the law firm of Lovett, Hennessey, Stambler and Siebert P.C. By letter dated December 22, 1982, that Firm withdrew as counsel for Hibbing Broadcasting Company. In that same letter Lovett, Hennessey, Stambler, and Siebert indicated that it wouldn't be filing either any Proposed Findings of Fact and Conclusions of Law or any Reply Findings in this proceeding.

[2] On September 28, 1982, Johnson, Johnson, and Laidlaw was granted permission to withdraw from this proceeding. See FCC 82M-3004.

[3] Why it took a month to get this designation order published in the Federal Register isn't clear.

> 2. To determine, in light of the evidence adduced pursuant to Issue 1, whether the applicant misrepresented facts or was lacking in candor with respect to its May 1977 field strength measurements.
>
> 3. To determine, in light of the evidence adduced pursuant to Issue 1, whether the applicant's May 1977 field strength measurements are valid.
>
> * * *[4]
>
> 5. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of this application would serve the public interest, convenience and necessity.

The burden of proceeding and the burden of proof under the foregoing issues is on WKKQ.

3. Prehearing Conferences were held on August 18 and September 24, 1982. Hearing Sessions were held on November 1 and 2, 1982. The evidentiary record was closed after the last hearing session. Both WKKQ and the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on January 7, 1983. No Reply Findings were filed.

Findings of Fact

The Events of May 20, 1977

4. Jerry J. Collins is the President and General Manager of WKKQ. At the time he determined to increase WKKQ's power, switch frequencies, and add nighttime operation, Collins retained Robert A. Jones, a consulting engineer in LaGrange, Illinois. It was Jones who was to prepare the engineering portion of the application and the accompanying engineering exhibits (WKKQ Ex. 6, p. 1).[5]

5. As previously noted (Footnote 4 *supra.*) one of the questions they faced was whether WKKQ's proposed operation would cause prohibited overlap to Station KNDK, Langdon, North Dakota. To obtain data on that question Jones decided that they should take field intensity measurements along the 284 ° and 295 ° radials from Station WKKQ. The purpose of such measurements was to ascertain the soil conductivity in the direction of co-channel KNDK (WKKQ Ex. 3, p. 2; Tr. 243–244, 248–249, 488–490).

6. Although he had never previously taken measurements on the 284 ° and 295 ° radials in the Hibbing area, about a week before the measurement undertaking, Jones sat down and *preselected* most of

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[4] Issue 4 - a prohibited overlap issue was originally designated against WKKQ; i.e., whether WKKQ's proposed operation would cause prohibited overlap to KNDK, Langdon, North Dakota in violation of 47 CFR 73.37. On September 7, 1982, a Summary Decision resolved that issue in WKKQ's favor. See FCC 82M-2708.

[5] Previously, on several other occasions over a 20-year span, Collins has relied on Jones as his consulting engineer and he has never had occasion to doubt Jones' veracity, or the accuracy or reliability of his work (WKKQ Ex. 6, pp. 2, 4; Tr. 248, 484–488, 503–504, 516 and 564).

the measuring points and *preplotted* them on a U.S.G.S. topographic map.[6] He also preselected routes used to travel between measurement points and predetermined the order in which those points would be measured (Tr. 239–240, 250–256, 272).

7. Early on the morning of May 20, 1977, Jones took an airplane from Chicago, Illinois to Hibbing. He intended to complete the measurement undertaking in one day, although he was prepared to stay an extra day, if necessary (WKKQ Ex. 3, pp. 5, 27–28; Tr. 270–271, 501). Collins met him at the Hibbing airport somewhere between 9:00 a.m. and 9:30 a.m. (Tr. 271, 491).

8. Collins was to drive Jones to all but the close-in measurement points on the two radials. So they reviewed Jones' topographic map, and the general area they would be driving through, and Jones outlined the procedure he wanted Collins to follow. They then went to Station WKKQ where Jones verified the operation of the transmitter and the correct output power. Before they started the measurement undertaking, Jones told Collins that he wanted to complete the course in one day. Collins accepted this statement as a challenge and drove Jones through the course measured on May 20, 1977 as rapidly as he could (WKKQ Ex. 6, p. 1; Tr. 271, 491, 501, 502–506).

9. Jones took his first measurement at 10:20 a.m. and he continued to rapidly take measurements throughout the day. Putting drive time aside, Jones estimates that it only takes him about 10 to 12 seconds to take a single measurement.[7] (Tr. 263, 269). This includes lifting the meter cover, ensuring that the meter is in the linear mode, checking the battery by adjusting the switch, turning the switch to the field intensity mode, adjusting the receiver to receive the desired signal, calibrating position by adjusting a switch, calibrating the meter for maximum field strength, nulling the meter by adjusting a switch, moving a switch to the field intensity position, raising the meter for maximum signal reception, reading the field strength, and finally, nulling the meter by rotating it 90 degrees in order to check for reradiation (Tr. 86–88, 257–262).[8]

10. When they were still approaching each measuring point in

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[6] According to another WKKQ engineering consultant, John Heffelfinger, it's not good engineering practice to preselect and preplot most of your measuring points on a given radial. Heffelfinger's testimony on this point will be credited for the reasons he has given (Tr. 422–427). While the ALJ has no reason to doubt Jones when he says that he always prepares the map ahead of time (Tr. 250), it is held that it is a careless and risky practice that should be avoided (except on reruns) by a responsible engineering consultant.

[7] Jones modestly states that he is able to take a field intensity measurement faster than and as accurately as any other engineer he knows (WKKQ Ex. 3, p. 4; Tr. 263, 266–267, 269).

[8] Jones has testified regarding the measurement process that "you probably can do it in less time than it takes to describe how to do it" (Tr. 259). Although the Presiding Officer remains dubious that testimony will be credited.

Collins' car, Jones checked the radio frequency environment; i.e., he observed whether there was anything in the vicinity which could affect the accuracy of the reading. While taking each measurement Jones also checked the field intensity meter, looking for anomolies which might indicate a defective reading (WKKQ Ex. 3, pp. 5–6; Tr. 256, 269–271, and 277).

11. Jones acted as navigator during the measurement undertaking. Using the preplotted USGS map he selected the route that would be followed and directed Collins to each roadside measuring point. The weather conditions on May 20, 1977 were ideal and didn't inhibit the speed and accuracy of the measurement undertaking. The 284 ° and 295 ° radials traverse an area that is rural and devoid of fences, wires or other obstructions that may affect measurements in an urban area. Collins' average speed during the automobile portion of the measurement undertaking was something less than 51 miles an hour (WKKQ Ex. 3, pp. 5–6; Tr. 250, 256–257, 286, 492, 497, 500, 512).

12. The terrain in which the measurements were taken is relatively level. So when Jones got out of Collins' car he only had to walk ten to twenty feet to the point where he took his reading. Collins left the engine of the car running while Jones took his measurements. If needed he would turn the car in the direction of the next measurement point. Jones recorded his readings and made his notations (if any) after he got back into the car (WKKQ Ex. 3, pp. 5–7; Tr. 265, 276–277).

13. When he started taking the measurements Jones used his own wrist watch to ascertain and record the times the measurements were taken.[9] But after the measurement undertaking was partially completed Jones realized that his wrist watch was malfunctioning; i.e., he was recording inaccurate times. So he began to rely on Collins' watch. He would ask Collins for the time after returning to the car after taking a measurement. However, Collins' watch was running slower than his.[10] Consequently, the times Jones recorded with his own watch are not only suspect they do not correlate with the times he recorded using Collins' watch.[11] (Tr. 279–283, 288)

14. Jerry Collins is largely ignorant of engineering matters. He has no particular knowledge about the methods, techniques, and equipment used to take field measurements. So he didn't understand exactly what it was that Jones was doing with the meter. He had no

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[9] 47 CFR 73.186(b) states that: "Complete data taken in conjunction with the field intensity measurements shall be submitted to the Commission in affidavit form including the following: (1) . . . the date and time of each measurement. . . ."

[10] Collins says his watch ran about 5 minutes slow a day (Tr. 499).

[11] Jones took the close-in measurements by himself; i.e., without Collins being present, on the afternoon of May 20, 1977. Jones claims he borrowed Collins' watch to record the close-in times. Collins can't recall that happening (Tr. 288, 498).

working knowledge of how to measure the field intensity of a transmitted signal. And he didn't observe what Jones was recording. Consequently his major role in the May 20th measurement undertaking was to do all the driving to where Jones directed. While he also gave Jones the time at some of the measurement points, Collins wasn't aware that 47 CFR 73.186 requires that the measurement times be recorded and submitted to the FCC (WKKQ Ex. 6, p. 4; Tr. 492, 498, 504, 584–585; and Footnote 9 *supra*).

15. As previously noted (Footnote 5 *supra*), Collins has relied on Jones as a consulting engineer for a 20-year period. And he has never had occasion to doubt Jones' veracity or question the caliber of Jones' work (Tr. 484–489).

Events Surrounding June 16, 1977

16. After completing his May 20th, 1977 measurements, Jones returned to his home in LaGrange, Illinois. There he ostensibly[12] analyzed and prepared his engineering affidavit for submission to the Commission (see 47 CFR 73.186(b)). He submitted that affidavit on June 16, 1977. There he included the location number of the measurement, the time the measurement was taken, and the distance in miles, the measurement point is in miles from Station WKKQ's tower for each May 20, 1977 measurement (WKKQ Ex. 3, pp. 8, 10, 12; Tr. 228).

	284° Radial			*295° Radial*	
Loc. No.	*Time*	*Dist. in Miles*[13]	*Loc. No.*	*Time*	*Dist. in Miles*[13]
101	4:30 p.m.	0.1	201	5:43 p.m.	0.1
102	4:33	0.2	202	5:39	0.2
103	4:36	0.3	203	5:36	0.3
104	4:39	0.4	204	5:33	0.4
105	4:42	0.5	205	5:30	0.5
106	4:45	0.6	206	5:27	0.6
107	4:48	0.7	207	5:24	0.7
108	4:51	0.8	208	5:21	0.8
109	4:54	0.9	209	5:18	0.9
110	4:57	1.0	210	5:15	1.0
111	10:20 a.m.	2.0	211	10:22 a.m	2.0
112	10:29	4.6	212	10:27	3.7
113	10:34	6.6	213	10:39	6.5

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[12] The word "ostensibly" has been used because the Presiding Officer finds it hard to believe that a consulting engineer with Robert Jones' substantial experience, after analyzing the raw measurement data and the related material, would submit such slipshod engineering to the Commission. As will be described *infra*, Jerry Collins has been forced to go through an expensive and time-consuming hearing involving character allegations, not because of any wrongdoing on his part, but because his consulting engineer was willing to prepare and submit careless and uncraftsmanlike engineering to the Commission.

[13] "Dist. in Miles" is the straight-line distance from the measurement point to the WKKQ transmitter (Tr. 334).

284° Radial			295° Radial		
Loc. No.	Time	Dist. in Miles[13]	Loc. No.	Time	Dist. in Miles[13]
114	10:36	7.1	214	10:41	6.7
115	10:41	9.2	215	10:44	8.7
116	10:52	10.7	216	10:46	9.2
117	10:54	12.0	217	10:48	11.2
118	10:57	13.7	218	11:10	13.5
119	11:00	16.4	219	11:12	14.4
120	11:03	17.4	220	11:15	16.3
121	11:50	22.5	221	11:19	17.6
122	1:35 p.m.	29.6	222	11:23	18.7
123	3:10	34.3	223	11:33	20.8
124	2:15	38.6	224	12:30 p.m.	24.0
			225	1:00	27.7
			226	1:10	32.0
			227	2:50	34.4
			228	2:45	37.8
			229	2:40	40.5
			230	2:37	41.8
			231	2:32	44.6

17. Jones took the May 20, 1977, measurements in the following location number order: 111, 211, 212, 112, 113, 114, 213, 214, 115, 215, 216, 217, 116, 117, 118, 119, 120, 218, 219, 220, 221, 222, 223, 121, 224, 225, 226, 122, 124, 231, 230, 229, 228, 227, 123, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 210, 209, 208, 207, 206, 205, 204, 203, 202, 201 (WKKQ Ex. 3, pp. 8, 10, 12; Tr. 295–297).

The Commission's March 19, 1979 Letter

18. On March 19, 1979, the Commission expressed its dissatisfaction with Jones' field intensity measurement survey. In a letter signed by Jerrold L. Jacobs, then Chief, Broadcast Facilities Division, Broadcast Bureau, they said this:

> "Upon analysis of the submitted measurement data, we note the following: (1) the survey was conducted for distances of 38.6 miles along the 284 degree radial and 44.6 miles along the 295 degree radial and that every one of the measurements was made by a single individual; (2) the time intervals between several points appear to be unrealistically short and (3) the surveyor appeared at different locations simultaneously."

The Commission then indicated that it would withhold action on Collins' application so he could satisfactorily explain the discrepancies (HBC Ex. 1).

WKKQ's April 18, 1979 Response

19. On April 24, 1979, WKKQ forwarded its response to the Commission's March 19, 1979 letter. Attached to that response is a Statement from Robert A. Jones dated April 18, 1979 (WKKQ Ex. 3, pp. 31–33).

20. There Jones explained the discrepancies as follows:

> "I object to the statement that 'the time intervals between several points appear to be unrealistically short'. There is no basis for such a statement and it completely ignores the logical facts. 1). I am an experienced field engineer, have taken and submitted similar measurements to the FCC for over 25 years. 2). I have a photographic memory and do not need to keep stopping to study road maps and hence require very little time to be so wasted. 3). I was driven by Mr. Jerry Collins, the Owner of WKKQ in his Corvette sports car. I thus had no time wasted in starting or stopping vehicles. 4). Mr. Collins lives 30 miles northwest of the station and travels many of these roads to and from to work and thus is even more familiar with the roads and the area than would any other driver I could have wished for. 5). As to the fact that two readings, #115 on the 284 ° and #214 on the 295 ° bearing were shown as taken at the same time, yes I know. They were of course not physically taken at the same time, but my watch stopped about then and we relied upon Mr. Collins' watch for the balance of the readings.[14] Since his watch showed 10:41 that was the time we recorded even though it was the same time shown for another measurement. Which watch was more correct is really unimportant since Section 73.186 does not require either the date or the times of field intensity measurements be submitted. . . ."[15]

21. Jones' explanation apparently didn't convince the Commission. For on April 29, 1982, it designated WKKQ's application for hearing. And it included issues that would permit an evidentiary inquiry into Jones' May 20, 1977 field intensity measurement survey (47 F.R. 23559, published May 29, 1982).

22. In the Designation Order the Commission further explained the problem. It said this:

> ". . . Field strength measurements are critical to many of our AM allocation decisions, and as with other applicant representations, we must be able to rely on the accuracy of the data submitted to us . . . The most suspicious measurements are apparently a series of thirteen made . . . between 10:44 and 11:23 a.m. (all presumably timed using Collins' watch), as follows:

Time	*Miles From WKKQ*	*Radial*
10:44	8.7	295°
10:46	9.2	"
10:48	11.2	"
10:52	10.7	284°
10:54	12.0	"
10:57	13.7	"
11:00	16.4	"
11:03	17.4	"
11:10	13.5	295°
11:12	14.4	"
11:15	16.3	"
11:19	17.6	"
11:23	18.7	"

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[14] Collins can't verify that his watch was used "for the balance of the readings." See Findings 13–14 and Footnotes 10–11 *supra*.

[15] But see Footnote 9 *supra*. This contention is rejected. It strains credulity too far to believe that a consulting engineer with Robert Jones' measurement-taking experience didn't know 47 CFR 73.186's requirements. WKKQ's other consulting engineer, John Heffelfinger, is certainly aware of those requirements (Tr. 417–418).

> . . . This tabulation indicates that in a period of 39 minutes WKKQ's engineer traveled over 21 miles and stopped to make 13 measurements. Considering the time that should have been spent assuring proper location of measurement points and accurate measurements, and allowing for roads that do not generally straight-line, point-to-point travel (so the distances traveled actually exceeded the straight-line distances shown above), it seems to us improbable that accurate measurements could have been made as reported . . . *There is therefore a substantial and material question that either the measurements were not made with sufficient care to assure their validity, or the measurements were not made as reported.* Hearing issues are thus required." (Underlining added.)

Postdesignation Activities

23. On May 15, 1982, Jones attempted to replicate certain of the May 20, 1977 measurements; i.e., those 13 measurements the Commission had referred to in its designation order. See Finding para. 22 *supra*. Collins again drove Jones to these measurement points and the same measurement-taking procedures were used that were employed in the May 1977 undertaking. The physical conditions for the measurement taking were essentially the same. This time Jones completed the 13 measurements in 37 minutes and 37 seconds (as compared with 39 minutes in May, 1977); however, Collins admits that he was anxious to drive *even faster* than he did the first time, and that his average speed of 51 miles per hour was faster than it was on May 20, 1977 (WKKQ Ex. 6, p. 3; WKKQ Ex. 23 - as corrected at Tr. 589; Tr. 288–292, 507–516, and 548).

24. A short time later, on June 2, 1982, Collins again tried to replicate the 13 measurements the Commission was concerned about - this time with Mark Persons.[16] While they didn't duplicate the May 1977 undertaking in every respect, they tried to go as rapidly as possible while allowing sufficient time for taking proper measurements (WKKQ Ex. 4, pp. 2–3; WKKQ Ex. 6, pp. 4–5; Tr. 88–89, 95, 105–109, 115–116, 119, 141–142, 155, 158 171).

25. Collins and Persons completed the 13 measurements in 44 minutes. However, between Location Nos. 120 and 218, Collins made a wrong turn. They estimate that they lost 2 minutes because of that. They claim that if they hadn't taken a wrong turn the total elapsed time would have been 42 minutes (WKKQ Ex. 4, pp. 3–4; WKKQ Ex. 6, p. 5; Tr. 107, 115–120, 172–174, 539–541, 568–569 and 583–584).

26. In addition, subsequent to designation, Collins commissioned a consulting engineer - John Heffelfinger - to take field intensity measurements and develop the facts on the prohibited overlap issue that the Commission had designated against WKKQ. Heffelfinger took those measurements between June 16–18, 1982.[17] Heffelfinger's

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[16] Persons has worked as a radio engineer for 12 years. He holds a General Class license with Radar endorsement. He has taken field strength measurements without direct supervision on at least 9 radio stations and on at least 100 separate occasions over a period of 5 years. He has worked for WKKQ since July, 1978 (WKKQ Ex. 4, pp. 1–2; Tr. 95–96, 101–102, and 206–207).

thorough and craftsmanlike measurement survey was credited and the prohibited overlap issue was summarily resolved in WKKQ's favor (see FCC 82M-2708 released September 7, 1982 and Footnote 4 *supra*).

27. However, Heffelfinger also compared Jones' May 1977 measurements, Lysiak's June, 1982 measurements (see Footnote 17 *supra*), and his own June 1982 measurements on the 295 ° radial. This comparison shows a marked similarity in the "conductivity break" between miles 4 and 7, and miles 10 and 15; further each set of measurements shows a similar "clustering" of points about the 2 mmho/m conductivity wave (WKKQ Ex. 5, p. 2; Tr. 408–413).

28. Noting that the Commission's Figure M3 map shows a uniform soil conductivity along the 295 ° radial where the measurements were taken, Heffelfinger says it would have been "very difficult" for someone only looking at Figure M3 to have predicted the conductivity breaks and clustering at those distances. To do that, says Heffelfinger, a person would have had to take actual measurements (Tr. 412–413, 415–417).[18]

29. No other party to the proceeding offered any direct evidence[19] on Jones' May 20, 1977 measurement undertaking. Two FCC engineers arrived at WKKQ on June 16, 1982 to observe Mr. Heffelfinger perform his field intensity measurements. Collins offered to drive either one through the course of the 13 questioned measurements to witness the time involved, but both FCC engineers refused his offer[20] (WKKQ Ex. 6, p. 5; WKKQ Ex. 1, p. 5).

30. Hibbing Broadcasting Company (HBC) who throughout the hearing actively opposed a WKKQ grant (but see Footnote 1) claimed that it had two witnesses; i.e., a Mr. Vilah Brooks and Conrad Gabrielson, who had driven the route of the 13 disputed measurements to determine the amount of time required to complete these measurements. However, HBC introduced no evidence whatsoever on the subject (WKKQ Ex. 2, p. 3; HBC Ex. 3, pp. 4–5).

31. However, at the hearing, additional facts (in addition to Findings 4–30 *supra*) were developed about the times that Jones represented to the Commission those measurements were taken.

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[17] On June 16, 1982, Garrett Lysiak, EIC of the Commission's St. Paul, Minnesota District Office accompanied Heffelfinger. Lysiak also took measurements on the 295 ° radial. The Broadcast Bureau made Lysiak's measurements available to Heffelfinger (WKKQ Ex. 1, pp. 3, 8–10).

[18] Heffelfinger performed a similar type of comparison on the 284 ° radial measurements that he took in June, 1982 and Jones took on May 20, 1977. They too showed similar breaks in the conductivity at about the same distance (Tr. 462–467, 472–474).

[19] As opposed to evidence developed via cross-examination.

[20] This is strange. As noted this was one of the Commission's major concerns in this case. See Findings 19–22 *supra*. One would think that when FCC personnel were sent into the area that they would welcome any occasion to obtain relevant facts on the questions the Commission wanted answered.

32. First, and as previously noted,[21] Jones originally represented to the Commission that he was at Location point 115 on the 284° radial at 10:41 a.m., May 20, 1977. In the same affidavit he swore that he was at Location point 214 on the 295° radial at exactly the same time. Aside from his previous explanation that his watch was malfunctioning and that he then began recording the times that Collins gave him, Jones offered no further explanation.[22]

33. Next, in his May 20, 1977 affidavit Jones averred to the Commission that he was at Location point 216 on the 295° radial at 10:46 a.m. and at Location point 217 at 10:48 a.m. This representation is as false as the one set out in the previous paragraph. The running distance between Points 216 and 217 is 3.4 miles.[23] So even *assuming* that Jones' measurement time wasn't included in the two minutes (which it was) and further *assuming* that the distance between Points 216 and 217 is a straightline (which it isn't - see Footnote 23 *supra*), Collins would had to have driven his 1968 corvette at a speed of 102 miles an hour to go 3.4 miles in two minutes. That is simply unbelievable (Tr. 305–306; WKKQ Ex. 3, p. 20 and 23).[24]

34. Next, in his May 20, 1977 affidavit Jones claims he was at Location point 119 on the 284° radial at 11:00 a.m. and at Location point 120 at 11:03. The running distance between those two points is 3 miles. But they had changed directions at two different times at two different intersections to get from Point 119 to 120.[25] This means that Collins averaged 60 miles an hour over winding roads. While this isn't a physical impossibility, it certainly appears highly doubtful that he did so (WKKQ Ex. 3, p. 19, and 23).

35. Conversely, some of Jones' May 20, 1977 affidavit times present another type of problem. Keep in mind that both Jones and Collins have testified that Jones took all of his measurements as rapidly as possible so Jones could complete the measurements in one day;[26] also remember that Collins drove Jones through the measurement course as rapidly as he could (Findings paras. 8–12 *supra*).

36. Yet the record shows the following reported times:

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[21] See Findings 16, 18, 20, and 22 *supra*.

[22] As an experienced engineer Jones must have known at the time he submitted the data to the Commission that this physical impossibility would be challenged. Why Jones would nevertheless proffer such data without any explanation remains a mystery.

[23] The straight-line distance between those two points is two miles (WKKQ Ex. 3, p. 20).

[24] This time was ostensibly recorded after Jones began relying on Collins' timepiece. So he can't very well say the unbelievable readings were the product of his own malfunctioning wrist watch.

[25] The straight-line distance between Location points 119 and 120 is 1 mile (WKKQ Ex. 3, p. 19).

[26] Also keep in mind that Jones says that it only took him from 10 to 12 seconds to take a measurement (Finding para. 9 *supra*.).

(a) Jones and Collins ostensibly were at Location point 211 on the 295° radial at 10:22 a.m. They arrived at Location point 212 at 10:27 a.m. So it took them five minutes to travel no more than two miles. This would mean that Collins was driving the car at only 24 miles per hour. That doesn't harmonize with the record evidence (WKKQ Ex. 3, p. 20; Tr. 308–309);

(b) Jones and Collins ostensibly were at Location point 213 on the 295° radial at 10:39 a.m. and they arrived at Location point 214 at 10:41 a.m. So it took them two minutes to travel .4 of a mile. This would mean that Collins was driving the car at an average speed of only 12 miles per hour; that doesn't harmonize with the record evidence (WKKQ Ex. 3, p. 20; Tr. 310);

(c) Jones and Collins were ostensibly at Location point 215 at 10:44 a.m. They arrived at Location point 216 at 10:46 a.m. So it took them two minutes to travel .5 of a mile. This would mean Collins was driving the car at an average speed of only 15 miles per hour (WKKQ Ex. 3, pp. 20, and 23);

(d) Jones and Collins were ostensibly at Location point 219 on the 295° radial at 11:12 a.m. They arrived at Location point 220 at 11:15 a.m. Thus it took them three minutes to travel 1.3 miles. This means Collins drove the car at an average of 26 miles per hour (WKKQ Ex. 3, pp. 20 and 23); and

(e) Jones and Collins were ostensibly at Location point 220 at 11:15 a.m. They arrived at Location point 221 at 11:19 a.m. So it took them four minutes to travel 2 miles. This would mean that Collins was driving the car at an average speed of 30 miles per hour (WKKQ Ex. 3, pp. 20 and 23).[27]

37. Jones apparently realized that the data he submitted to the Commission was inaccurate, because at the hearing he admitted that any of the measurement times he submitted in his May 20, 1977 report could be off by as much as two minutes (Tr. 377–383).

Ultimate Findings and Preliminary Conclusions

1. The Commission has inquired into the facts and circumstances surrounding WKKQ Inc.'s (WKKQ's) May 1977 field strength measurement survey. They want to know whether WKKQ, when it submitted those measurements, misrepresented the facts to or lacked candor with the Commission. The Commission also wants to know if those May 1977 measurements are valid (Finding 2 *supra*).

Background

2. When Jerry J. Collins, WKKQ's President and General Manager, decided to increase WKKQ's power, switch frequencies, and add nighttime operation, he retained Robert A. Jones as his consulting engineer. Jones was to prepare the engineering portion of the application and the accompanying engineering exhibits (Finding 4 *supra*).

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[27] At another point Jones' sworn testimony doesn't make sense. He states that the running distance between Location points 113 and 114 on the 284° radial is *less* than a half a mile, and that includes negotiating at least one turn (Tr. 309). However, according to the data Jones furnished the Commission on May 20, 1977 (WKKQ Ex. 3, p. 19) the straight-line distance between Location points 113 and 114 is exactly one-half mile.

3. One of the engineering questions WKKQ faced was whether its proposal would cause prohibited overlap to Station KNDK, Langdon, North Dakota. To obtain data on that question Jones decided that they would have to take field intensity measurements along the 284° and 295° radials from Station WKKQ (Finding 5 *supra*). He took those measurements on May 20, 1977. And after analyzing them he prepared and submitted an engineering affidavit to the Commission (Findings 16–17 *supra*).

4. After reviewing Jones' affidavit the Commission had cause to question the validity of his sworn data. They first noted that Jones had averred that he was at two entirely different measurement locations at exactly the same time. And the Commission further observed that the time intervals between several measurement points appeared to be unrealistically short (Finding 18 *supra*).

5. Jones tried to address the Commission's concerns (Findings 19–20 *supra*). But his response was unconvincing, and the Commission set the matter down for hearing. And they theorized that: (1) either the measurements hadn't been made; or (2) if they had been made they were not made with sufficient care to assure their validity (Findings 21–22 *supra*).

Were the May 20, 1977 Measurements Made?

6. There is no question. Jones took the 284° and 295° measurements on May 20, 1977 as he claims. These aren't "hotel room" measurements. On the morning of May 20, 1977 Jones traveled by airplane from Chicago to Hibbing. Jerry Collins met him at the airport. Except for the close-in measurements Collins used his car to drive Jones to the various measurement points. Since Jones had expressly indicated that he wanted to complete the measurement survey in one day, Collins drove Jones to the various measurement locations as rapidly as he could (Findings 8–12 *supra*).

7. Collins has testified that he observed Jones taking the measurements in question. There is no reason not to accept that testimony. In addition John Heffelfinger, another WKKQ engineering consultant, made an engineering comparison, and on the basis of that comparison properly concluded that Jones actually took the measurements on May 20, 1977, as he said he did (Findings 26–28 *supra*). So the first question that concerned the Commission (see Conclusion 5 *supra*.) is answered in WKKQ's favor.

Were the May 20, 1977 Measurements Made With Sufficient Care?

8. We have just concluded that Jones conducted a field intensity measurement survey on May 20, 1977. But determining whether Jones exercised sufficient care in making that survey (Conclusion 5 *supra*) is another matter entirely.

9. The record evidence clearly demonstrates that Jones failed to

conduct the May 20, 1977 measurements in a professional manner. He was far more interested in the speed with which the measurements were taken than he was in their accuracy. He was more anxious to complete the measurements in one day than he was in gathering accurate data to submit in his engineering affidavit to the Commission.

10. When he had partially completed his measurement survey Jones suddenly realized that his wrist watch was and had been malfunctioning, and that he had been recording inaccurate measurement times. Yet he never obtained an accurate timepiece and reran those measurements. He went right ahead and submitted them to the Commission representing them to be accurate time recordings (Finding 13 *supra*).

11. For example, in his engineering affidavit Jones represents that he was at two separate measurement points on two different radials at exactly the same time (Findings 18, 20, 22, and 32 *supra*). When confronted with this physical impossibility he claims that this was the point that he discovered his watch wasn't running properly and he began using Collins' watch to record his measurement times.

12. Assuming this explanation to be true, it still doesn't explain why - without any explanation whatsoever - he would proffer such conflicting data to the Commission. As an experienced engineer[28] he knew this physical impossibility would be challenged. Yet he went ahead and submitted it anyway.

13. Similarly, as the Commission suspected (Finding 18 *supra*) some of the time intervals between several of Jones' 1977 measurement points proved unrealistically short (Findings 33–34 *supra*). And conversely, at the hearing when he tried to explain those unrealistically short intervals away; that i.e., he was taking measurements as fast as possible so he could complete the entire undertaking in one day, several of the time intervals between his 1977 measurement points proved unrealistically long (Findings 35–36 *supra*).

14. In summary, Robert Jones did conduct a field intensity measurement survey on the 284° and 295° radials from WKKQ on May 20, 1977. But it was a poorly conducted survey fraught with inaccuracies. Jones was well aware that much of his survey data was less than accurate. But he nevertheless submitted it to the FCC in affidavit form. And when he was called upon to explain those inaccuracies his answer bordered on sheer arrogance (Finding 20 *supra*).[29] It was only after his client was thrown into hearing that

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[28] For complete details on Jones' engineering experience see Mass Media Bureau Findings 7–9. As previously noted (Footnote 15 *supra*), Jones claims he didn't know 47 CFR 73.186 required him to record the time the measurement was taken. This claim is summarily rejected. Jones claims he has conducted allocation type field measurements on at least 280 occasions (WKKQ Ex. 3, pp. 1–2; Tr. 240, 245). It's inconceivable that he doesn't know what 47 CFR 73.186's requirements are.

[29] This assessment of Jones' engineering techniques is neither harsh nor isolated.

Jones was willing to admit that the measurement times he originally reported to the Commission could have been off by as much as two minutes (Finding 37 *supra*).

15. So it must be concluded that Robert Jones misrepresented the facts to the Commission about his May 20, 1977 field strength measurements; and the character issue 2 must be resolved adversely to WKKQ, Inc.[30]

16. Moreover, Jerry Collins - WKKQ's principal, President, and General Manager - is responsible for Jones' improprieties. Under the doctrine of *respondent superior* a principal is responsible for the acts of his agent performed within the scope of his employment. And this Commission has so held: *Eleven-Ten Broadcasting Corp.*, 32 FCC 706, 22 RR 699 (1962); *reconsideration denied* 33 FCC 92 (1962); *affirmed sub. nom. Immaculate Conception Church of Los Angeles, et. al.*, 116 U.S. App. D.C. 73, 320 F.2d 795 (1963), *cert. denied*, 375 U.S. 904; *KWK Radio, Inc.*, 34 FCC 1039 (1963), *reconsideration denied*, 35 FCC 561 (1963); *affirmed in KWK Radio, Inc.* v. *Federal Communications Commission*, 337 F.2d 540 (1964); and *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968).

17. Having decided that Collins must bear responsibility for Jones' improprieties, we must decide whether Collins' application should be denied for that reason. It is concluded that Collins' (WKKQ's) application should not be denied. Jerry Collins is largely ignorant of engineering matters. He isn't well versed on the methods, techniques, and equipment used to take field measurements. So, on May 20, 1977, he properly relied on Robert Jones, his consulting engineer, to conduct a craftsmanlike field strength measurement survey. And when he drove Jones from measurement point to measurement point, as far as he (Collins) knew Jones was doing just that (Finding 14 *supra*).

18. Moreover, he had no reason to suspect that Jones would do anything less than a craftsmanlike job. He had employed Jones as a consulting engineer over a 20-year period, and had never had an occasion to doubt Jones' reliability in the past (Finding 15 and Footnote 5 *supra*).

19. In summary, Collins properly placed himself in the hands of

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See *Oil Shale Broadcasting Company*, FCC 83M-89 released January 10, 1983. There Jones' techniques were described as being ". . . contemptuous of the Commission's processes." Also see Tr. 146–282 of *Town and Country Broadcasting, Inc.*, BC Docket No. 81–802, where two Town and Country engineering exhibits prepared and submitted by Mr. Jones had to be withdrawn from evidence with the result that Mr. Jones' client failed to carry its burden of proceeding.

[30] While Issue 3 is also resolved against WKKQ, it has become irrelevant, since WKKQ (via a new engineering consultant, John Heffelfinger) took valid measurements on the 284° and 295° radials from Station WKKQ (Finding 26 *supra*).

a consulting engineer he believed was reliable. He could do no more. So while he must take responsibility for Jones' improprieties,[31] it is concluded that such improprieties don't detract from his (Collins') character qualifications to be a Commission licensee. See *Cumberland Broadcasting Corporation* v. *Federal Communications Commission*, 647 F.2d 1341 (1980).

20. One further observation is in order. When the Commission designated WKKQ, Inc.'s application for hearing back on April 29, 1982 (Finding 2 *supra*), Collins became aware that the Commission was seriously challenging Jones' May 20, 1977 field intensity measurements. He immediately hired another consulting engineer - John Heffelfinger - to take field intensity measurements and develop the facts on the prohibited overlap issue. So it can be further concluded that he moved in a timely and tactful manner to extricate himself from the tenuous position Jones had placed him in.

Ultimate Conclusion

21. Since it has been concluded that WKKQ, Inc. should not be disqualified for its former consulting engineer's improprieties; and since there are no other issues standing in the way of a grant of its application, it's now further concluded that a grant of WKKQ's application would serve the public interest, convenience and necessity.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion,[32] WKKQ, Inc.'s application (File No. BP-780901AG) IS GRANTED subject to the following four conditions:

> 1. An antenna monitor of sufficient accuracy and repeatability, and having a minimum resolution of 0.1 degree phase deviation and 0.1 percent sample-current ratio deviation, shall be installed and continuously available to indicate the relative phase and magnitude of the sample current of each element in the array, to insure maintenance of the radiated fields within the authorized values of radiation.
>
> 2. A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, shall be submitted before program tests are authorized. The nondirectional and directional field strength measurements must be made under similar environmental conditions.
>
> 3. Upon receipt of operating specifications and before issuance of a license, permittee shall submit the results of observations made daily of the base currents and their ratios, relative phases, sample currents and their ratios, and sample-current deviations for each element of the array, along with the final amplifier plate voltage and current, the common-point current, and field strengths of each

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[31] Had this been a comparative proceeding Collins would have been assessed a comparative demerit. See *James C. Sliger*, 70 FCC 2d 1565, 1574 at para. 16 (1979).

[32] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

monitoring point for both nondirectional and directional operations for a period of at least 30 days, to demonstrate that the array will be maintained within the specified tolerances.

4. The inverse distance field intensity at a distance of one kilometer from the antenna in the directions specified shall not exceed the following values.

True Azimuth	*Maximum Field Strength (mV/m)*
91.5°	23.58
118.0°	23.61
157.0°	23.53
172.0°	23.51
192.0°	25.27
202.0°	23.98
212.0°	22.85
220.0°	23.01
227.0°	22.85
240.0°	28.97
266.0°	23.61
292.5°	23.58

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

Application, For Review, Time for Filing
Fairness Doctrine
Fairness Doctrine, Refiling of Complaint

> Petition for Reconsideration must be timely filed. Followup complaint must be filed within reasonable time (normally within 30 days) after Commission denial of initial complaint.
> –*Accuracy In Media*

FCC 83–293

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
Accuracy in Media
against
CBS TELEVISION NETWORK

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: June 30, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Broadcast (now Mass Media) Bureau's ruling of September 1, 1982,[1] denying reconsideration, filed September 23, 1982 by Accuracy in Media (AIM). On January 18, 1982, the Commission received a complaint from Mr. Reed Irvine on behalf of Accuracy in Media alleging that the CBS television network had violated the Fairness Doctrine as a result of a November 17, 1981 airing of "The Mike Wallace Profiles: 'Jean Seberg,'" and related news broadcasts. The Bureau, in a ruling of April 15, 1982,[2] found that AIM failed to establish that the broadcasts discussed a controversial issue of public importance. AIM had identified the issue as "whether or not the FBI was responsible in any significant degree" for Ms. Seberg's various problems.

2. In a letter dated May 27, 1982, AIM requested reconsideration of the Bureau's April 15 ruling.[3] The Bureau found that AIM had failed to seek reconsideration within 30 days as required by Section

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[1] A copy of this ruling is attached (Appendix A).

[2] A copy of this ruling is attached (Appendix B).

[3] The last sentence of AIM's letter states:

> We therefore ask that you reconsider your rejection of our complaint and consider on its merits whether or not CBS has complied with the requirement

405 of the Communications Act of 1934, as amended (47 U.S.C. §405). Accordingly, the Bureau dismissed AIM's request for reconsideration.

3. AIM now asks the Commission to reinstate its complaint and address it on its merits. AIM asserts that the Commission should accept its May 27 letter as timely filed "because it was a bona fide effort to meet a requirement [establishing a *prima facie* case] in good faith levied on AIM by the FCC staff."

4. After a careful review of the information before us, we believe that the Bureau's ruling is correct, and the Application for Review does not contain sufficient grounds to warrant reversal. The Bureau's dismissal of AIM's request for reconsideration was consistent with the statute and precedent because no extraordinary circumstances have been raised. *Gardner v. FCC,* 530 F.2d 1086, 1091 (D.C. Cir. 1976); *The Ridgewood Group,* 79 FCC 2d 588 (1980).

5. Some further comment is warranted. AIM in its Application for Review stated that its May 27, 1982 pleading was filed in accordance with Commission instructions to provide new information for purposes of establishing a *prima facie* case. This requirement is necessary before the Commission will ask a broadcaster for its comments on a fairness complaint. Although there is a 30-day statutory requirement for filing petitions for reconsideration, we have not previously limited the time within which a complainant could perfect the original complaint so as to warrant an inquiry to the broadcaster. We believe that the lack of some limitation is administratively inefficient and creates an undue burden on our licensees when a "follow-up" complaint is filed long after the initial complaint has been dismissed. Therefore, we will now require complainants to file such "follow-up" Fairness Doctrine complaints within a reasonable time after the date of the Commission's denial of the initial complaint.[4] If this is not done, such complaints will be dismissed as untimely filed. Of course, complainants can elect to seek reconsideration within the statutory guidelines. 47 C.F.R. §1.106. Because we are detailing this policy for the first time, and because AIM may have intended its May 27, 1982 pleading to be treated as a "follow-up" complaint, we shall examine the merits of AIM's allegations contained in its pleadings of January 18 and May 27, 1982.

6. In establishing a Fairness Doctrine complaint there must be a current controversial issue of public importance. The events creating

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that it air all sides of this controversial issue.

The Bureau appropriately referred to this letter as a Petition for Reconsideration.

[4] Ordinarily, a reasonable time would be within 30 days of the date of the complaint's denial.

the dispute concerning the FBI's alleged involvement in the Seberg matter[5] occurred well over ten years ago. Therefore, even if the degree of FBI involvement was an issue that may have been subject to the Fairness Doctrine in 1970, we cannot find that a broadcaster would be unreasonable in determining that such events at the time of the broadcast did not amount to a controversial issue of public importance. *Frederich P. Berg,* 71 FCC 2d 387 (1978), *review denied,* 71 FCC 2d 385 (1979), *recon. denied sub nom. The Ridgewood Group,* 79 FCC 2d 588 (1980).

7. AIM has furnished numerous newspaper and magazine articles which it contends demonstrates this issue to be controversial. Certainly these articles illustrate the newsworthiness of the Seberg matter, but they do not establish that more than a decade after the disputed events took place the issue of the FBI's alleged interference in Ms. Seberg's personal affairs is subject to vigorous debate with substantial elements of the community in opposition to one another.[6] In this connection, the Court of Appeals in *Healey v. FCC,* 460 F.2d 917 (D.C. Cir. 1972) stated:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues. [*Id.* at 922.]

8. AIM has asserted that the FBI's involvement in the Seberg matter is important because of its effect on "the reputation of the FBI"[7] and that a "[w]eakening of public respect for the FBI" can damage its ability to function effectively. If, in fact, AIM is suggesting that "the reputation of the FBI" is a separate and distinct fairness issue requiring offsetting viewpoints, we find that AIM has not submitted any information to show that CBS meaningfully addressed this issue during its presentation of "The Mike Wallace Profiles: 'Jean Seberg.'" Under the Fairness Doctrine an issue must

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[5] See Appendix B for details.

[6] In establishing a *prima facie* case under the Fairness Doctrine, an issue must be both controversial and of public importance. As indicated in the *Fairness Report,* 48 FCC 2d 1 (1974), and in the Bureau's April 15, 1982 response to AIM's January 18, 1982 complaint, in determining whether an issue is controversial "it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. Furthermore, the licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the *subject of vigorous debate with substantial elements of the community in opposition to one another." Fairness Report,* 48 FCC 2d at 11–12 (emphasis added).

[7] Pursuant to a request from AIM, Mr. Robert Young, assistant director in charge, Office of Congressional and Public Affairs of the FBI, sent to the Commission a letter which we received on June 11, 1982. He asserts that the national publicity surrounding the Jean Seberg matter and its effect on the credibility of the FBI makes this a matter of "public importance." In addition, Mr. Young is of the opinion that the Seberg case is "controversial" as evidenced by the numerous editorials addressing this matter and the countless inquiries received by the FBI.

be addressed in an obvious and meaningful fashion so as to amount to advocacy on that particular issue. ***Fairness Report,*** 48 FCC 2d at 13; ***American Security Council Education Foundation,*** 607 F.2d 438, 450 (1979). The Commission does not expect its licensees to present contrasting viewpoints on every statement or shade of opinion presented in a particular program. In this regard, we have stated:

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. More important, . . . such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We would become an integral part of broadcast journalism, passing on thousands of complaints that some statement, or inference to be drawn from a statement, on a newscast or other news show had not been offset by a countering presentation. A policy of requiring fairness, statement by statement or inference by inference, with constant governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, [and] wide-open. . . ." [*National Broadcasting Co.,* 25 FCC 2d 735, 736-37 (1970) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)).]

9. Based on all of the foregoing, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Sep. 1, 1982

8330-D
C6-5

Mr. Reed Irvine
Accuracy in Media, Inc.
1341 G. Street, N.W., Suite 312
Washington, D.C. 20005

Dear Mr. Irvine:

This is in reply to your correspondence filed on May 28, 1982, on behalf of Accuracy in Media (AIM), in which you seek reconsideration of the April 15, 1982 Broadcast Bureau ruling that determined you had failed to establish a *prima facie* Fairness Doctrine complaint.

Your original complaint alleged that the CBS television network, in its November 17, 1981 airing of "The Mike Wallace Profiles: 'Jean Seberg'" and related news broadcasts, had violated the Fairness Doctrine. You defined the controversial issue of public importance as "whether or not the Federal Bureau of Investigation [FBI] was responsible in any significant degree" for Ms. Seberg's various problems. You asserted that CBS had failed to present evidence "(1) that the FBI was not responsible for the publication of the 1970 story about [Ms.] Seberg [concerning her pregnancy], and (2) that the publication of the story was not the cause of her miscarriage or her subsequent mental problems." The Bureau found this complaint to be deficient because it failed to establish that the issue in question was "controversial" or of "public importance."

Section 405 of the Communications Act of 1934, as amended (47 USC §405), and Section 1.106 of the Commission's rules (47 CFR §1.106) require that petitions for reconsideration must be filed within 30 days from the release of the subject decision. The Bureau's ruling concerning this matter was mailed to you on April 15, 1982, and your petition for reconsideration was received by the Commission on May 28, 1982, well beyond the 30 day statutory filing period. Therefore, since, under 47 USC §405, your petition for reconsideration was untimely filed, and since the Commission has no authority or discretion to change the requirements of the statute, your petition must be dismissed. *See Washington Broadcasting Co.*, 2 FCC 2d 952 (1966).

Mr. Reed Irvine

In view of the foregoing, your petition for reconsideration IS DISMISSED.

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Apr. 15, 1982

3466
IN REPLY REFER TO:
8330-C
C1-319

Mr. Reed Irvine
1341 G Street, N.W. Suite 312
Washington, D.C. 20005

Dear Mr. Irvine:

This refers to your complaint, filed January 18, 1982, on behalf of Accuracy in Media, Inc. (AIM), in which you allege that in its November 17, 1981, profile of the late Jean Seberg, the CBS television network violated the Fairness Doctrine.

In support, you allege that the program contained numerous charges or suggestions that the Federal Bureau of Investigation (FBI) was responsible for the publication by newspapers and magazines of a story about Ms. Seberg in 1970 which caused her such mental anguish that she had a miscarriage, subsequently became mentally unbalanced, and later committed suicide.[1] You identify the controversial issue of public importance as "whether or not the FBI was responsible in any significant degree" for Ms. Seberg's various problems. In this regard, you assert that CBS did not present any of the "strong evidence" that: (a) the FBI was not responsible for the publication of the 1970 story about Ms. Seberg, and; (b) the publication of the story was not the cause of her miscarriage or her subsequent mental problems and eventual suicide.[2] You further state that CBS aired a portion of a recording of a telephone conversation between Ms. Seberg and Mr. Hewitt which you allege it edited to make the recording conform to CBS' version of what the recording was about. You declare that "This tampering with the evidence strongly indicates that the CBS effort to portray the FBI in an unfavorable light was not only deliberate but contrived." Moreover, you charge that the documents and tape were made available to the three major networks, major newspapers and the wire services, and that only CBS refused to carry a report mentioning this evidence. In this regard, you contend that CBS produced the November 17, 1981, profile of Ms. Seberg which repeated all the charges against the FBI and ignored all of the exculpatory evidence.

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[1] According to AIM, CBS made five references to an allegation that the FBI was responsible for "plant[ing]" stories in the press stating Ms. Seberg was carrying a baby fathered by Raymond Hewitt, a Black Panther leader.

You enclose a copy of a November 27, 1981, letter you wrote to CBS asking that it tell the other side of the Seberg-FBI story. You state that in his December 9, 1981, reply, Mr. William Leonard, President of CBS News, did not address the issue of the omission of all the contrary evidence and did not claim that the other side of the story has previously been or ever will be aired by CBS. We note, however, that you do not enclose a copy of that reply, and thus you have furnished us no evidence in support of these allegations. Nonetheless, you request that the Commission order CBS to present the other side of this "controversial issue."

The First Amendment to the Constitution and provisions of the Communications Act prohibit the Commission from taking any action that would interfere with free speech in broadcasting. Although there are other laws which establish limited exceptions, the authority of the Commission to regulate broadcasting does not, in general, include the right to direct broadcasters in the selection of programming to be aired by their stations. In this context, the First Amendment protects the right of the press, including broadcasters, to air what may be considered biased or offensive by the audience as well as that thought unprejudiced and pleasant. Within this framework, decisions as to what material to broadcast are left to the licensee's good faith judgment as to how best to serve the public interest.

Under the Fairness Doctrine the broadcaster must afford a reasonable opportunity for the presentation of contrasting viewpoints when it presents one side of a controversial issue of public importance. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcaster has an affirmative duty to encourage and implement the presentation of contrasting views in its *overall* programming which, of course, includes statements or actions reported on news programs.

The Commission's *Fairness Report*, 48 FCC 2d 1, 11–12 (1974), sets forth the factors involved in defining a "controversial issue of public importance." In determining whether an issue is of "public importance," the Commission looks to (1) the degree of media coverage; (2) the degree of attention given the issue by government officials and other community leaders; and (3) the principal test, a "subjective evaluation of the impact that issue is likely to have on the community at large." With respect to whether an issue is "controversial" the Commission states that: "Here, it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media." Furthermore, the licensee should be able to tell, with a reasonable degree of objectivity, "whether *an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another.*" (Emphasis added.) In this regard, we note that you have submitted no evidence that any degree of attention was given the issue by governmental officials and community leaders, or that the issue had any impact on the community at large. Moreover, you have not furnished any information to establish that the subject issue is the "subject of vigorous debate with substantial elements of the community in opposition to one another." Thus, you have not met the burden of establishing that this issue, which arose over eleven years ago, is either "controversial" or "of public importance."

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[2] The evidence consisted of documents and a tape recording from the FBI's file on Ms. Seberg which AIM released at a press conference on August 22, 1980.

Accordingly, no further action is warranted on this aspect of your complaint. Should you furnish the necessary information to satisfy the requirements of a *prima facie* complaint, the Commission will give your complaint appropriate further consideration. In this regard, we are enclosing Broadcast Bureau Publication 8330-FD with attachment. These materials will provide you with the necessary information for filing a *prima facie* Fairness Doctrine complaint.

With respect to your allegation that CBS "contrived" elements of this broadcast, please note that the Commission is not the national arbiter of the "truth" of a news event or the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air. Absent extrinsic evidence of deliberate distortion, the FCC cannot properly investigate to determine whether an account or analysis by a commentator is "biased" or "true." By extrinsic evidence the Commission generally means evidence outside the content of the program. This kind of evidence would include testimony, in writing or otherwise, from "insiders" or persons who have direct personal knowledge of an intentional attempt to falsify the news. Of particular concern would be extrinsic evidence revealing orders from the broadcaster, its top management, or its news management to falsify the news.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely,

Jeffrey W. Malickson, Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

Computing Device
Equipment Authorization Program
Measurement, Computing Devices
Radio Frequency Device Authorization
Technical Standards

Memorandum Opinion and Order adopted amending Part 15 of Rules concerning radio noise emissions measurements for computing devices. This MO&O makes a number of minor changes in the specific instructions contained in the procedure. In addition, the measurement procedures are removed from Part 15 Appendix A and will be published as an FCC Measurement Procedure MP-4.

–*Amendment of Part 15*
GEN. Docket No. 80–284

FCC 83–352

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter	
Amendment of Part 15 of the Rules relating to methods of measurement of radio noise emissions from computing devices	General Docket 80–284

MEMORANDUM OPINION AND ORDER

(Adopted: July 21, 1983 Released: July 26, 1983)

Introduction:

1. A *Report and Order* in the above captioned proceeding was adopted by the Commission on February 25, 1981 (46 FR 23240, April 24, 1981), to specify the method of measuring radio frequency emissions from computing devices subject to limits in Part 15, Subpart J. The test procedure was set out in Appendix A of Part 15. A petition for limited reconsideration was filed by the Computer and Business Equipment Manufacturers Association (CBEMA) on May 26, 1981. This *Memorandum Opinion and Order* makes a number of minor changes in the test procedures for computing devices.

2. The requirements for computing devices in Part 15, Subpart J, are designed to control radio frequency interference from digital electronic equipment such as personal computers and coin operated games. The rules specify limits on emissions radiated into space and emissions carried along the power cord of the product. In developing

these standards in FCC Docket 20780, commenters emphasized that determination of compliance with the limits rests heavily on how tests are to be performed and urged the Commission to institute a separate proceeding to adopt detailed measurement procedures.[1] The need for specifying the test methods is particularly important because the vast majority of computing devices are subject only to verification, an equipment authorization procedure performed by the manufacturer, normally without FCC review.[2] Thus the subject proceeding was initiated.

3. The *Report and Order* in the instant docket set forth measurement procedures for computing devices in Appendix A of Part 15, based on extensive study by the computer industry and measurement laboratories. Manufacturers are encouraged to employ these procedures when performing their own tests. Second, the FCC document discusses a number of variations from the standard procedure that may be employed by manufacturers for convenience or to accommodate unique measurement situations, provided of course that it can be demonstrated that equivalent results are achieved. The test procedures were made as flexible as possible to account for the diverse nature of computer products and practical problems one faces in performing emissions tests on such equipment, while still ensuring accurate and repeatable results.

4. CBEMA's petition for limited reconsideration requests a few substantive changes and several amendments for clarification purposes. No responses to the CBEMA petition were received. We believe the action taken herein should relieve most of CBEMA's concerns. In addition to the points raised by CBEMA, we will also discuss several interpretive questions and other matters which have come to our attention in correspondence or in testing equipment at the FCC Laboratory. Before getting to these items, we will first revisit our decision to publish the computing device measurement procedures as an appendix to Part 15.

Method of Publication of FCC Computing Device Measurement Procedures

5. Since the time when the *Report and Order* in this docket was adopted, the Commission has had opportunity in other rulemaking proceedings to consider the method of publication of other FCC equipment authorization measurement procedures. Specifically, in the recent rulemaking proceedings concerning TV interface devices

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[1] 44 FR 59530. Complete references to the various actions in Docket 20780 are given in Appendix A of Bulletin OST 54, *Understanding the FCC Regulations Concerning Computers*, available from the FCC Consumer Assistance Office, Washington, D.C. 20554.

[2] See Part 2, Subpart J (47 CFR Part 2, Subpart J), for details on the equipment authorization procedures.

(General Docket 79–244) and remote control and security devices (General Docket 20990), the Commission elected to publish the associated measurement procedures as separate documents.[3] This was obviously a different course than was taken in the instant docket 80–284, where the test procedures were appended to Part 15. However, it had become clear that in the long term it would be preferable to publish the test procedures separately so that they may be purchased only by those who need them. Measurement procedures are generally of interest only to a limited audience, and publication of all such documents as appendices to the FCC Rules is an inefficient means of distributing this information. Accordingly, upon review we have decided to remove the computing device test procedures from Part 15 Appendix A and publish them as a separate FCC Office of Science and Technology measurement procedure.[4] FCC Measurement Procedure MP-4 "FCC Methods of Measurement of Radio Noise Emissions from Computing Devices," will be available in the near future from the FCC duplicating contractor.

CBEMA Petition and Discussion

6. CBEMA requests clarification of the Commission's position on whether the equipment under test (EUT) is to be configured in a manner which tends to produce maximized emissions, or whether efforts are to be made to find the absolute "worst case" emissions configuration. Various paragraphs of the test procedure are said by CBEMA to be inconsistent on this point. CBEMA objects to those portions of the procedure calling for specific steps to be taken to find the absolute "worst case" configuration, such as shifting cables or reorienting equipment.

7. It appears that the confusion has been caused by the slightly different instructions that appear in paragraphs 4.2.5, 4.5.1, and 6.1 and in the text of the *Report and Order*. To alleviate this situation we are consolidating all the information on EUT configuration into a revised paragraph 4.5.1. The revised paragraph 4.5.1 allows the test engineer considerable discretion to select the EUT configuration likely to maximize emissions, but the rationale and steps taken to arrive at the final selection must be documented in the test report.

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[3] *Report and Order* in General Docket 79–244 adopted February 9, 1983 establishing requirements for TV interface devices, 48 FR 13029, March 29, 1983; *Report and Order* in General Docket 20990 adopted October 22, 1981, establishing requirements for remote control and security devices, 46 FR 55520, November 10, 1981.

[4] The change in the method of publication is considered to be purely administrative in nature. Accordingly, as provided in Section 553(b)(3) of the Administrative Procedure Act (5 U.S.C. 553(b)(3)), further notice and comment on this change are unnecessary. The significance of the test procedure, as stated in Section 15.840, is that it will be used by the Commission when performing its own tests. This rule Section is not being changed, except to amend the language to clarify that manufacturers may employ alternative test techniques as discussed in the FCC document.

8. CBEMA objects to the requirement in paragraph 4.5.4 that equipment which may be used with a variety of cable lengths must be tested with both long and short cables, because they claim this effectively doubles the required testing. They go on to state that interface cables are often too bulky or rigid to be bundled as called for in paragraph 4.5.4. We have elected to establish a new paragraph 4.5.4.1 to bring together all pertinent information concerning interface cables. The new paragraph 4.5.4.1 does not specifically call for tests with long or short cables. Instead we are calling attention to the need for the test engineer to select cable lengths likely to produce maximum radiation. Disposition of excess cable length that cannot be bundled will be left to the test engineer.

9. Another point raised by CBEMA is that the stated preference in paragraphs 4.1.1 and 6.2 for testing small computers and Class B computing devices at a distance of 3 meters should be deleted.[5] The justification given is that the limits for Class B devices, although specified at 3 meters, were in fact formulated on the basis of a ten meter protection distance. We are providing partial relief by deleting the instruction in 4.1.1 to measure equipment that occupies a volume of less than a meter cube at 3 meters. Thus Class A computers may be tested up to 30 meters away. (The radiated emissions limits for Class A computing devices are specified at a distance of 30 meters.) For Class B computers, since the limit is specified at 3 meters and measurements at this distance are convenient, we will continue to encourage measurements at 3 meters. Measurements at further distances reduce sensitivity because the signal levels are lower, and they add the uncertainty of extrapolating results inwards from further distances. We have shifted the statement concerning 3 meter measurements for Class B computing devices from paragraph 6.2 to 4.2.4.1 to improve organization of the information. It should be noted that despite the stated preference for 3 meter measurements, provision is made to allow testing Class B devices at further distances if justification exists.

10. CBEMA requests clarification of the Commission's position with regard to equipment that was tested and verified before the test procedures were adopted in this docket. Although the Commission at paragraph 57 of the *Report and Order* in this docket stated that equipment verified prior to the effective date (July 1, 1981) of the formalized test procedures need not be retested, CBEMA feels this is inadequate. CBEMA requests that the Commission state *in the rules* that *any* measurements made before July 1, 1981, will be considered as satisfying the verification requirements, provided that they are

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[5] The definitions of Class A and B computing devices are given in Section 15.4 of the FCC Rules. Briefly, Class A pertains to equipment used in industrial or business environments and Class B pertains to equipment intended for use in residential environments. Different technical standards have been established for each category. See Sections 15.810 and 15.830 (47 CFR 15.810 & 15.830).

repeatable and consistent with good engineering practice. CBEMA is mainly concerned about measurements of broadband emissions, stating that some manufacturers understood measurements of such emissions might not be required, and others measured broadband emissions but assumed a greater reduction of the measurement instrument readings than ultimately decided upon by the FCC.[6]

11. We believe CBEMA and others are entitled to clarification of this point. We have amended 15.840 to note that we will accept procedures that are repeatable and consistent with sound engineering practice. Naturally the Commission must reserve the right to evaluate the procedures employed for testing a given equipment on a case by case basis. As provided in Sections 15.803 and 15.814(d), in the event that a given equipment is found to cause harmful interference, the Commission will investigate the cause of the problem with the manufacturer, including a review of the verification test data, and take appropriate action to correct the situation.

Miscellaneous Matters

12. In a letter dated April 7, 1981, Messrs. Ralph Calcavecchio and Robert F. German, of the International Business Machines Corp. (IBM), explain that their paper, "On Radiated EMI Measurement in the VHF/UHF Frequency Range," referred to in paragraph 34 of the *Report and Order,* was misinterpreted. The *Report and Order* indicated that the subject paper suggests use of a fixed measurement antenna height. To the contrary, the paper does in fact call for antenna height scanning, but instead of scanning from 1 to 4 meters above ground as the Commission proposed, and ultimately adopted, it states that an appropriate scan range is from 0.5 to 1.5 meters.

13. Messrs. Calcavecchio and German make several excellent points in support of their position, but we do not concur that sufficient evidence has been presented to deviate from the traditional 1 to 4 meter scan range. We have reservations about effects on the measurement antenna when it is close to ground e.g., within 0.5 meters of the ground, because the proximity of the antenna to the ground that may lead to erroneous readings. We understand that this question is currently under study by a number a parties. A second concern we have is that the reference antenna—a dipole—could not be used in vertical polarization over such a low scan range due to its physical length. Manufacturers are advised that we view the need to scan over a lower range than 1 to 4 meters as relevant only for measurements in anechoic chambers where ceiling height is

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[6] In paragraph 4.2.2. of the measurement procedure, the Commission in Note 4 allowed measurements of power line conducted broadband emissions to be reduced by 13 dB for comparison to the FCC limits. CBEMA had submitted comments suggesting that a 20 dB reduction be allowed. Nevertheless, CBEMA states that it accepts the Commission's 13 dB factor.

a factor. We will entertain requests to use a lower scan height for alternate test sites on a case by case basis.

14. The Commission on April 9, 1981, received a letter from Mr. Al Lavis of the Canadian Department of Communications raising a question about the line conducted emissions measurement procedure. The FCC limits are based on the use of a 50 ohm/50 microhenry (uH) Line Impedance Stabilization Network (LISN). Because of the limited availability of this network, the Commission provided for use of the more traditional 50 ohm/5 uH LISN by setting forth a curve in Fig. 5 which could be used to adjust the results. Mr. Lavis states that the curve is not entirely valid because it assumes that the impedance presented by the EUT to the LISN is negligible, which is not always the case. We do not disagree with Mr. Lavis' observation, but we see no simple way to account for EUT impedance since it will vary from one device to the next. Given that there is a temporary need to provide for use of the 50 ohm/5 uH LISN, we view the FCC correlation factor as a practical, although not exact, solution. We are, however, revising the NOTE under paragraph 5.3 to emphasize that measurements should be made with the 50 ohm/50 uH LISN whenever possible.

15. Spectrum Measurements Corp. and Dash, Straus & Goodhue, Inc., independent measurement laboratories, point out in letters dated December 28, 1982, and February 8, 1983, respectively, that there may be some confusion over the need to connect interface cables when testing certain computers and peripherals. Paragraph 4.5.1 of the FCC measurement procedure states that, when testing a computer or peripheral, interconnecting cabling shall simulate typical application and usage insofar as practical.[7] The question arises as to how this statement applies to computers that can be used either on a stand alone basis or with peripherals. For instance, some computers contain a microprocessor, keyboard, video display and disk memory storage all in one cabinet, which can be functionally used alone. Yet almost all such stand alone computers provide industry standard interface ports to allow the user to add peripherals such as printers, plotters and modems of his own choosing. Apparently, some segments of the industry are testing stand alone computers without interface cables connected to the interface ports and certifying compliance with FCC requirements; however, when other manufacturers use that computer as a host to exercise their peripherals, they find that FCC limits cannot be met because the computer couples excessive radio frequency energy via the interface port onto the interconnecting cable. We are also aware of situations where peripherals have been tested without an interface cable, using

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[7] The reason for this is that interface cables are often the primary source of radiation because they behave like an antenna for any radio signals that would otherwise be contained in the computer cabinet.

built-in programs to exercise the device. Here again, the device was stated to comply with FCC requirements yet could not meet the emissions limits when a cable was connected as in normal use.

16. With the considerable discussion devoted to interface cables in the test procedure, we believe we made our intention clear that interface cables must be connected to the available interface ports. Nevertheless, in the new paragraph 4.5.4.1 on interface cables (see paragraph 8, above), we state clearly that interface cables must be connected to at least one of each type port on the host computer or peripheral when tested for FCC compliance. We are also amending the requirements on information to be provided to the user, contained in FCC Rules Sections 15.818 and 15.838, to explicitly require that the user be so advised if shielded cables or other special accessories are necessary to insure FCC compliance. This is implied in the present text of these requirements, which state generally that the user instruction manual must provide sufficient information to insure that the system complies.

17. Another question that has come up periodically, which is also raised by Dash, Straus & Goodhue, Inc., concerns the use of simulators.[8] In paragraph 4.5.4 of the FCC test procedure, the Commission indicated that a simulator could be used to exchange signals with the equipment under test instead of an actual host computer. This provision was made primarily because of the limited availability of complying host computers during start up of the FCC program. However, we have encountered situations where a simulator was used in testing a product intended for exclusive use with a certificated host computer, although the device would not comply when connected to that computer. Accordingly, we are amending 4.5.4 to emphasize that use of simulators should be avoided if possible. If a peripheral is intended for use with a specific host computer it must be tested with that computer.

18. A number of other minor changes to the measurement procedure are made to add greater flexibility, respond to minor points raised by CBEMA or delete duplicate or overlapping instructions. Chief among them are the following:

a. Paragraph 4.2.5 is amended to indicate that preliminary radiated emissions testing is not mandatory.

b. Paragraph 4.7 is amended to allow use of 80 cm test stand heights as an alternative to 1 m, for comity with certain international measurement standards.

c. Information on the test distance in paragraphs 4.1.1, 4.7 and 6.2 are brought together in a new paragraph 4.2.4.1.

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[8] The Commission has received and responded to several hundreds of inquiries concerning the rules governing computing devices and test procedures therefor. The correspondence is available for public inspection. Contact the RF Devices Branch, telephone (202) 653-8247.

Ordering Clauses

19. Pursuant to the authority contained in Sections 4(i),302 and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED that effective September 1, 1983, Part 15 IS AMENDED as set out in Appendix A, attached.

20. IT IS FURTHER ORDERED that the FCC measurement procedure for computing devices, heretofore contained in Part 15 Appendix A, is amended as set out in the attached Appendix B, with the procedure to henceforth be published as Office of Science and Technology Measurement Procedure MP-4 "FCC Methods of Measurement of Radio Noise Emissions From Computing Devices."

21. IT IS FURTHER ORDERED that the Petition for Limited Reconsideration filed by the Computer and Business Equipment Manufacturers Association is GRANTED to the extent discussed herein and otherwise is DENIED.

22. For further information about this ORDER, contact Mr. Julius Knapp, Office of Science and Technology, Federal Communications Commission, Washington, D.C. 20554, telephone 202-653-8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

47 CFR Part 15 is amended as follows:

1. Section 15.818 is amended by adding a new paragraph (c) to read as follows:

Section 15.818 *Class A Computing Device: Information to User.*

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(c) Where special accessories, such as shielded cables, are required in order to meet FCC emissions limits, appropriate instructions on the need to use such equipment must be contained in the user manual.

2. Section 15.838 is amended by adding a new paragraph (d) to read as follows:

Section 15.838 *Class B Computing Device: Information to the User.*

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(d) Where special accessories, such a shielded cables, are required in order to meet FCC emissions limits, appropriate instructions on the need to use such equipment must be contained in the user manual.

3. Section 15.840 is amended to read as follows:

Section 15.840 *Computing Device Test Procedures.*

(a) The measurement techniques that will be used by the Commission to determine compliance with the technical requirements in this Subpart are set out in FCC Measurement Procedure MP-4 "FCC Measurement of Radio Noise Emissions from Computing Devices". Manufacturers are encouraged to follow the same procedure that will be used by the FCC. MP-4 also discusses a number of variations from and alternatives to the FCC test method that manufacturers or others may employ, provided that they can demonstrate that equivalent results are obtained.

(b) Measurements made prior to July 1, 1981, the effective implementation date for the FCC Measurement Procedures, are acceptable for equipment verification provided they are repeatable and consistent with sound engineering practice. Measurements of broadband emissions that are inconsistent with MP-4 need not be redone. However, should a given equipment be found to cause harmful interference, the Commission will take appropriate action as provided elsewhere in this Subpart.

4. Part 15 Appendix A is deleted in its entirety.

APPENDIX B

The *FCC Methods of Measurements of Radio Noise Emissions From Computing Devices* which were formerly contained in Part 15 Appendix A, are amended as follows and will be published as FCC Measurement Procedure MP-4.

1. The Index is amended as follows:

   a. Delete paragraph 6.2.1

   b. Add new paragraphs:
      4.2.4.1 Antenna-to-Test Unit Distance
      4.2.4.2 Antenna Height Variation
      4.5.4.1 Interface Cables

   c. The titles of the following paragraphs are amended:

      4.5.1 Test Conditions and Configuration of EUT

      4.7 Test Platform

2. In paragraph 1.0, fourth sentence, delete "and units, sub-units."

3. Paragraph 4.1.1 is amended to read as follows:

4.1.1 *OPEN FIELD TESTS*

Measurements of radiated radio noise should be made in an open, flat area characteristic of cleared, level terrain. For details on how to set up a suitable site, see FCC Bulletin OST 55: *Characteristics of Open Field Test Sites*, available from the FCC Consumers Assistance Office, Washington, D.C., 20554. Measurements made by the Commission will be performed on an open field test site.

4. In paragraph 4.2.3, delete the last sentence "Measured data may . . . charts or photographs."

5. Paragraph 4.2.4 is amended to read as follows:

4.2.4 *ANTENNAS*

A calibrated, tuned half-wave dipole antenna is preferred for measuring the level of radiated emissions. Other linearly polarized antennas are acceptable provided the results obtained with such antennas are correlateable to levels obtained with a tuned dipole. The antenna shall be capable of measuring both horizontal and vertical polarizations. Over the frequency range of 30 to 1000 MHz, the Commission will use tuned half wave dipole antennas for compliance testing.

6. A new paragraph 4.2.4.1 is added to read as follows:

4.2.4.1 *ANTENNA-TO-TEST UNIT DISTANCE*

The distance between the EUT and the measurement antenna may be 3 to 30 meters. An EUT subject to a radiated limit at 3 meters shall be measured at a distance of 3 meters, unless impractical because of size of the equipment, location, etc., in which case measurements may be made at a further distance up to 30 meters and the results extrapolated inwards utilizing an inverse distance extrapolation factor (i.e., 20 dB/decade). Equipment subject to a limit at 30 meters may be measured at a distance of from 3 to 30 meters provided that the results are exrapolated to equivalent signal at 30 meters utilizing an inverse distance extrapolation factor (20 dB/decade).

The horizontal distance between the measuring set antenna and the EUT shall be measured from the closest point of the device or system, as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the EUT system. All intra-system cables and connecting devices shall be included within this boundary.

7. A new paragraph 4.2.4.2 is added to read as follows:

4.2.4.2 *ANTENNA HEIGHT VARIATION*

The measurement antenna must be varied in height above ground to obtain the maximum signal strength. For measurement distances up to and including 10 meters, the antenna height shall be varied from 1 to 4 meters. Beyond 10 meters the height shall be varied from 2 to 6 meters. These height scans apply for both horizontal and vertical polarization, except that for vertical polarization the minimum height should be increased so that the lowest point of the bottom end of the dipole (or other antenna), at any frequency, clears the site ground surface by approximately 25 cm. At sites other than open field, alternative scanning heights and procedures may be used, provided that it can be shown that equivalent results are obtained.

8. Paragraph 4.2.5 is amended to read as follows:

4.2.5 *PRELIMINARY TESTING AND MONITORING*

It is often valuable to perform preliminary radiated measurements at a closer distance than specified for compliance to determine the emission characteristics of the EUT. At close-in distances it is easier to determine the spectrum signature of the EUT and, if applicable, the EUT configuration that produces the maximum level of emissions as discussed in 4.5.1. A site other than open field may be used for this purpose, but the test engineer should be aware that the alternate site may not produce precisely correlateable results. Where a radio noise meter is used for this spectrum search, it is recommended that either a headset or loudspeaker be connected as an aid in detecting ambient signals and finding frequencies of significant emission from the EUT.

Preliminary testing is optional. However, if preliminary tests are not performed, the steps outlined above (spectrum signature, EUT arrangement) must be accounted for when making tests at the distance used on the open field site.

9. Paragraph 4.4 is amended by adding a second paragraph to read as follows:

4.4 *DATA REPORTING FORMAT*

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The justification for selecting a particular EUT configuration as tending to produce maximized emissions must be documented in the test report. The test report should also show precisely how the interface cables were finally arranged when the measurements were made.

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10. Paragraph 4.5.1 is amended by adding the sentence "See Figure 1." at the end of the first paragraph and by adding a second paragraph to read as follows:

4.5.1 *TEST CONDITIONS AND CONFIGURATION OF EUT*

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The configuration that tends to maximize emissions is not usually intuitively obvious and in most instances selection will involve some trial and error testing. For example, interface cables may be shifted or equipment reoriented during initial stages of testing and the effect on results observed. For large systems with numerous cables, trial and error type tests may better yield to experience and knowledge about the characteristics of the EUT. Only those configurations that are within the range of positions likely to occur in normal use need be considered. In any event, there must be a definite justification for selecting a particular configuration.

11. Paragraph 4.5.4 *INTERFACING UNITS AND SIMULATORS* is amended as follows:

a. A new paragraph is inserted after the first paragraph to read as follows:

Because of the added degree of uncertainty when a simulator is used, such use should be avoided if possible. If a device is designed to be used with a specific host computer or peripheral subject to mandatory compliance, it must be tested with that computer or peripheral.

b. The last paragraph is deleted.

12. A new paragraph 4.5.4.1 is added to read as follows:

4.5.4.1 *INTERFACE CABLES*

It is imperative that interface cables be connected to the available interface ports on the EUT. This includes, but is not limited to, standard interface bus ports (IEEE 488, RS-232C) provided on computers and peripherals. The effect of varying the positioning of the cables must be investigated to find the configuration that produces maximum emissions. The configuration must be precisely noted in the test report.

Interconnecting cables should be of the type and length specified in the individual equipment requirements. If the length may vary, the test engineer should select the length that in his judgment will most likely produce maximum emissions. In general this decision should be based on some trial and error tests. If the cables will be purchased separately by the consumer, and shielded or special cables are used during FCC tests to achieve compliance, then a note must be included in the instruction manual advising of the need to use shielded cables. See FCC rule Sections 15.818 and 15.838.

Excess lengths of cables should be bundled at the approximate center of the cable with the bundles 30 to 40 cm in length. If it is impractical to do so because of cable bulk or stiffness, or because the testing is being done at a user installation, disposition of the excess cable is left to the test engineer.

Where there are multiple interface ports all of the same type, connecting a cable to just one of that type port is sufficient provided it can be shown that the additional cables would not significantly affect the results. Here again, the test engineer must use judgment as to what is appropriate for a particular EUT.

Products that provide a unique interface port for peripherals that are not yet available, may be tested by attaching a cable, extended one meter vertically above the device and left unterminated.

13. Paragraph 4.7 is amended to read as follows:

4.7 *TEST PLATFORM*

An EUT which is normally operated on a table shall be placed on a non-conducting table having a height of 1 meter above test site ground level. For ease of testing, the table may be placed on a rotatable platform, in which case the total height of the table plus the platform shall be approximately 1 meter above test site ground level. If the platform is elevated, it should be non-conducting to the maximum extent practicable.

Measurements made on a test table of 80 centimeter height as called for in some international measurement standards will be accepted for verification or certification of compliance. Although the results will probably be only marginally different than with the 1 meter height, the risk for discrepancies lies with the manufacturer. FCC tests will be performed at a height of 1 meter.

In the event that all the units or peripherals of an EUT system will not fit on the table, one or more of these may be placed on non-conductive shelves below the table top, using the minimum spacing below the top for their placement. In selecting units for placement on the shelf, first preference should be given to those normally not requiring frequent attention.

For an EUT normally placed on the floor, the equipment should, if practicable, be placed on a rotatable platform. If the platform is elevated it should be non-conducting to the maximum extent practicable and have a height of not more than 0.5 meters above ground level. The EUT shall be located in the center of the platform. If the EUT consists of two or more units, these shall be arranged around the center of the platform consistent with actual use.

14. In paragraph 5.1 the first sentence is amended to read as follows:

5.1 *CONDUCTED POWERLINE TEST CONFIGURATIONS*

The EUT shall be placed 40 centimeters from an earth grounded conducting surface 2 meters square (e.g. the floor of the test chamber) and shall be kept at least 80 centimeters from any other earthed conducting surface. Floor standing equipment may of course be mounted on an earth grounded floor.

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15. In paragraph 5.3, the NOTE is amended as follows:

a. The first sentence is amended to read "LISN's designed to comply with the impedance characteristic of Figure 2, have limited availability on the market."

b. Another sentence is added at the end of the paragraph to read "The correction has limited validity due to wide variation in EUT impedances, so measurements should be made with the 50 microphenry LISN if at all possible."

16. In paragraph 5.5, a sentence is added at the end of the paragraph as follows: Investigation shall be made to determine whether the position of interface cables affects the test results and if it does, the cables should be positioned so as to produce maximum emissions results.

17. In paragraph 6.1, in the fourth paragraph all sentences except the last one are deleted.

18. Paragraph 6.2 is amended to read as follows:

6.2 *RADIATED RADIO NOISE TESTS*

Radiated radio noise measurements shall be made at one of the test sites described in 4.1, above. The EUT shall be rotated as per 6.1 and measurement antenna height varied as prescribed in 4.2.4.2 in order to obtain a maximum reading on the measurement instrument. Tests shall be made in both the horizontal and vertical planes of polarization.

The frequency range 30 MHz to 1 GHz shall be investigated. For record keeping purposes only the 6 highest emanations observed during the tests need be recorded and maintained in the permanent record files.

19. Paragraph 6.2.1 is deleted.

20. In paragraph 6.3 the last sentence "Preliminary measurements . . . per paragraph 6.1." is deleted.

21. The curve shown in Fig. 2 "Impedance Stabilization Network" is revised to cover the frequency range 450 kHz to 30 MHz.

Fairness Doctrine
Fairness Doctrine, Complaint, Sufficiency in Overall Programming
Fairness Doctrine, Controversial, Within Overall Programming

Application for Review of a Bureau ruling denying a complaint against CBS television network denied. Complainant has failed to establish that CBS did not present contrasting viewpoints in its overall programming on the issue of "National Defense: do we need less or do we need more?"
–American Security Council

FCC 83-292

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
AMERICAN SECURITY COUNCIL
against
CBS, INC.

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: July 12, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Broadcast (now Mass Media) Bureau's September 8, 1982 ruling, filed October 7, 1982, by the American Security Council (ASC).[1]

2. The CBS television network broadcast a five-part series entitled "The Defense of the United States" during prime time for five consecutive nights from June 14–18, 1981. The series was rebroadcast in August 1981. On May 26, 1982, ASC filed a complaint alleging that CBS, in its presentation of "The Defense of the United States," had violated the Fairness Doctrine by not presenting contrasting points of view on the issue of "National Defense: do we need less or do we need more?"

3. In its September 8, 1982 ruling, the Bureau found that ASC's entire complaint focused on the lack of contrasting viewpoints presented within the five-part series. The Bureau noted that the Fairness Doctrine does not require a balanced presentation within a

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[1] A copy of the ruling is attached as an Appendix. The American Security Council describes itself as "a non-profit educational institution whose purpose is to improve and increase public understanding and awareness of facts and issues relevant to the security and defense of the United States."

single program or series of programs. The Bureau found that the subject series contained contrasting viewpoints and that no information was provided concerning CBS' overall coverage of the issue in question; that ASC's complaint failed to establish the nature and extent of its members' viewing habits in that it did not specify those time periods when its members were "routine" or "regular" viewers; and that ASC had furnished no extrinsic evidence of deliberate distortion by CBS to support ASC's allegations that the subject program contained inaccurate and misleading material. In this connection, the Bureau stated that "the Commission is not the national arbiter of the 'truth' of broadcast programming or the judge of its wisdom, accuracy or adequacy."

4. In its Application for Review ASC asserts that to sustain that part of the Bureau's ruling regarding the showing required to establish the nature and extent of its members' viewing habits "would not only insult common sense but would also require repeal of the Commission's own policy as stated in its *Fairness Report*, 48 FCC 2d 1 (1974), and as set forth in the *Phelps* Doctrine (*Alan C. Phelps*, 21 FCC 2d 12 (1969))."

5. According to ASC, paragraph 52 of the *Fairness Report* defines the appropriate basis for establishing viewing habits in a fairness complaint. Citing this paragraph, ASC asserts that the *Fairness Report* "recognizes the fact that some groups have a particular interest in certain issues and are in a position to state that contrasting views have *not* been presented."[2] ASC thus concludes that its organization "is a specialized group that has a particular interest in the national defense capabilities of the United States and routinely monitors CBS (and others) relative to such matters."[3] Furthermore, ASC asserts that the affidavit submitted by its president, Mr. John Fisher, "precisely" complies with the requirements of the Commission's rules and policies.[4]

6. ASC argues further that where a five-hour prime time program is presented and perceived by its audience "as *the* compre-

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[2] Paragraph 52 of the Fairness Doctrine states in relevant part:

> Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus have been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. [*Fairness Report*, 48 FCC 2d at 19.]

[3] ASC indicated in a footnote that it has been involved in monitoring CBS since 1973.

[4] The affidavit of John M. Fisher, states in relevant part:

> That in my role as President of the American Security Council and also as a concerned citizen of the United States, I am, and have been in excess of the past five years, a regular and routine viewer of the news, public affairs and other non-entertainment programming carried by the CBS television network.

hensive overview of the state of the National Defense of the United States," the program should be internally balanced. ASC contends that Commission policy should be changed to reflect this principle because under present policy it will never "recognize a need for fairness to be applied to a single series or major project no matter how egregious the unfairness or how important the subject matter."

7. ASC alleges that the Bureau erred in two respects. First, it "did not recognize the unrebutted claim in the ASC [c]omplaint by 'a regular viewer' that the opposing pro-defense viewpoint had *not* been presented in CBS' overall programming." Secondly, ASC asserts that the Commission should have made an inquiry of CBS regarding its overall coverage of the subject issue.

8. Finally, ASC argues "that the Commission must consider not only the substance of the complaint addressed to the broadcaster, but the manner in which it was presented, as well as the manner in which the licensee responds." In this regard ASC characterizes CBS' response to their concern as "on the order of 'drop dead'" and "arrogant." As a consequence, ASC requests the Commission to direct CBS to respond substantively to its concerns.

Discussion

9. Having carefully examined the pleadings before us, we conclude that ASC has not presented any new information or additional arguments which would warrant reversal of the Bureau's ruling. ASC has failed to show that in its overall programming CBS did not afford reasonable opportunity for contrasting views. Nor has ASC rebutted the Bureau's finding that CBS presented contrasting viewpoints within the subject series. Therefore, we find that the Bureau was correct in ruling that ASC's complaint did not establish a *prima facie* fairness violation.

10. In reviewing complaints under the Fairness Doctrine, the Commission does not substitute its judgment for that of the broadcaster. Rather, the Commission considers whether the station or network has acted reasonably and in good faith:

> We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. [*Fairness Report*, 48 FCC 2d 1, 9 (1974).]

11. With regard to ASC's allegation that CBS' overall programming was not balanced, in a letter of June 29, 1981, Mr. Bill Leonard, then President of CBS News, stated to ASC:

> "The Defense of the United States" included a variety of viewpoints regarding national defense issues and we believe that the broadcast was fair and accurate. Moreover, CBS News has provided extensive coverage of national defense matters in other news and public affairs programming.

In a subsequent letter of January 22, 1982, to ASC's counsel Howard F. Jaeckel, Assistant General Attorney, CBS Law Department, stated:

> . . . the extensive coverage given to defense matters in the overall news and public affairs programming of CBS news, and our continued belief that "The Defense of the United States" presented a variety of viewpoints on national defense issues fairly and accurately, we respectfully reiterate our rejection of your request for responsive programming.

12. ASC has not presented any new arguments concerning its assertion that the subject five-part series, in itself, should be internally balanced. In fact, in the *Fairness Report* we specifically stated that we did not want to impose on licensees the burden of proving compliance with the Fairness Doctrine on a program by program basis. Instead, we placed the burden on complainants to establish that a licensee's *overall* programming is unbalanced. The pertinent portion of the *Fairness Report,* 48 FCC 2d at 19–20, states:

> We do not believe this requirement [regarding the necessary showing for overall programming] to be unduly burdensome, as contrasted to the heavy burden we would place on all stations if we required them to provide evidence of compliance with the Fairness Doctrine based on complaints which assert that *one* program has presented only one side of an issue.

Therefore, as stated by the Bureau, "the Commission will not examine an individual program or series of programs in determining a licensee's overall good faith compliance with the Fairness Doctrine." *See Democratic National Committee v. FCC,* 460 F2d 891, 905 (D.C. Cir. 1972); *Energy Action Committee, Inc.,* 64 FCC 2d 787, 796 (1977). We are not persuaded to change this precedent since to do otherwise would constitute greater Commission intrusiveness into the content of programming than warranted by our Fairness Doctrine policy. In any event, the Bureau in its ruling of September 8, 1982, found that within the subject series CBS' had presented contrasting viewpoints on the issue of "National Defense: do we need less or do we need more?" (see *infra,* Appendix at note 4). ASC has failed to furnish any material to show otherwise and, therefore, we cannot find CBS to be unreasonable in determining that "The Defense of the United States" contained a "variety of viewpoints."

13. We also agree with the Bureau that the complainant has not sufficiently specified the nature and extent of its viewing habits in terms of indicating those periods of time during which it has been a regular member of the CBS television audience. The relevant portion of paragraph 52 of the *Fairness Report,* which ASC has cited in alleging that it has fully complied with Commission precedent regarding viewing habits, reads as follows:

> [A] claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. . . . One example of a "regular" television viewer would

> be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. [*Fairness Report*, 48 FCC 2d at 19.]

However, paragraph 52 also states:

> Complainants should specify the nature and extent of their viewing or listening habits, *and should indicate the period of time during which they have been regular members of the station's audience.* [*Id*; emphasis added.]

In adopting paragraph 52 of the *Fairness Report*, we "did not intend that the mechanical repetition of the words 'regular viewer' or the assertion that the complainant 'routinely listens to the news, public affairs and other non-entertainment programs'" would suffice for establishing a *prima facie* complaint. *See John Howard*, 55 FCC 2d at 780–81. We have clearly stated that our requirements for establishing a fairness complaint are not merely formal. *See John Howard*, 55 FCC 2d at 781 n.2. We expect a complainant to specify the programming he or she has viewed or heard on a particular station or network and to specify what programming, if any, addressed the various contrasting viewpoints on the alleged controversial issue of public importance. In making this showing, a complainant should indicate those time periods when he or she viewed or listened to the station's programming, including the frequency and length of time. This information should initially be brought to the attention of the station to allow it to assess what actions may be appropriate for purposes of complying with the Fairness Doctrine. If a complainant is not satisfied with the station's response and decides to pursue a fairness complaint with the Commission, then this information should be included in the complaint. Our requirement for viewing habit specificity thus serves to allow a licensee and, subsequently, the Commission to determine whether the complainant has sufficiently established that a licensee's overall programming complies with the Fairness Doctrine. We therefore agree with the Bureau's finding that ASC has merely provided a "mechanical repetition" which, in accordance with the Fairness Report, is not an adequate basis for a fairness complaint.

14. ASC asserts that the Bureau is in error for not recognizing ASC's "unrebutted claim" concerning the lack of contrasting viewpoints within CBS' overall programming. ASC bases this allegation on footnote 7 of its May 26, 1982 complaint, which states:

> It is also noted for the record that ASC is aware of no such "other programming" that could be offered by CBS to "balance" *The Defense of the United States* and CBS in its correspondence has offered no such examples.

We note that ASC does not allege that CBS has failed completely to present programming on the issue of National Defense: should we spend more? Instead the foregoing allegation, (which is based on the assumption that the five-part series, in itself, was one-sided) contends that whatever programming CBS has presented on the "more defense spending" side of the issue would be insufficient for purposes of a balanced presentation. However, ASC presents no persuasive argument or information to support this contention. Under the Fairness Doctrine the complainant has the burden of establishing a specific imbalance in the licensee's overall programming. *Healey v. FCC*, 460 F.2d 917, 921 (D.C. Cir. 1972); *Hale v. FCC*, 425 F.2d 556, 558 (D.C. Cir. 1970). Absent detailed and specific evidence of failure to comply with the Fairness Doctrine, the Commission will not require licensees to disprove bare allegations. *Allen C. Phelps* 21 FCC 2d 113 (1969). *See Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance* 29 F.R. 10415 (1964). In this regard the *Fairness Report*, 48 FCC 2d at 19 states:

> . . . we expect the complainant *to state the reasons* for concluding that in its other programming the station has not presented contrasting views on the issue. (emphasis added)

In the instant case, not only has ASC failed to establish imbalance within the subject series, para. 12 above, but it failed to specify the CBS programming it viewed to support its contention that in its overall programming CBS failed to afford reasonable opportunity for contrasting views. An allegation of unbalanced programming must be supported by a proper showing of viewing habits. As discussed above, ASC did not specify those time periods when it has actually viewed the CBS television network and the frequency of such viewing. Therefore, ASC has presented no information on which to base its allegation that CBS' overall programming presented a disproportionate amount of material on one side of the issue in question. Also, there is no indication it presented such information to CBS. Under these circumstances, we cannot find that ASC has presented a *prima facie* fairness violation.[5]

15. ASC also asserts in regard to paragraph 52 that if a complainant can establish that it is a specialized group with a particular interest and it routinely monitors a network with respect to such interest, this showing would suffice for purposes of establishing the nature and extent of a particular organization's viewing habits. We do not believe this interpretation is correct. The Commission included this language in paragraph 52 of the *Fairness Report* to emphasize that we did not expect all complainants to make the same type of showing that could be made by a specialized group which regularly monitors a station with respect to a particular interest. We did not intend, as ASC has suggested, that this paragraph would allow such a group to circumvent our requirements for specifying their viewing habits by a mere recitation that they are

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[5] ACS has also asserted that the Bureau erred by not making an inquiry of CBS. We disagree. Where the underlying allegation on which to base such action does not comply with our policies for establishing a *prima facie* Fairness Doctrine complaint, no inquiry is warranted.

a specialized group with a particular interest. Furthermore, if in fact ASC has been regularly engaged (since 1973) in monitoring CBS with regard to defense programming, then it should have had no problem specifying those periods of time during which it had actually viewed CBS television programming.

16. Finally, with respect to ASC's allegations concerning the unresponsiveness of CBS to its substantive concerns, as we have stated previously, the Commission's role under the Fairness Doctrine is limited to a determination of whether the station or network has acted reasonably and in good faith. *Fairness Report*, 48 FCC 2d at 9. In accordance with Section 326 of the Communications Act of 1934, as amended, and the First Amendment to the Constitution, decisions as to the selection and presentation of program material are left to the journalistic discretion of our licensees. In the instant case ASC has not established a *prima facie* case. Therefore, we cannot find CBS' response to ASC's Fairness Doctrine complaint to be unreasonable.

17. In view of the foregoing, we believe that the Bureau's ruling was correct. Therefore, pursuant to Section 1.115(g) of the Commission's rules and regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
September 8, 1982

IN REPLY REFER TO:
8330-D
C5-734

American Security Council
c/o Robert J. Buenzle, Esq.
1300 Nineteenth Street, N.W., Suite 404
Washington, D.C. 20036

Dear Mr. Buenzle:

This is in response to your Fairness Doctrine complaint (on behalf of American Security Council) against CBS, Inc.[1]

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[1] In your May 26, 1982 complaint, you enclosed four exhibits. Exhibit Number 1 is an exchange of correspondence between you and CBS; Exhibit Number 2 contains reprints of two magazine articles; Exhibit Number 3 is a transcript of the five-part series, "The Defense of the United States"; and Exhibit Number 4 is an affidavit of Mr. John M. Fisher, your president.

On July 16, 1982, the American Legal Foundation (ALF) submitted comments in support of your complaint on behalf of its "members and supporters" who viewed the program and who "are regular viewers of CBS." ALF asserts that "the program, 'The Defense of the United States,' was a one-sided presentation of a controversial issue of

You allege that CBS has violated the Fairness Doctrine in its airing of a five-part series entitled "The Defense of the United States."[2] You assert that CBS "ignor[ed] a substantial and important body of opinion on a very controversial issue of public importance *and* further, that the program contained an inordinate amount of factually inaccurate and misleading material." You identify the controversial issue of public importance as "National Defense: do we need less or do we need more?" You assert that this issue is important and controversial because of the extensive amount of disagreement that existed on it prior to the airing of the CBS program and because of the recent media coverage focusing on the issue. You allege that CBS advocated less national defense spending in the program. You also contend that because CBS offered this five-part series as a complete and thorough examination of the entire national defense issue, the program required a more balanced presentation under fairness principles. Finally, you allege that CBS "stone-wall[ed]" your request to have it correct errors in the program and to provide time for some spokesperson to present the opposing viewpoint; that "CBS as a matter of general policy will never voluntarily admit to a mistake or correct an error"; and that CBS' response to your complaint is not consistent with its public interest responsibilities or with "its obligations under the Fairness Doctrine."

In response to your Fairness Doctrine allegations, CBS asserts that "'The Defense of the United States' included a variety of viewpoints regarding national defense issues" and that "the broadcast was fair and accurate." In addition, CBS asserts that it had "provided extensive coverage of national defense matters in other news and public affairs programming."

As you have recognized in your complaint, the Fairness Doctrine requires broadcast licensees to: (1) inform the public by broadcasting discussions of controversial issues of public importance; and (2) afford reasonable opportunity for the presentation of contrasting viewpoints when they present one side of a controversial issue of public importance. In meeting these obligations both sides of an issue need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station or network, because it is the right of the public to be informed which the Fairness Doctrine is designed to assure rather than the right of any individual to broadcast his or her views.

In bringing a complaint under the second part of the Fairness Doctrine, a complainant must establish, among other things, that a licensee or network has failed to afford a reasonable opportunity for the presentation of contrasting views in its *overall* programming.[3]

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public importance." It defines the issue to be the level of national defense this country needs. ALF asserts that "[t]here has been no coverage of opposing viewpoints on the CBS network in any manner even approximating the coverage the network gave this program." ALF further asserts that American Security Council and ALF have "not been able to identify any coverage of opposing viewpoints on CBS."

[2] You indicate that this series was "originally presented in June of 1981 and rerun in the following month." However, it is our understanding that the series was rebroadcast in August rather than July as you suggest.

[3] In addition to addressing the licensee's overall programming, a *prima facie* complaint should include the following:

(1) the broadcaster (station or network) involved;

(2) the specific issue of a controversial nature broadcast (complainant should include an accurate summary of the views broadcast);

(3) the date and time when the issue was broadcast;

(4) the basis for the claim that the issue was controversial and of public importance;

Your complaint does not present any showing concerning CBS' *overall* coverage of your specified issue. Instead, your entire complaint focuses on CBS' five-part series and the alleged lack of programming *within* it. You provide no information on CBS' programming before or after the broadcasts in question. Absent detailed and specific evidence of failure to comply with the requirements of the Fairness Doctrine, the Commission will not impose on licensees or networks the burden of refuting every Fairness Doctrine complaint. *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969). Within this framework, the Court of Appeals has stated:

> On a complaint under the Fairness Doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue. It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard. . . . The essential element in invoking the Fairness Doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. [*Healey v. FCC*, 460 F.2d 917, 921, (D.C. Cir. 1972).]

With respect to the alleged lack of balance within the broadcasts, you request that we implement a new standard for the applicability of the Fairness Doctrine. You assert that where a program is offered "as a complete and thorough examination" on a particular issue, the Fairness Doctrine should require a balancing of contrasting viewpoints within the program or series of programs, rather than looking to the licensee's *overall* programming. We have previously rejected this argument. It would be unduly burdensome on broadcasters to require such individual program balance because it would serve to discourage the broadcast of "robust, wide-open debate." *See Horace P. Rowley III*, 39 FCC 2d 437 (B/c Bur. 1973), *recon. denied*, 45 FCC 2d 1069 (1974); *Fairness Report, supra; see generally The New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Requiring balanced presentations within a single program or series of programs would not only discourage licensees from addressing controversial public issues for fear of not adequately presenting contrasting viewpoints within each program, but would also create an administrative quagmire for the Commission. The Commission would have to determine on a program by program basis when the treatment of a particular issue would be considered "definitive" for purposes of requiring a balanced presentation. Thus, the Commission will not examine an individual program or series of programs in determining a licensee's overall good faith compliance with the Fairness Doctrine. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1255 (1949); *James Batal*, 24 FCC 2d 301 (B/c Bur. 1970).

Moreover, in order to avoid interfering with the broadcaster's journalistic discretion in determining how an issue should be covered, the Commission will not attempt a microscopic inquiry into each and every program or series of programs which may address controversial issues of public importance. *See Fairness Report, supra* at 8; *see also CBS v. Democratic National Committee*, 412 U.S. 94, 127 (1973).[4]

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(5) copies of correspondence between the complainant and the broadcaster; and

(6) whether the broadcaster has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue. *See Fairness Report*, 48 FCC 2d 1 (1974).

[4] Furthermore, even if we were to implement your suggested Fairness Doctrine standard, an examination of the five-part series reveals that CBS presented contrasting viewpoints on the issue of "National Defense: do we need less or do we need more?" In Part III of the series, "Call to Arms," CBS correspondent, Ed Bradley, advocated increased spending for military training, weapon parts and

Your complaint also fails to specify the nature and extent of your viewing habits or indicate those time periods when you have been a regular member of the network's audience.[5] You submit an affidavit indicating that John M. Fisher, president of the American Security Council, has been "a regular and routine viewer of the news, public affairs and other non-entertainment programming covered by CBS television network" during the past five years. Although a complainant does not have to be an "around the clock viewer" of the station to establish himself as a regular viewer of the news, public affairs or other non-entertainment programs, *see Fairness Report, supra,* at 19, a mechanical repetition of the terms "routine" or "regular" with respect to viewing habits, without further particularity, is not an adequate basis for a Fairness Doctrine complaint. *John Howard,* 55 FCC 2d 777, 780–81 (1975); *see also Environmental Defense Fund.* 90 FCC 2d 648 (FCC 82–268, July 9, 1982).

With regard to your allegations concerning inaccurate and misleading material on CBS' presentation, the Commission is not the national arbiter of the "truth" of broadcast programming or the judge of its wisdom, accuracy or adequacy. Some broadcasts (programs or announcements) involve the discussion of controversial public issues, or involve support or opposition to candidates for public office. In these cases, intervention by the Commission would be especially inappropriate because it might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being broadcast on either side of a controversial issue, or favoring one candidate over the other. Thus, in absence of extrinsic evidence of deliberate distortion, the Commission will not attempt to judge whether statements broadcast on political or other controversial public issues are true or false, or whether a licensee was justified in either broadcasting or rejecting them. The Commission has stated:

> [I]n a democracy, dependent on the fundamental rights of free speech and press, no [g]overnment agency can authenticate the news, or should try to do so. Such an attempt would cast the chill of omnipresent government censorship over the newsman's independence in news judgment. [*Mrs. J. R. Paul,* 26 FCC 2d 591, 592 (1969)]

In view of the foregoing, your complaint is denied.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)] by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

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skilled personnel salary levels. Also, in Part IV of the series, "The War Machine," Secretary of Defense Weinberger, Senator John Tower and Admiral Kinnear made statements favoring increased spending.

[5] ALF's claims also suffer from the same deficiences.

Cordless Telephone
Equipment Authorization Program
Low Power Communications Device
Radio Frequency Device, Authorization

Memorandum Opinion and Order adopted reconsidering a waiver of Rules for a cordless telephone. This MO&O responds to petitions for reconsideration of the waiver Order and reaffirms the Commission's original decision.
–*American Telecommunications Corp.*

FCC 83-358

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Order granting a waiver of Section 15.7 of the FCC Rules to American Telecommunications Corporation for a cordless telephones

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1983; Released: August 5, 1983)

I. *INTRODUCTION*

1. On September 29, 1982, the Commission adopted an *Order Granting Conditional Waiver* of Section 15.7 for a cordless telephone marketed by American Telecommunications Corporation (ATC), released October 4, 1982 (FCC *Order* 82-430, 48 FR 4788, February 3, 1983). An *Errata* was issued on February 1, 1983 (48 FR 5928, February 9, 1983), correcting some of the technical conditions in the waiver.[1] The instant action responds to three petitions submitted by GTE Service Corp. (GTE): for reconsideration of the *Order*; for reconsideration of the *Errata*; and for stay of the waiver Order. It also responds to a petition for partial reconsideration of the *Order* submitted by Electronics Industries Association, Communications Division, Personal Communications Section (EIA).[2] After reviewing

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[1] The changes were made to reflect a correction in the FCC laboratory Report that served as the basis for the technical conditions. See the Report in Project No 2247-56, available from Downtown Copy Center, 1114 21st St., N.W., Washington, D.C. 20037.

[2] A list of the various comments and pleadings filed in this proceeding is given in the Appendix.

these petitions and the comments about them, we have concluded that the waiver order and the technical conditions as corrected in the *Errata* should continue in affect, as specified therein.

2. A cordless telphone uses a short range two-way radio communication link in place of the wire normally connected to the telephone handset, thereby allowing the user freedom of movement. These devices are subject to the provisions of Part 15 of the FCC Rules and are operated without individual license. Most cordless phones on the market today employ a portable handset that transmits in the 49 MHz band, subject to the provisions in Section 15.118 of the FCC Rules, and a base unit (connected to the telephone line) that transmits using carrier current techniques in the band 1.625 to 1.8 MHz, subject to the requirements in Section 15.7. Carrier current refers to a technique whereby an RF signal is coupled to a wire, such as the household AC electrical wiring, which in effect is used as an antenna. Some cordless telephone base units also intentionally couple an RF signal to the telephone line, which then also behaves as an antenna.

3. American Telecommunications Corporation petitioned the Commission for a waiver of the field strength limit in Section 15.7 for the 1.7 MHz carrier current transmitter in its cordless telephone base unit. ATC argued that the limit in Section 15.7 would restrict the operating range to 40 feet or less as compared with the several hundred feet range exhibited by many cordless telephones already on the market. In order to evaluate the petition, the Commission tested a number of cordless telephones and subsequently found that none of the cordless phones tested complied with the field strength limit in Section 15.7. However, the Commission had received only a few reports of interference, and those were caused by cordless telephones operating in the 1.8 to 2.0 MHz amateur radio band.[3] Nevertheless, a potential interference problem was foreseen if cordless telephones would be allowed to continue operating in the 1.7 MHz band. At the 1979 World Administrative Radio Conference, an agreement was reached to reallocate the band 1605 to 1705 kHz for broadcasting.[4] When AM broadcast stations go on the air in this region of the radio spectrum (expected to begin in 1988), cordless telephones may experience substantial interference. In view of these circumstances the Commission decided to grant a limited two year waiver of Section 15.7 to ATC, subject to certain conditions, as an

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[3] The frequency of operation of devices subject to Section 15.7 is not restricted. While most cordless telephones were designed to operate between 1.6 and 1.8 MHz, a few models were designed for operation just above this band.

[4] See paragraph 19 of the waiver *Order*.

interim solution while new provisions for cordless telephones could be established in a separate proceeding.[5] The Chief Scientist was given authority to grant waivers to other manufacturers subject to the same conditions.

4. The principal conditions set out in the ATC waiver were: the device must operate in the band 1.625 to 1.8 MHz; the radio frequency current on the power conductors and telephone line may not exceed certain values; manufacture must terminate by October 1, 1984; and, the device must carry a label with a specific text. The limits on radio frequency current were imposed as a simple and convenient way to control the strength of the radiated signal. The values chosen for these limits were consistent with what was exhibited by cordless telephones tested by the FCC Laboratory.

II. *GTE and EIA PETITIONS FOR RECONSIDERATION*

5. The petitions for reconsideration focus primarily on two issues. GTE Service Corp., an operator of telephone systems and vendor of cordless telephones, argues that the radio frequency current that the waiver allows to be carried on the telephone line will harm the telephone network. This matter is discussed in paragraphs 6 thru 10, below. EIA, representing cordless telephone manufacturers, requests an extension of the waiver termination date. This issue is discussed in paragraphs 11 and 12, below.

A. *Potential harm to the telephone network*

6. GTE disagrees with the Commission's statement at paragraph 22 of the *Order* that the permitted level of RF energy on the telephone line is not expected to harm the telephone network. The basis for the Commission's statement was that cordless telephones had not been reported to be a source of harm to the telephone network and that the limits on conducted RF energy set out in the waiver were designed to maintain the same levels as exhibited by cordless telephones already on the market. GTE states that the lack of cases of actual trouble should not be interpreted to mean that problems do not exist. According to GTE, the interference caused by cordless telephones is intermittent and disappears before the source can be located.

7. GTE discusses a number of ways cordless phones may harm the telephone network.[6] Apparently the most significant potential

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[5] A *Notice of Proposed Rule Making* in Docket 83–325 proposing new temporary frequencies for cordless telephones was adopted by the Commission on March 31, 1983, 48 FR 16298, April 15, 1983.

[6] Some of the difficulties GTE describes concern alleged poor cordless phone receiver susceptibility, or lack of security coding in the receiver. The instant proceeding concerns only 1.7 MHz cordless telephone transmitters and problems

problem is interference to T-1 carrier systems.[7] GTE submits the results of tests which purportedly show how T-1 system performance can be degraded by the presence of 1.7 MHz cordless telephone signals on the telephone line. According to GTE, all 48 communication channels served by a T-1 system could be interrupted under certain conditions. Another potential problem described by GTE is that the 1.7 MHz signal can cause a beat note to be generated within an integrated circuit filter chip that is used as a component of central office and subscriber line cards, which results in noise in excess of central office system objectives. GTE states that, because of informal reports, it is also concerned about cross-coupling and demodulation of the 1.7 MHz RF signal by diode circuitry in the telephones of adjacent users.

8. AT&T, in a letter addressed to Mr. Art Wall, Chief of the RF Devices Branch, Office of Science and Technology, concurs with the GTE pleading with respect to potential harm to T carrier systems, but the company offers no actual data to support its concurrence. Also concurring with no factual data is the Computer and Communications Industry Association, representing companies providing data communication services. EIA, on the other hand, states that the problems cited by GTE are new to its members and have not been supported by complaints from either users or other telephone companies. While EIA does not acknowledge the validity of GTE's claims, it is participating in an informal dialog with GTE in order to establish a factual basis from which to proceed. Uniden Corp., a manufacturer of cordless phones, partially supports the GTE petition because it is concerned about the prospect that a few cordless phone designs could cause interference to the telephone network resulting in bad publicity for the entire industry. (Uniden's phones do not intentionally couple RF energy onto the telephone lines.) Mura Corp., another manufacturer of cordless telephones, opposes GTE's petition. Mura states that hundreds of thousands of Mura cordless telephones that couple RF energy onto the telephone line are in use today, and it knows of no complaint of interference to, or degradation of, telephone communications that has resulted from use of its cordless telephones.

9. We consider the GTE test results to be inconclusive for several reasons. The tests were made under simulated conditions and it is questionable whether the tests truly represent what actually occurs in practice. For instance, GTE did not fully account for or investigate

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associated with the receiver are irrelevant and not discussed herein. Issues concerning cordless telephone receivers are addressed in the proposal for new rules for cordless phones. See footnote 5, *supra*.

[7] T-1 carrier systems convert incoming analog signals, such as voice, into digital form for multiplexing onto transmission lines so that a greater number of channels can be carried on each line. They also reformat and transmit incoming digital signals.

the attenuation that the 1.7 MHz cordless phone signal experiences as it is carried on the telephone line, and GTE states that relevant information on attenuation at this frequency is not available. In certain tests GTE shows how cordless telephones can cause noise in excess of telephone system performance objectives, but it is not clear whether the excess noise is actually significant or whether it could be tolerated. For example, one test shows interference to be caused only when dialing, but since this would occur for only a short duration we might expect this to be a minor problem. It becomes clear in reviewing GTE's tests that the true potential for harm can only be evaluated from a probabilistic standpoint. The probability of harm is a function of a host of variables, such as the number of cordless telephones operating at the same time through the same switching system, the proximity of the cordless phone to the central office, whether the frequency of the cordless phone coincides with the frequency of maximum telephone system susceptibility etc. These factors, together with the facts that only some cordless telephones intentionally place an RF signal on the telephone line and that we are effectively limiting the population of 1.7 MHz cordless telephones by setting a termination date for manufacture of such units, lead us to believe that the chance of harm to the network is minimal, at most speculative.

10. The important factor is the length of time granted to ATC and others for waiver of 15.7. The waiver is intended only as a short term measure. For the Commission to delay a decision in order to seek further information, as GTE suggests in its comments, would serve no useful purpose. Since the GTE test results are inconclusive, we can only rely on the fact that cordless phones of the type in question here have been on the market in quantity for some time and neither GTE nor AT&T have reported cases of actual harm to the network caused by the 1.7 MHz RF signal. We are therefore retaining the limits on RF current set out in the waiver. We reject the GTE request to immediately impose limits on longitudinal and metallic voltage, or alternatively to set some arbitrarily low limit on current on the telephone line.[8] To impose such a restriction would necessitate that manufacturers redesign their cordless telephones when manufacture is already scheduled terminate by October 1, 1984. GTE has not demonstrated nor does experience dictate that such drastic action is warranted.

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[8] GTE suggests that the Commission impose the limits on longitudinal and metallic voltage recommended by AT&T in its comments to the *Notice of Proposed Rule Making and Notice of Inquiry* in Common Carrier Docket 81-216, adopted March 26, 1981; released April 10, 1981; 46 FR 22215, April 16, 1981. This proceeding concerns various modifications of the rules in Part 68 concerning telephone equipment registration. The AT&T comments will be addressed in CC Docket 81-216.

B. *Request to extend termination date*

11. EIA requests that the termination date for manufacture under the waiver be changed from October 1, 1984, to two years from such time as the Commission adopts new provisions for cordless telephones. EIA is primarily concerned that adoption of the new rules may for unforeseen reasons be delayed, leaving too little time to design new cordless phones before manufacture of the present 1.7 MHz cordless phones must cease. EIA finds the October 1, 1984, date to be particularly objectionable because that is the time of year when the Christmas marketing season begins.

12. For the reasons already stated in the ATC Order, we believe that the manufacture of cordless telephones at 1.7 MHz must cease as soon as possible. The most important reason is the anticipated expansion of the AM broadcast band. We are therefore expediting a recently initiated proposal for new frequencies for cordless telephones, and we expect to have new rule provisions in place within adequate time for new cordless telephones to be designed and manufactured before October 1, 1984.[9] We have not set any cut-off date for marketing 1.7 MHz cordless telephones, so we fail to see the point of EIA's argument about the Christmas season. Manufacturing and shipping for the Christmas season generally occur before October. Moreover, by the 1984 Christmas season, most manufacturers will have begun to produce and market cordless telephones under the new rule provisions, which we expect to be in place well in advance of that time. We are therefere retaining October 1, 1984, as the date when manufacture under the waiver must terminate.

C. *Miscellaneous matters*

13. GTE states that, instead of requiring a label to be carried on the product, the Commission should merely require information to be carried in the instruction manual. We have already received and granted a substantial number of requests for waiver, and we presume that most manufacturers have already had the required label printed in quantity. A change in the labelling requirement at this time would be disruptive and not serve any useful purpose. We also believe the label on the telephone to be useful to the consumer. Therefore we are not changing this requirement.

14. GTE also asks for clarification on whether the computing device rules in Part 15, Subpart J, apply to spurious emissions generated by digital electronics in cordless telephones. As indicated in Section 15.4(n), the computing device rules do not apply when the product is already subject to specific emissions requirements elsewhere in the FCC rules. Cordless telephone base units generally contain a 49 MHz receiver, which is subject to emissions require-

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[9] See footnote 5, *supra*.

ments in Part 15, Subpart C. Thus, the computing device rules do not apply. The 1.7 MHz transmitter may be disconnected during these spurious emission tests.

III. *ORDERING CLAUSE*

15. In view of the foregoing, IT IS ORDERED that the Petition for Reconsideration of the *Order*, the Petition for Reconsideration of the *Errata*, and the Petition for Stay of the *Order* filed by GTE Services Corp. ARE DENIED.

16. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration filed by Electronic Industries Association IS DENIED.

17. For further information about this proceeding, contact Julius P. Knapp at (202) 653–8247.

Federal Communications Commission
William J. Tricarico, *Secretary*

Appendix

List of Pleadings/Comments Regarding Petitions for Reconsideration of ATC Waiver for Cordless Telephones.

9-29-82 *Order Granting Conditional Waiver* to ATC, released October 4, 1982; 48 FR 4788, February 3, 1983.

11-01-82 EIA "Petition for Partial Reconsideration."

11-04-82 GTE Service Corp. "Petition for Partial Reconsideration on Clarification."

11-10-82 EIA "Request for Extension" of time to file comments.

11-16-82 Comment from Keith Olson (amateur radio operator).

11-23-82 Mura "Request for Extension of Time" by attorney Covington & Burling.

11-26-82 EIA Comments.

11-26-82 Mura "Reply to Petitions for Reconsideration."

12-06-82 Correction of Comment from Keith Olson.

12-07-82 GTE Reply Comments.

1-04-83 Comments from Ed. Marriner (amateur radio operator).

1-14-83 "Supplemental Response of Mura Corp." by attorney Covington & Burling.

1-27-83 GTE "Motion to Strike Late - Filed Pleading."

2-01-83 *ERRATA* to ATC Waiver Order issued; 48 FR 5928, February 9, 1983.

3-01-83 GTE "Petition for Reconsideration" (of *ERRATA*).

3-01-83 GTE "Request for Stay" of the waiver *Order* and *ERRATA*.

3-09-83 American Telephone and Telegraph Co. letter dated March 3, 1983 to Mr. Art Wall, Chief, RF Devices Branch.

3-14-83 Uniden Corp. of American request for 2 day extension of time to file comments, by attorney Blum & Nash.

3-14-83 "Opposition of Mura Corp." to GTE petitions for reconsideration and stay, by attorney Covington and Burling.

3-16-83 "Comments of Uniden Corp. of America" by attorney Blum & Nash.

3-16-83 GTE motion to strike Opposition of Mura Corp.

3-21-83 Mura Corp. "Motion to Accept Late-Filed Pleading" by attorney Covington & Burling.

3-24-83 Computer & Communications Industry Association "Reply Comments."

3-28-83 GTE "Opposition to Mura's Motion to Accept Late - Filed Pleading."

3-28-83 GTE "Reply Comments."

4-04-83 Mura letter dated April 4, 1983 correcting its March 14, 1983 "Opposition" by Covington & Burling.

Discovery, Proceedings, Scope of
Privileged Communications

Discovery granted in part and claim of attorney-client privilege disallowed on finding that applicants waived right to assert privilege. Discovery denied with respect to documents protected by attorney-work-product doctrine.
–A.S.D. Answer Service, Inc.
CC Docket No. 82-587

FCC 83–277

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
A.S.D. ANSWER SERVICE, INC.	CC Docket No. 82–587 File No. 23194-CD-P-(01)–82, *et al.*
B.W. COMMUNICATIONS, INC.	CC Docket No. 82–588 File No. 23259-CD-P-(01)–82, *et al.*
P.A.L. COMMUNICATIONS SYSTEMS, INC.	CC Docket No. 82–589 File No. 23168-CD-P-(01)–82, *et al.*
VINEYARD COMMUNICATIONS, INC.	CC Docket No. 82–590 File No. 23199-CD-P-(01)–82, *et al.*
For authority to construct new one-way paging stations in the Domestic Public Land Mobile Radio Service on 34 and 43 MHz frequencies at various locations throughout the United States	

MEMORANDUM OPINION AND ORDER

(Adopted: June 13, 1983; Released: June 14, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The *Order Designating Applications for Hearing,*47 Fed. Reg. 40896, published September 16, 1982, questions whether Graphic Scanning Corporation (Graphic) is the real party in interest in the subject applications, and whether Graphic and Applicants were candid in representations to the Commission with respect to their relationship. The Commission designated real party in interest and candor issues, made Graphic a party to the proceeding, and placed Graphic on notice that the record in this proceeding would be "incorporated in the records of . . . applications of . . . subsidiary corporations of Graphic." Graphic then directed its attorney to conduct an investigation of the facts underlying the designated issues. On November 24, 1982, Graphic, citing Section 1.65 of the Rules, filed a statement which advised the Commission that the investigation ascertained "that Graphic may have inadvertently provided some inaccurate or incomplete information" in response to Commission inquiries. In response to the Respondents'[1] discovery requests for the documents underlying the investigation, Graphic and Applicants submitted a log describing over 400 documents and argued that they are are protected by the attorney-client privilege and the attorney-work-product doctrine. In a pleading filed February 7, 1983, supporting their claim, Graphic and Applicants represented that the November 24, 1982 submission "fully explained the mistakes and inadvertent omissions" which are in issue in this proceeding. Subsequently, pursuant to the ALJ's instructions, the parties discussed the disputed documents, and the number of documents for which exemption is claimed was reduced to 73.

2. In a Memorandum Opinion and Order, 83M-729, released March 3, 1983, the ALJ held that Graphic and Applicants waived their right to assert the attorney-client privilege and attorney-work-product doctrine by the filing of the November 24, 1982 statement and the February 7, 1983 pleading. The ALJ cited *Columbia Broadcasting System,*45 FCC 2d 119 (1973) (*CBS*), wherein the Commission held that such an assertion is incompatible with a licensee's duty to be forthcoming with information.

3. The Commission now has under consideration an Appeal of the ALJ's March 3, 1983, Memorandum Opinion and Order, filed March 10, 1983, by Graphic and Applicants, an Opposition filed March 15, 1983, by Respondents, Comments filed March 22, 1983, by the Separated Trial Staff of the Common Carrier Bureau, and a Status Report filed May 26, 1983, by Graphic and Applicants.[2] In the

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[1] Respondents are radio common carriers who compete with Graphic and its subsidiaries in numerous media markets, and who have filed applications which are mutually exclusive with the applications that are the subject of the instant hearing.

[2] In addition, the Commission has under consideration a Petition for Stay filed

Status Report, Graphic and Applicants advised the Commission that 35 of the disputed documents had been produced and that three documents were produced in redacted form. In addition Applicants, individually, agree to waive their right to assert the attorney-client privilege and the attorney-work-product doctrine. Graphic, however, continues to claim that the undisclosed documents are exempt from discovery.

4. The primary issue now before the Commission is whether Graphic waived its right to assert the attorney-client privilege and attorney-work-product doctrine, and if so, the extent of the waiver. Graphic argues that under Section 1.65 of the Rules, it was obligated to report all matters of decisional significance to the Commission and that it is well settled that a waiver cannot be inferred from a compulsory disclosure of confidential material.[3] It further argues that there could be no waiver since none of the protected communications were disclosed in the November 24 statement and February 7, 1983 pleading. Graphic also contends that the ALJ in requiring disclosure, improperly relied on *CBS* because that was not a litigated proceeding and the documents were not prepared with an eye toward litigation. The Trial Staff supports the Appeal asserting that the November 24 statement advising the Commission of "corrections" in information filed with the Commission does not constitute a blanket waiver. Respondents argue that Graphic waived its rights and they conclude that there is no basis for overturning the ALJ's determination granting full discovery.

5. The attorney-client privilege protects the confidentiality of attorney-client communications made for the purpose of seeking or giving legal advice. Communications for other purposes, even if between attorney and client, are not protected. Nor is the claim of privilege consistent with the self-serving selective disclosure of confidential documents.[4]

6. Graphic's November 24 statement advised the Commission that its attorney had investigated the facts underlying the designated issues, and that the investigation established that the information furnished in response to the Commission's inquiries may have inadvertently provided some inaccurate or incomplete information. The November 24 statement corrects the inaccuracies and explains them in a self-serving and exculpatory manner. Attached to the statement are 31 selected exhibits which support Graphic's version of the facts underlying the designed issues. Graphic and Applicants then relied on the November 24 statement in their February 7 pleading.

March 14, 1983, by Graphic and Applicants, and an Opposition filed March 18, 1983, by Respondents. In light of our action herein, the request for stay will be dismissed as moot.

[3] *In Re Sealed Case*,676 F.2d 793, 817 (D.C. Cir. 1982).

[4] *In re John Doe Corp.*v. *United States*,675 F.2d 482, 489 (2nd Cir. 1982).

7. While we agree with Graphic that confidentiality is not waived by a compulsory disclosure, we reject the argument that the November 24 statement was required by Section 1.65 of the Rules. Section 1.65 requires that applicants keep their applications current. Graphic did not amend or correct any misstatements in its applications. The November 24 submission was clearly a voluntary, self-serving act, filed in response to the designated issues.

8. We therefore find that the November 24 statement and February 7 pleading effectuated a waiver of the attorney-client privilege with respect to the facts garnered in the investigation of the circumstances underlying the designated issues. Graphic can not make a selective disclosure of some facts and documents ascertained and then assert confidentiality and privilege to deny access to the remainder.[5] However, the waiver does not require full disclosure of all disputed documents because most of the documents are further protected by the attorney-work-product doctrine.

9. The attorney-work-product doctrine protects the confidentiality of materials developed in preparation for litigation including the attorney's notes and memoranda of witness statements. Discovery of attorney-work-product "is particularly disfavored because it tends to reveal the attorney's mental processes."[6] Disclosed attorney-work-product "could not qualify as evidence; and . . . would make the attorney much less an officer of the court and much more an ordinary witness."[7] The interests of clients, the legal profession and justice are best served by requiring that an attorney's thought processes be held inviolate. This policy has been protected by the courts[8] and has been incorporated in Federal Rule of Civil Procedure 26(b)(3).[9] This does not mean that all written materials obtained or prepared by counsel with an eye toward litigation are free from discovery. Discovery may be had of relevant and non-privileged facts in an attorney's files when those facts are essential to the preparation of one's case. Moreover, privileged attorney-work-product must

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[5] *In Re John Doe Corp.*v. *United States,supra* at 489; *In Sealed Case,supra* at 819–21.

[6] *UpJohn Co.*v. United States,449 U.S. 383, 399 (1981).

[7] *Hickman* v. *Taylor,*329 U.S. 495, 513 (1947).

[8] *UpJohn Co.*v. *United States,supra* at 398; *Hickman* v. *Taylor,supra* at 511.

[9] In pertinent part Rule 26(b)(3) provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

be disclosed upon a showing that the party seeking discovery has a substantial need for the materials and is unable to secure the materials or their equivalent by other means without undue hardship.[10] Attorney-work-product is clearly entitled to special protection, and even when disclosure of work product is required, the Courts are obligated to safeguard the mental impressions, conclusions, opinions or legal theories of an attorney.[11]

10. Our holding in *CBS* does not require a contrary result. In *CBS* the Commission required the submission of statements and memoranda of subordinate employees of the licensee, which had been given to counsel during an investigation into alleged misconduct. The Commission found the attorney-work-product doctrine did not attach because, *inter alia,*the requested documents were not generated in the course of preparation for litigation, and that CBS's assertion of the attorney-work-product doctrine was inconsistent with its obligation as a licensee to be forthcoming in response to a Commission inquiry.[12] Here, the disputed documents were generated in the course of preparation for hearing, and they are not requested by the Commission but rather by Respondents in a litigated proceeding.

11. We can not definitively rule on the disclosure of each of the disputed documents because those documents are not before us. We have, however, reviewed the descriptions of the documents submitted in the Appendix to Graphic's and Applicants' February 13, 1983 Memorandum in Support of Claim of Privilege and amended in the May 26, 1983, Status Report, and to the extent practicable, we will rule thereon.

12. The documents in question have been broken down into five broad categories.[13] The first category contains a letter from a prinicpal of A.S.D. to A.S.D.'s attorney and a number of letters from the attorneys for two of the Applicants to their clients. The letters have all been produced and the question of their disclosure is now moot.

13. The second category consists of draft affidavits. A number of these documents contain handwritten notations and editorial changes by counsel. The descriptions of the affidavits do not indicate that they were drafted by counsel. If the affidavits were drafted by potential witnesses who had knowledge of relevant facts, disclosure is warranted. However, any annotations of counsel, conveying

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[10] *UpJohn Co.*v. *United States,supra* at 398–99; *Hickman* v. *Taylor,supra* at 511; Thus, witnesses' statements drafted by an attorney would not be subject to discovery when the witness is available for depositions.

[11] *UpJohn Co.*v. *United States,supra* at 399–400.

[12] *CBS,supra* at 122–23.

[13] Graphic has asserted a broad claim of exemption without attempting to distinguish which documents are protected by the attorney-client privilege and the work-product doctrine.

mental impressions, conclusions, or legal theories, are protected by the attorney-work-product doctrine and such materials can be purged by the ALJ through *in camera* inspection. If the affidavits were drafted by counsel, they are protected as attorney-work-product, and no basis has been presented for disclosure.[14]

14. The third and fourth categories of documents, are drafts of pleadings filed with the Commission, attorney memoranda, and correspondence between counsel. These documents, which were drafted after counsel were on notice of the impending hearing, are protected as attorney-work-product and are not subject to discovery.

15. The fifth category consists of attorney's statements of services rendered to clients. It is well settled that statements listing the dates and general nature of services performed and for whom they were provided, are not protected by either the attorney-client privilege or the attorney-work-product doctrine.[15] In light of the real party in interest issues these statements could be relevant. However, since the statements also contain descriptions of the topics of conversations and meetings, including those with other attorneys, portions of the statements may be entitled to protection as attorney-work-product. The ALJ should review these communications, *in camera,*and allow examination of relevant unprotected information.

16. ACCORDINGLY, IT IS ORDERED, That the Appeal, filed March 10, 1983, by Graphic Scanning Corp. and Applicants, IS GRANTED, to the extent indicated herein, and in all other respects, IS DENIED.

17. IT IS FURTHER ORDERED, That the Petition for Stay, filed March 14, 1983, by Graphic Scanning Corp. and Applicants, IS DISMISSED as moot.[16]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[14] A draft affidavit prepared by counsel would not be competent evidence until signed and sworn to, and its use on cross-examination of witnesses, absent such affirmation, would effectively place the attorney in the position of being a witness. *Hickman* v. *Taylor,supra* at 513.

[15] *Colton* v. *United States,*306 F.2d 633, 636–37 (2nd Cir. 1962), *cert. denied* 371 U.S. 951 (1963).

[16] The *Order Designating Applications for Hearing,*47 Fed. Reg. 40896, published September 16, 1982, did not specify who could participate in this proceeding as decision making personnel. Such participation will be restricted to personnel specified in Section 1.1205 of the Rules.

Common Carrier, Specialized Services
Rules, Waiver of
Wide Area Telephone Services (WATS)

> **Petition for waiver of rules prescribing rate structure for use of local transport facilities to originate or terminate interstate or foreign telecommunications granted. Rules had assumed equal interconnection opportunity for all interexchange carriers.**
> *–AT&T Co.*

FCC 83–287

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations

MEMORANDUM OPINION AND ORDER

(Adopted June 23, 1983; Released June 28, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING

1. On March 17, 1983, the American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies filed an emergency petition for waiver of our Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of this Commission's Rules and Regulations to the extent necessary to enable Bell System Operating Companies that will be divested ("BOCs") to implement transport access charges that are consistent with the Appendix to the *Modification of Final Judgment* ("MFJ") entered in *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131 (D. D.C. 1982), *affirmed sub nom, Maryland v. United States*, U.S. (51 U.S.L.W. 3628, decided February 28, 1983). The AT&T petition states that the methods that have been prescribed for the computation of transport charges in the access charge rules adopted by this Commission differ in several respects from the MFJ Appendix requirements for the computation of access charges and that the BOCs would be required to prepare duplicative tariffs based upon different methodologies in the absence of Commission action upon this waiver request. For reasons set forth below we grant a waiver

for a period of one year ending December 31, 1984, and shall permit all telephone companies during that year to impose charges to recover their transport costs that do not comply with the applicable sections of Part 69 of our Rules.

BACKGROUND

2. In the Third Report and Order in CC Docket No. 78–72, FCC 82–579, released February 28, 1983 ("Access Charge Order"), we adopted a comprehensive plan for recovering the costs of exchange carrier facilities assigned to the interstate jurisdiction through the separations process. Among these costs were those incurred to transport an interexchange carrier's switched interstate traffic between its facilities and the end office through which that traffic originates or terminates. A telephone company may transport an interexchange carrier's traffic between these two locations solely through dedicated trunks or through a combination of jointly used (or common) trunking and dedicated trunks. To recognize the differences between these two alternatives for moving traffic, the *Access Charge Order* allocated transport costs between two access rate elements, Dedicated Transport and Common Transport. The *Order* allocated to Dedicated Transport the costs of the dedicated facilities and equipment used to provide conditioning and interface arrangements between the local carrier's and the interexchange carrier's facilities. Common Transport included the costs of the jointly used trunking and access tandems upon which interexchange carriers might alternatively rely to complete the transport of traffic between their facilities and an end office. The rate structure for each element reflected the manner in which the costs allocated to it were incurred. For the Common Transport element, the Order prescribed a usage and distance sensitive rate structure, *see* 47 C.F.R. § 69.111, while for Dedicated Transport, the charges would be based on the number of voicegrade channels provided to the interexchange carrier and other non-traffic sensitive parameters reflecting the cost of the facilities provided. *See* 47 C.F.R. § 69.112.

3. The MFJ also required that the BOCs file cost-based tariffs for access services. *See* MFJ, Appendix B, Section B. For transport charges, however, it delayed the effective date of this requirement until September 1, 1991. The MFJ required that until that date:

> charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers; provided, that the facilities of an interexchange carrier within five miles of an AT&T class 4 switch shall, with respect to end offices served by such class 4 switch, be considered in the same subzone as such class 4 switch.

MFJ, App. B at para. B(3).[1]

4. In their March 17 petition, AT&T and the BOCs requested that we waive the requirement that they file cost-based rates for common and dedicated transport facilities insofar as this requirement conflicts with the MFJ requirement of "equal charge per unit of traffic delivered or received." They noted that our granting the waiver would enable them to comply with the MFJ, would affect only the charges for the two elements and would increase the transport charges assessed on AT&T by twenty to thirty million dollars.

5. The Department of Justice ("Justice"), the Ad Hoc Telecommunications Users Committee ("Ad Hoc") and seven carriers filed oppositions or other comments.[2] Justice, Satelco and Teltec supported the waiver request while Cincinnati, SNET and SBS opposed the waiver request. Southern Pacific said that a waiver should be granted, but that the waiver should be "carefully limited" to ensure that the BOC tariffs will comply with a correct interpretation of the MFJ.[3]

6. Opponents of the waiver request opposed it for somewhat different reasons. Ad Hoc said that the waiver should be denied because the access charge rules provide a better method of computing transport charges than the method described in the MFJ Appendix. SBS said that the MFJ Appendix methodology is better,[4] and Cincinnati and SNET expressed no opinion with respect to the relative merits of the two methods. SBS, Cincinnati and SNET said that a decision to waive the transport access charge rules for divested BOCs and to retain them for all other exchange carriers would produce an undesirable absence of uniformity in access charges. Those carriers recommended that we deny the waiver petition and use proceedings relating to petitions for reconsideration of our decision adopting the access charge rules as a vehicle for

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[1] The "five mile" requirement is similar to one imposed in the Access Charge Order to reduce the competitive advantage AT&T enjoys over other interexchange carriers because of the location of some of its switches. *See* 47 C.F.R. 69.112(c).

[2] Cincinnati Bell Inc. ("Cincinnati"); Satelco Incorporated ("Satelco"); Satellite Business Systems ("SBS"); Southern New England Telephone Company ("SNET"); Southern Pacific Communications Company ("Southern Pacific"); Teltec Savings Communications Co. ("Teltec"); and Tel Systems Management Corporation ("Tel System").

[3] SPC urged us to limit the waiver to assure that transport charges continue to reflect the cost difference of the varying types and qualities of access that are now and will in the future be offered to interexchange carriers. *See* SPC Comments at 9–17.

[4] SBS explains that, under the Commission's transport rules, the OCCs could be forced to pay potentially much higher rates to cover the costs of designing and constructing the new parallel transport system that the BOCs plan to build to comply with the MFJ's requirement that they offer equal exchange services to all interexchange carriers. *See* SBS Response at 2,4. Because of the direct trunks, "left over" from its past monopoly control over the local network, that link its toll switches to end offices, AT&T, however, will largely escape such charges.

determining the appropriate transport charges for all exchange carriers.

7. The AT&T Reply stated that an industry-wide waiver is "not essential," but that it would not object to such an action "if the Commission believes that it can grant the industry-wide waiver on the basis of the Comments . . . " (Reply, p. 2, note * * *). AT&T adds that its waiver request should be granted because "prompt Court approval of AT&T's Proposed Plan of Reorganization hinges on an expeditious grant of the Emergency Petition . . . . " (*Id.* at 2–3.)[5]

DISCUSSION

8. This Commission may waive any provision of our rules "on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. An applicant for waiver must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that the grant of the waiver will not undermine the public policy served by the rule. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). We are unconvinced that AT&T itself has made the clear demonstration required to justify the relief it seeks. The entire record in this waiver proceeding, however, convinces us that we should suspend the provisions of the rules setting charges for the dedicated and common transport access elements for a short period during which we shall determine the extent to which delays in equal interconnection opportunities for all interexchange carriers justify some departure from a cost-based rate structure for these elements.

9. The OCCs note that our access charge plan will immediately cause substantial increase in OCC costs without a concomitant improvement in their interconnection options.[6] The transport rules were in fact proposed on the assumption that interexchange carriers would from the outset have the ability to choose the kind of transport facilities (*i.e.*, dedicated or shared) that they would be offered. If, based upon economic considerations, an interexchange carrier concluded that it preferred dedicated transport facilities to carry its traffic to a particular end office, it could order such facilities and then should expect to bear the cost of such facilities. We have, however, only recently begun the rulemaking proceeding through which we anticipate extending to independent telephone

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[5] The Department of Justice has conditioned its approval of the proposed reorganization plan upon our granting the requested waiver of our transport rules.

[6] In their petitions for reconsideration of the *Access Charge Order*, filed on April 14, 1983, SBS and SPC have renewed the arguments they have already presented in this proceeding. While admitting that our transport rules might be reasonable if all carriers had the option of equal interconnection, they claim that with existing interconnection arrangements determined by a network design reflecting AT&T's historical monopoly of toll traffic, the cost-based charges mandated by these rules unfairly penalize the OCCs.

companies the equal interconnection obligations that the MFJ has imposed upon the BOCs. *See Notice of Proposed Rulemaking* in CC CR re: release Docket No. 78–72, Phase III, FCC 83–178, released May 31, 1983. It has also become apparent that even within BOC territory the choice of transport facilities may not be available. Therefore, the OCCs will remain unable to choose the routes their traffic travels through the local network or the facilities used to carry that traffic. Under these circumstances, imposing cost-based transport charges could have anticompetitive effects if AT&T, because of its past control over local network design, pays relatively less for comparable interconnection. Until interexchange carriers have the flexibility we anticipated their having in the *Access Charge Order*, we conclude that the rules governing transport charges imposed by any telephone company should be modified to reflect the existing interconnection choices of interexchange carriers.[7]

10. Having concluded that a change should be made in the transport charge rules of Part 69, we must now determine the most appropriate and expeditious way to proceed. SBS had recommended that we review our transport rules in the now pending reconsideration proceeding in Phase I of CC Docket No. 78–72. In order for 1984 access tariffs to reflect any modifications to Part 69 that we may make on reconsideration, we must, and expect to, complete our reconsideration proceeding shortly. We believe that more time is required for us to be able to determine the transport rate structure that will best meet the goals of this docket. We would also find helpful comments that discuss this issue in light of the additional information, available only since we adopted our *Access Charge Order*, concerning how the BOCs propose to satisfy the MFJ's equal interconnection requirements. For this reason we are granting a waiver until December 31, 1984, of the rules prescribing the rate structure for Dedicated Transport and Common Transport.[8] Accordingly, telephone companies shall recover the costs allocated to the

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[7] We agree with the Cincinnati-SNET-SBS view that it would be unwise to follow a course that results in different access elements and associated rate structures for divested BOCs and other exchange carriers. A considerable degree of uniformity in access charge elements and rate structures is essential to the success of our access charge scheme and must be viewed as one of the paramount purposes of the access phase of CC Docket No. 78–72. If the MFJ Appendix methodology is preferable to the methodology described in the access charge rules, that methodology should be imposed upon all carriers. If the MFJ Appendix methodology is not preferable, it should not be imposed upon any of them.

[8] One issue before us on reconsideration of the Access Charge Order concerns upon whom carrier's carrier charges, including transport charges, should be assessed. The action we take today in no way prejudges that issue, but affects only the 1984 rate structures for the Common Carrier and Dedicated Transport elements. This waiver may in fact be affected by the outcome of the reconsideration proceeding. Until our reconsideration of the *Access Charge Order* is completed, however, carriers should proceed in their tariff preparation assuming that the waiver is in effect.

Dedicated Transport and Common Transport elements by Subparts D and E of Part 69 by filing 1984 access tariffs that comply with our general tariff requirements instead of following Sections 69.111 and 69.112[9] In the exchange carrier association's tariff such charges shall replace charges for the Dedicated Transport and Common Transport elements. Companies electing for 1984 to cross-reference an association charge for any carrier's carrier access element other than the Carrier common Line element or elements and the transitional surcharges must cross-reference the association's charges for transport. The waiver does not, moreover, alter the requirement that telephone companies participating in extended area agreements either file a joint tariff for all traffic sensitive elements or concur in the association tariff for these elements.[10] See *Access Charge Order* at paras. 321-22.

11. Accordingly, IT IS HEREBY ORDERED, That pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, As Amended, 47 U.S.C. 154(i) and (j), and Section 1.3 of the Commission's Rules, 47 C.F.R. 1.3, the Emergency Petition for Waiver filed by the American Telephone and Telegraph Company and the Bell System Operating Companies is GRANTED to the extent reflected herein and is OTHERWISE DENIED.

12. IT IS FURTHER ORDERED, That Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111-112, shall not apply to access service tariffs filed by or on behalf of any telephone company for the period ending December 31, 1984. A waiver of Sections 69.1(b), 69.4(b)(7) and (8), and 69.101, 47 C.F.R. §§ 69.1(b), 69.4(b)(7)-(8), and 69.101, shall also be in effect during this period to the extent that these sections compel compliance with Sections 69.111 and 69.112.

13. IT IS FURTHER ORDERED That the Secretary shall cause this *Memorandum Opinion and Order* to be Published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[9] Compliance with MFJ criteria is not one of the standards that we shall require an access charge tariff to satisfy. Compliance or noncompliance is an issue to be resolved by the court. Our action today, however, should leave AT&T and the BOCs with sufficient flexibility to meet both MFJ criteria and the standards imposed by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, and Commission rules and regulations.

[10] In their petitions for reconsideration of the Access Charge Order several parties have asked us to reconsider imposing this requirement. *See, e.g.*, petitions for reconsideration filed by AT&T, Centel Corporation, GTE and Rochester Telephone Company. We shall address the issue shortly in that reconsideration proceeding.

Common Carrier, Rate Revision, Authority to Make
Message Telecommunications Service
Tariff, Amendment of
Tariff, Experimental

Memorandum Opinion and Order adopted denying petitions to reject or suspend and investigate and permitting AT&T to conduct an experiment with its MTS rates in the trial states of New York, California and Iowa to expire on December 31, 1983. –*AT&T Co.*

FCC 83–288

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Revisions to Tariff F.C.C. No. 263 Message Telecommunications Service (MTS)	Transmittal No. 14251

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: June 29, 1983)

BY THE COMMISSION: COMMISSIONERS FOWLER (CHAIRMAN), QUELLO, RIVERA AND SHARP, WITH COMMISSIONER DAWSON CONCURRING IN THE RESULT AND COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

1. The Commission has before it the above-captioned tariff revisions filed by the American Telephone and Telegraph Company (AT&T) scheduled to become effective June 25, 1983. These tariff revisions would implement, on a limited trial basis, fifteen Long Distance Message Telecommunications Service (MTS) Optional Calling Plans. These plans apply only to direct dial interstate calls originating from selected central office codes (NXXs) in California, New York and Iowa during selected rate periods and terminating in the United States, Hawaii, Alaska, Puerto Rico, or the U.S. Virgin Islands. AT&T projects that less than one-half of one percent of MTS customers would be encompassed in the experiment.

2. Petitions seeking rejection or suspension and investigation of these tariff revisions were filed by Satellite Business Systems (SBS), Southern Pacific Communications Company (SPCC), Teltec Saving Communications Co. (Teltec), and U.S. Telephone, Inc. (U.S. Tel). A

petition filed by the Association of Long Distance Telephone Companies (ALTEL) seeks partial rejection of the tariff. For the reasons discussed below, we deny the petitions and allow the tariff revisions to become effective.

I. *BACKGROUND*

A. *Application For Special Permission To Conduct MTS Rate Experiments*

3. On March 14, 1983, AT&T submitted Application No. 1724 requesting special permission to file tariff revisions without the usual economic support material required by Section 61.38 of the Commission's rules, and to become effective on less than 14 days' notice, instead of the 90 day notice period set out in Section 61.58.[1] AT&T stated that the purpose of this experiment would be to examine customer demand and the impact of the calling options on network utilization, efficiency, and costs and revenues before implementing the plans nationwide.

4. The proposed tariff revisions would introduce on an experimental basis three types of optional calling plans, each offering a choice of five different rates levels for long distance direct dialed calls. These plans, designated the Linear Plan, the Tapered Plan, and the Block-of-Time Plan, would offer customers additional rate reductions for long distance calls made during the evening, night

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[1] AT&T also submitted Application Nos. 1720, 1721, 1722, and 1723 on the same day requesting special permission to file tariffs that would expand its satellite, digital and international private line services without accompanying economic support material and to become effective on not less than 14 days' notice. On March 31, 1983, the Bureau waived the provisions of Sections 61.38 and 61.58 allowing AT&T to file revisions to Tariff F.C.C. Nos. 267 and 268 that would add new digital city serving areas without economic support data and to become effective on not less that 14 days' notice. *See* Special Permission No. 83-181. On April 8, 1983, Application Nos. 1720, 1722, and 1723, involving new service offerings and a rate change, were consolidated for action. *See* Special Permission No. 83-208. The Bureau waived Section 61.58 to allow the tariff revisions to become effective on not less than 45 days' notice, but pointed out that AT&T had not documented any specific circumstances that usually warrant waiver of the 90 day notice period. The Bureau acknowledged, however, that the Commission is attempting to create a regulatory environment for all carriers that encourages innovation and efficiency, eliminates unnecessary paperwork requirements, and allows carriers to react quickly in the market place, while maintaining the control necessary to achieve the objectives of the Communications Act. Furthermore, the Bureau pointed out that the Commission is now considering reducing the current 90 and 70 day notice periods to 45 and 35 days, respectively, for all carriers, and therefore granted the notice waiver on that basis. The Bureau declined, however, to waive the economic support material requirements of Section 61.38. It stated that AT&T had failed to show good cause for such a waiver in its applications, and that it was not eligible for non-dominant treatment under the Commission's rules as they now stand. The Bureau indicated that the requisite economic support material for the proposed tariffs need not necessarily be extensive so long as the submissions are sufficient for review purposes.

and weekend rate periods. The optional calling plans would be available to customers in four wire centers within the trial states of New York, California, and Iowa.

5. The 15 experimental rate discounts differ according to customers' long distance calling patterns. Generally, customers with the heaviest long distance calling during the evening, night and weekend rate periods would receive the largest rate discounts. Under the Linear Plan, subscribing customers would pay a monthly charge entitling them to receive an additional uniform percent discount off the existing distance-sensitive MTS rate structure for the night and weekend rate periods. Under the Tapered Plan, subscribing customers would pay a monthly charge entitling them to receive a special usage rate for the first hour of calling each month during the evening, night and weekend rate periods. Usage in excess of one hour would be billed at a somewhat lower special hourly usage rate. Customers using less than a hour would be charged the appropriate fraction of the hourly rate. The rate structure for the Tapered Plan is not distance sensitive.[2] Customers subscribing to the Block-of-Time Plan would pay a monthly charge entitling them to receive an initial allotment of either one or two hours of monthly usage during the night and weekend rate periods. This plan differs from the Tapered Plan in that a monthly usage allotment is included as part of the monthly suscription charge. Customers would not receive a reduction in the subscription charge if usage is less than the monthly allotment. The rate structure for the Block-of-Time Plan also is not distance sensitive. AT&T stated that it expected to continue the experiment "until sufficient data are gathered to develop satistically reliable projections of the experiment's impact."

6. In support of its request to file the experimental tariff provisions on short notice, AT&T stated that waiver of the 90 day notice period would allow customers to participate in optional calling plans substantially sooner. Regarding its request to file the tariff without the usual economic support data, AT&T contended that the experimental nature of the proposed service offerings makes it difficult to prepare detailed information as to demand, revenue and cost of service. Moreover, AT&T argued that the very purpose of the experiment is to permit them to evaluate customer response and ascertain the effects of the calling plans on efficiency and costs and earnings, if offered nationwide.

B. *Bureau Waiver of Sections 61.38 and 61.58 and Request for Supplemental Documentation of the MTS Rate Experiments*

7. On April 8, 1983, the Bureau granted AT&T's Application No.

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[2] AT&T states that the rate structure for this plan is not distance sensitive because the "marginal cost of providing service during off-peak periods is relatively insensitive to distance."

1724 and permitted the carrier to file the experimental tariff without economic support data and to become effective on not less than 45 days' notice.[3] In this letter, the Bureau stated that it found good cause to waive the usual 90 days' notice period because the rate plans were a limited offering and a short notice period would indeed permit customers to participate far sooner. Regarding the waiver of Section 61.38 support data, the Bureau stated that a relaxation of this requirement is warranted where it can be shown that an experimental rate plan is soundly designed and has a worthwhile purpose. The Bureau then listed a number of concerns that it had with the rate experiment as described, and stated that if it was satisfied that the experiment is valid, after reviewing the requested supplemental information, it would allow the Section 61.38 waiver to stand. Finally, the Bureau stated that previous off-peak rate reductions have been introduced as general service offerings on a nationwide basis without the need for prior experimentation and asked AT&T to consider whether alternative research techniques could be used to test customer response to various rate plans before proceeding with the proposed experiment.

8. The Bureau stated that it was unable to determine from the information submitted in Application No. 1724 how the results of the experiment could be used to develop a nationwide MTS offering. The Bureau said it was particularly concerned about the sampling technique. It noted that the sample customer base was not randomly selected and was too small to offer statistically reliable results upon which to base a general service offering. Furthermore, there was concern about the demographic profile of the sample as compared to the universe of MTS users.

9. The Bureau also pointed out that the current MTS discount rate structure includes rate period specific billing (RPSB) procedures to prevent a call originating in a reduced rate period from continuing into a full rate period without a corresponding change in the charge. Under RPSB, if a call is placed in one rate period and continues into another, the rate is based on the actual number of minutes in each time period. As described, the experimental rate plans did not fully include RPSB. The Bureau asked AT&T to explain how this billing inconsistency might affect the results of the experiment. The Bureau also questioned why full business day rates were excluded from the experiment and asked to what extent AT&T would consider the overall public switched network (PSN) efficiency when evaluating the effectiveness of the rate plans.

10. Last, the Bureau expressed concern that no expiration date for the experiment had been stated, and specified that AT&T select a reasonable period within which to complete the study.[4] Without an

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[3] Special Permission No. 83-218.

expiration date specified in the tariff, the Bureau noted that the rate experiment could evolve into another MTS offering that would place unreasonable financial burdens on MTS rate payers not eligible for discounts.

C. *AT&T's Response to the Bureau and Filing of Tariff Revisions To Implement the MTS Rate Experiments*

11. On April 18, 1983, AT&T filed revisions to Tariff F.C.C. No. 263 that would implement the fifteen experimental MTS rate plans, essentially as proposed in its Application No. 1724, and responded to the Bureau's request for supplemental documentation. First, AT&T specified December 31, 1983 as the termination date for the experiment, unless cancelled or extended by subsequent filing. AT&T then responded to the concerns expressed by the Bureau. Addressing the Bureau's threshold problem, AT&T maintained that the rate experiment was necessary. It stated that this rate experiment is distinguishable from previous off-peak rate reductions because three elements of the experiment—the monthly subscription fee, distance insensitive rates, and the large percentage of rate reductions—are completely new concepts for both AT&T's customers and the PSN. AT&T states that an experimentation period is necessary to assess the impact of these major changes in its service offerings. Furthermore, AT&T contends that this type of experiment, which is designed to test actual purchase behavior, is necessary to complement and quantify market research data obtained by survey techniques.[5]

12. AT&T then addressed the specific questions directed by the Bureau toward its sampling technique and how results obtained by this method could be used reliably to develop a nationwide offering. AT&T responded that its sample size is adequate to permit accurate statistical assessment within each trial area.[6] It stated that it could reliably extrapolate the results obtained within each trial area to structure a nationwide offering by using this data in conjunction with a statisticlly valid description of the entire residence market obtained from a data base of 75,000 nationwide residence customers. AT&T stated its belief that the lack of random selection of trial areas in this experiment would not affect its ability to develop nationwide projections. Moreover, AT&T said that it planned to conduct several phases of market research that would enhance the use and projectability of the experimental data. It elaborated on its ability to use

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[4] We note here that previous experience with two experimental tariff filings has been less than satisfactory with regard to time constraints as each continued for about 15 years. *See* AT&T-GTE Satellite Corp. (Picturephone), 70 F.C.C. 2d 1358 (1979), and AT&T Company, (Dataphone 50), 66 F.C.C. 2d 677 (1977).

[5] AT&T stated that it tested customer response to the optional calling plans by conducting extensive survey research on a nationwide scale in 1982.

[6] Each trial exchange area has a minimum of 5000 residential customers.

individual customer tracking systems to provide specific usage data, demographics and subscription patterns.

13. Regarding the issue of rate period specific billing, AT&T stated that the rate experiment does not provide for this procedure because substantial work effort would be required to redesign the billing system to accommodate it, and this expenditure of resources would be inappropriate given the limited nature of the experiment. It pointed out that its customer specific tracking capability will allow for identification and adjustment of the effects, if any, of the lack of rate period specific billing for customers participating in the experiment. AT&T stated its intention to study methods of including rate period specific billing in a nationwide service offering.

14. Finally, AT&T explained why it excluded experimentation with full business day rates and how it would use the results of this study to assess network efficiency. AT&T stated that although it is reasonable to assume that the experiment could include rate discounts for calls made during the business day period, that this would require an extensive evaluation of the revenue and cost implications to the business market and it does not have the necessary data base of business users necessary to conduct this evaluation. AT&T indicated that it might develop such a data base in the future and then be able to experiment with discounts during the business day rate period. Addressing the network impact issue, AT&T stated that it will develop an actual and statistically projectable profile of demand changes to the network from each of the proposed trial plans. It will evaluate each of the demand profiles in terms of network costs and efficiency and will measure these factors against customer preferences and revenue impacts to develop a final rate plan or plans.

II. *SUMMARY OF PETITIONERS' CONTENTIONS AND AT&T'S REPLY*

15. Generally the petitioners challenge the filing of the experimental tariff without economic support data and contend that AT&T failed to respond adequately to the Bureau's concerns about the design of the experiment and the reliability of the results for structuring a nationwide service offering.

16. The petitioners argue that the absence of cost support data is at odds with the Commission's directives concerning dominant carriers as set forth in the *Competitive Carrier Rulemaking.*[7] U.S. Tel and SPCC maintain in that the lack of cost justification for the tariff

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[7] CC Docket No. 79-252, In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Order on Reconsideration, FCC 83-69, adopted February 17, 1983, released March 21, 1983; Second Report and Order, 91 F.C.C. 2d 59 (1982); Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445 (1981); First Report and Order, 85 F.C.C. 2d 1 (1980); Notice of Inquiry and Proposed Rulemaking, 77 F.C.C. 2d 308 (1979).

proposed threatens universal service because costs will be recovered from users other than those taking the service, and the longer interstate calls will be subsidized by shorter interstate calls. They argue that the experiment is unreasonably discriminatory because the discounted rates would be subsidized by those customers not selected to participate. They believe that if AT&T is allowed to escape cost based pricing, as a dominant carrier, it will have great potential to conduct predatory pricing. SBS notes that the optional plans include rates that are lower than off-peak rates for AT&T's Wide Area Telecommunications Service (WATS), and therefore cost data should be required. Teltec contends that the rate experiment is unlawful because it appears that it will be conducted below cost and will have anticompetitive effects contrary to the Commission's policies. Teltec states that the low rates will produce unrealistic demand results which can not validly support a lawful service offering.

17. U.S. Tel and SBS argue that AT&T will use the experiment to enhance its competitive position in a post-divestiture world. SBS further states that the other carriers are not in a position to conduct similar experiments.

18. All the petitioners argue that AT&T's supplemental documentation fails to demonstrate that the experiment is soundly designed and that the results will be reliable. U.S. Tel states that AT&T has not shown that the sampling frame would be reliable for a nationwide MTS offering, and points out that AT&T concedes that it must link the results with other research data before it could design a nationwide offering. SPCC argues that the sample is deficient because AT&T selected only those trial areas where there are competitors.

19. The petitioners argue that AT&T has failed to demonstrate adequately why rate period specific billing could not be incorporated into the optional plans. U.S. Tel would have AT&T compare costs of the customer specific tracking procedures it plans to use during the experiment with the costs of incorporating rate period specific billing.

20. Regarding the issue of network efficiency, U.S. Tel argues that AT&T selected those trial areas likely to exhibit heavy toll usage and therefore the impact on the network is predictable. U.S. Tel believes this fact undermines the need for the experiment in order to test the impact of demand. SBS notes that because the experiment was designed to encourage usage it may adversely affect network efficiency.

21. ALTEL, a trade association of resale carriers, petitions for partial rejection of AT&T's tariff. It objects to a particular provision

of the tariff as anticompetitive and as unlawfully discriminating against resellers.[8] ALTEL argues that under this multi-line charging provision, resellers stand to be the only customer category affected.

22. Finally, SBS states that AT&T should be required to disclose the results of the rate experiment, if permitted to conduct it.

23. In its reply, AT&T disputes the petitioners' contention that the rate experiment must be supported by cost data. It states that this approach would unreasonably restrict the ability of any carrier to engage in rate experimentation because experiments are not susceptible to projecting detailed cost data. AT&T reiterates its view that the very purpose of conducting experiments is to evaluate the effect of service offerings on network efficiency, costs and earnings. AT&T states that although the Commission adopted a carrier specific approach and classified it as dominant in the *Competitive Carrier Rulemaking*, it later expressed concern with this policy.[9] In any event, AT&T argues that the instant tariff proceeding presents very narrow issues and is not the proper forum for resolving broad policy matters.

24. AT&T repeats its view that the experiment is soundly designed for the intended purposes and that customers would benefit from the optional rate plans. It states that the supplemental documentation it provided is adequate to determine that the experiment is valid, that the results will be reliable and that its purposes are worthwhile. AT&T states that it would not be cost effective to include rate period specific billing in this experiment and it will be able to adjust for any impacts.

25. AT&T argues that the optional rate plans are not offered below cost and that it expects interstate revenues generated by the experiment to exceed costs. Even though certain rates may be lower than competitors' rates, AT&T believes this should be encouraged by the Commission, not precluded. Addressing the concerns expressed by ALTEL, it states that it has no wish to exclude any particular class of users, but on the other hand has no obligation to maximize the benefits to resellers. AT&T said it included the billing provision ALTEL objects to in its tariff because this practice is consistent with current procedures used by Northwest Bell, and therefore it would promote administrative convenience and avoid customer confusion.

26. AT&T emphatically rejects SBS's contention that it should

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[8] ALTEL objects to paragraph 3.1(c)(11)(a)(3). This provision states that: "Customers with more than one local exchange line in a rotary group (multi-line customers) in Iowa who participate in any of these calling plans will be charged a Subscription Charge for each line in the group and the associated usage will be billed on a per line basis. Multi-line customers in California and New York who participate in any of these calling plans will be charged one Subscription Charge for the group and the associated usage will be billed as if accumulated on one line."

[9] *See* note 7, *supra*, First Report and Order, 85 F.C.C. 2d at 10–11, and Further Notice of Proposed Rulemaking, 84 F.C.C. 2d at 456.

be required to disclose the results of the experiment. AT&T argues that SBS offered no authority for requiring disclosure to a competitor of what AT&T views as confidential business information. AT&T contends that no such authority exists.

III. *DISCUSSION*

27. After evaluating AT&T's support for the proposed experiment, we are left with reservations about the procedures selected and the overall value of the project. AT&T's reply to the Bureau's question regarding the need for the study and the usefulness of the results relies heavily upon the experiment's complementary role in a larger rate experimentation and survey program. The same is essentially true of its answers regarding the desirability of using a non-scientific sampling technique, the soundness of the sample selection criteria employed, and the lack of consistency in the controllable conditions under which the study is to be conducted. However, while AT&T has advised us of a number of related study activities including field trials in several states and a nationwide written questionnaire survey, it has not provided any concrete information about the nature of its research objectives, the details and results of the work it has performed to date, or the relationship of the proposed rate experimentation to that ongoing work. Therefore, without substantially more information and analysis, we are not in a position to confirm AT&T's assessment that this is a necessary and useful experiment. Ordinarily, we would require more from the carrier before allowing such a project to go forward. However, we recognize that this is a first try at this kind of experiment, and AT&T may not have been certain about what would be necessary to pass regulatory muster. Taking this into account, we think that in this instance the experiment could be allowed to proceed if we attached certain conditions to safeguard against possible adverse consequences to the public. This approach would also conserve time and resources of all concerned. We discuss below our concerns with the experiment as proposed, and why our decision to limit it in both duration and scope should amply protect the public against any untoward effects. For these reasons, we are denying the petitions to reject or suspend AT&T's experimental tariff. In addition, we shall outline certain standards by which we intend to judge proposed experiments in the future. These should serve as a guide to AT&T so that it can avoid the practices which have led to the imposition of some of the controls in this case. Finally we wish to make clear that our action in allowing this limited experiment cannot be viewed as favorable precedent for our acceptance of similarly designed future experiments. Should AT&T wish to conduct other experiments, it will be required to describe in a clear and concise way the experiment's objectives, the method of approach, alternatives considered and reasons for the selection made,

and the results of and methodology used in any other research studies related to the proposed experiment. These standards are discussed more fully in paragraph 34, *infra*. More careful preparation in these areas will put the Commission in a position to allow any future experimental proposals to be swiftly implemented.

28. A fundamental concern about the present experiment involves AT&T's sample selection methodology. AT&T states that it composed its sample of trial areas by selecting exchanges characterized by heavy toll usage during the evening, night and weekend rate periods, that exhibited comparable demographics, and were not operating at or near network capacity.[10] It would appear, therefore, that the points finally selected were determined through a judgmental process relying on the stated criteria as guidelines.[11] One result of using a non-scientific sampling technique of this type is that major sectors of the study universe may not be represented in the sample. We note, for example, that the sample contains no rural exchange areas.[12] As the rural central offices or exchanges constitute a significant proportion of all exchanges, a more scientifically selected sample might well be expected to include rural areas. Regardless of the relative importance of having these areas to achieving reliable results in this particular experiment, the general public may perceive the experiment as a precursor to a discretionary form of rate deaveraging outside the purview of regulatory scrutiny. Such experiments may create anxiety among ratepayers, warranted or not, that particular sectors of the population will by intent not benefit from any permanent discounted rate plans. Indeed, we have received a letter commenting on AT&T's proposed experiment from V. Louise McCarren, Chairman of the Public Service Board of the State of Vermont. She states that she views the rate experiment as the beginning of disaggregated, deaveraged interexchange rates, and that this rate experiment and others like it would permit AT&T to reduce rates in markets where there is competition but not in

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[10] AT&T's decision not to select offices at or near service capacity brings into question the feasibility of implementing the experimental plans on a nationwide basis. If AT&T sought later to introduce these rate plans on a nationwide basis, we would question the efficacy of a measure which stimulated busy hour traffic in areas where the plant is operating at or near capacity. Moreover, AT&T fails to explain what action it would take to minimize network impact in such cases.

[11] In this regard we note that Bell Canada recently filed a tariff with the Canadian government that seeks to implement similar long distance experimental rate plans to test their viability as regular service offerings. Unlike AT&T's experiment, Bell Canada plans to use a randomly selected sample of customers to conduct its test. See Tariff Notice No. 958 filed May 17, 1983, with the Canadian Radio-Television and Telecommunications Commission.

[12] The New York trial areas are East 79th Street and East 97th Street in New York City, and Central Islip and Deer Park in Long Island. In California the trial areas are Hollywood, Webster, and El Monte in Los Angeles; and Costa Mesa in Orange/Newport Beach, and Modesto. In Iowa the trial areas are east and west Des Moines, downtown Cedar Rapids, and downtown Sioux City.

markets where there is no competition, such as Vermont. This could result, says Chairman McCarren, in larger overall telephone bills for both interexchange access and interexchange toll in Vermont, and possibly the loss of interexchange service altogether. In order to minimize concerns such as these expressed by Chairman McCarren, we will require AT&T to provide us with a report which we will make public, describing the major findings and conclusions of the study by March 31, 1984. Furthermore, should AT&T propose to expand the optional calling plans to other geographic markets we would require it to file Section 61.38 economic support material. We would also consider requiring it to disclose the results of this or any other study so that we could determine their worth and validity. At such time we would address the full public policy implications of these MTS rate structures.

29. Another reason we must place conditions on the experiment is AT&T's subjective approach to sample design does not readily lend itself to regulatory review. Since the experiment has important rate level and marketing strategy implications, we must either be able to determine the reasonableness of any impact it may have on individual users or other carriers, or so limit the experiment in order to ensure that its effects on the public will not be significant. For example, if this sampling methodology were allowed to continue indefinitely or to be expanded, and it occurred that AT&T introduced a substantial MTS rate discount in a particular study area just prior to or coincident with the entry of a new competitor, the entrant could well be harmed.[13] In such an event we believe the Commission would not be in a position to readily determine whether these effects were a necessary consequence of the experimental design, or whether AT&T alternatively could have chosen another site to minimize the impact on competition.[14] We would like to avoid devoting our resources to investigations into the subjective factors and decisions which enter into any experiment design process. When such sensitive public interest concerns are at issue, therefore, we believe that we should discourage the proliferation of tariff practices

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[13] It is even possible that competitors' entry decision could be affected by AT&T's advertising of the availability of new discounted rate plans in certain areas.

[14] If, for example, a random selection technique were used, the sample would normally be expected to include at least some of many exchange areas which are subject to intense competition. This would simply be a reflection of statistical probabilities. Where the sample is hand-picked, however, it would be difficult for us to determine whether the judgmental factors which entered into the sample selection did not intentionally target certain competitive areas or avoid others. This is not to say, of course, that use of a scientific sampling technique by itself would satisfy all of our concerns. Clearly, whatever techniques are used must be properly controlled to insure a proper balance between research ojectives and avoidance of public harm.

which rely heavily upon subjective criteria for justification when alternatives practices that lend to objective validation are available.

30. Apart from public impact concerns, certain features of the study design cause us to question whether AT&T will actually obtain usable results, even in the context of its overall research program. We shall discuss several of these features to place AT&T on notice as to the types of practices we believe should be avoided in the event it wishes to conduct other experiments in the future. For example, the sample used here is comprised principally of high volume users even though it would appear that small volume users would be as likely, or perhaps more likely, to be attracted by certain aspects of the rate plans such as postalized (non-distance sensitive) rates or the absence of rate period specific billing. These pricing factors clearly could result in savings to any customer, even one making only one or two calls per month. Furthermore, telephone calling patterns vary by community of interest and therefore the propensity to make additional phone calls may well differ greatly from area to area. Thus, usage habits of residential customers in the New York metropolitan area participating in the study would not necessarily be representative of the usage habits of residential customers located in more sparsely populated areas, even if income levels were similar. Moreover, it does not appear that a hand-picked sample would even provide reliable results to project responses of similarly situated customers in metropolitan areas with different demographic characteristics.

31. We also question the absence of RPSB procedures in the Tapered and Block-of-Time Plans and the effect of this factor on the reliability of the study results.[15] If RPSB procedures are not used, the entire call is billed at the rate in effect when the call was initiated. Obviously, the charges for the same call would differ substantially depending upon which billing procedure is used. AT&T does not state, however, that use of the different billing technique is one of the rate parameters it wishes to test during the experiment. Rather, it states that it would identify and adjust for the impact of this billing anomaly in the test results. We note that the trial areas chosen include New York and California locations which may lend themselves to extensive computer-to-computer application. Such traffic could take advantage of this billing discrepancy because it is easy to begin a very long data transmission call using automatic terminals at the end of the deepest discount period and allow it to

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[15] The five rate options comprising the Linear Plan incorporate rate period specific billing for the base charge. Discounts would be applied to the total charge even if the call traverses two rate periods. In addition to the concerns we discuss about the possible distortion of results caused by the lack of rate period specific billing in the Tapered and Block-of-Time Plans, we think that the failure to consistently use this procedure throughout the experiment would unduly complicate the results to the point where the effects of these variables could not be separated from those of other variables.

extend into or traverse the entire full rate period. Finally, it is not clear that the individual customer tracking system AT&T intends to employ throughout the experiment will be able to offset the potential distortion caused by the lack of rate period specific billing.[16]

32. Notwithstanding the importance of the concerns we have raised here, we believe we can permit AT&T to conduct the experiment, as designed, while protecting against possible harmful effects by attaching the following conditions to our Section 61.38 waiver. First, AT&T may not extend the experiment beyond the specified expiration date of December 31, 1983. We believe it unlikely that any untoward market impact could occur in this short time frame, and a termination date will prevent the experiment from running on and developing the appearance of a permanent offering. Second, AT&T may not add central office code areas to those currently specified as trial areas in the tariff or augment or vary the rate plans being tested in each trial area. Third, in any related advertising or direct customer notification concerning the rate plans, AT&T must specifically and clearly state that the experiment is being conducted under special FCC tariff permission subject to the conditions that it will not extend beyond December 31, 1983 and will not expand to include additional exchange areas. These conditions are meant to respond to concerns, such as those expressed by Chairman McCarren of the State of Vermont, that AT&T will use the experiment to selectively deaverage MTS rates, accord any group of customers unreasonable preferential treatment, or engage in unfair competition.

33. As so conditioned, we are satisfied that AT&T will be able to conduct the experiment expeditiously and without significant impact on the market and the public interest. For this reason we are denying the petitions to reject or suspend AT&T's tariff implementing the rate experiment. We have tailored our conditions so as not to affect the basic purposes of the study. Thus, AT&T should be able to obtain the type of actual purchase behavior results that it claims will complement the other studies it has conducted and will be valuable in assessing its overall market research program for the possible development of modified nationwide MTS rate schedules.

34. As a final matter, before granting waivers of our tariff filing

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[16] There are other inconsistencies in the conditions under which the experiment is conducted in the three study areas. For example, in Iowa, calling volumes will be collected on a line by line basis whereas in New York and California, group average billing is employed for multi-line customers with lines arranged in rotary groups, where usage on essentially all of a customer's lines is added together. This variation can have a very significant impact on the discount the customers receive in the different areas for the same volume of usage under the same rate plan. Dissimilarities in study conditions of the types described here could make it very difficult to accurately measure customer reaction to the different rate plans. In other words, the failure to stabilize background study conditions can mask the meaning of the final results as they relate to the desired study parameters.

rules in connection with any future proposals to implement rate experiments, we will require AT&T to meet the following standards. First, it must specify a termination date in the tariff, and explain why it has selected this date. It must describe in detail the objectives of the study and how these objectives will specifically benefit the public. It must also include in the tariff filing a full explanation of the study methodology, why it selected this approach over alternative approaches, how the sample size was determined, and the basis for determining the degree of statistical reliability the experiment is anticipated to achieve. We urge AT&T to select experimental samples on as scientific a basis as possible, and try to avoid subjective or judgmental approachs of the type it has employed here. If AT&T should choose, however, to use a subjective sampling technique it should satisfactorily explain in its tariff filing why a scientific approach is not workable. In addition, the sample size should be as limited as possible to achieve clearly stated objectives. AT&T should provide concrete justification for the sample size selected, and explain why a smaller sample could not be used. If AT&T is conducting or planning related research or other trials in the same geographic market area(s), it should describe these studies and include an analysis of the results from available data. We will also expect AT&T to estimate the total cost of conducting the experiment and specify how such costs will be recovered. Finally, AT&T should describe the manner in which it intends to advertise or notify customers of the experiment, and append illustrative examples of advertisements or notices.

35. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate the above-captioned tariff revisions ARE DENIED.

36. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: American Telephone and Telegraph Company, Revisions to Tariff FCC No. 263 Message Telecommunications Service (MTS), Transmittal No. 14251.

I share Chairman McCarren's view that our approval of this action could be perceived as the "camel's nose under the tent" as far as rate deaveraging is concerned.[1] I write to emphasize that today's action is not, and should not be construed as, *de facto* selective rate deaveraging; nor is it an opportunity for AT&T to establish a "record" under a deaveraging experience; nor should it be construed as any precedent for future rate deaveraging.[2] This action is undertaken solely to afford AT&T the opportunity to examine customer demand and the impact of the MTS calling options on network utilization, efficiency, and cost and revenues before implementing the plans *nationwide*.[3] I am satisfied that the conditions imposed upon this experimental tariff proposal are appropriate to protect competitors and the public from any significant adverse impact.

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[1] Memorandum Opinion and Order (MO&O), para. 28.

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[2] This Commission would not embark on such a significant course until it had conducted a full and careful examination of the fundamental policy implications; deaveraging would not be "implemented" on an *ad hoc* basis.

[3] This is the stated purpose of AT&T's experiment. MO&O, para. 3.

Common Carrier, Rate Structure, Inquiry
Tariff, Investigation

Part time/full time rate structure based on 60/40 percent division of present and future revenue requirements-adopted as reasonable for AT&T's Series 7000 Terrestrial Television Transmission Services. Further action investigating unjust discrimination deferred until further notice.
AT&T CO.
CC Docket No. 81–351

FCC 83–289

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY	CC Docket No. 81–351
Revisions to Tariff F.C.C. Nos. 258 and 260, and the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Services	

MEMORANDUM OPINION AND ORDER

(Adopted June 23, 1983; Released June 28, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. We consider at this time the most recent development in our investigation of the tariff provisions governing American Telephone and Telegraph Company's (AT&T) tariff for terrestrial television transmission services. Presently before us are an Interim Settlement Proposal submitted on December 1, 1982, by the User Parties[1], AT&T's comments on the proposal, and the User Parties' response.[2] As explained below, we believe that the rate structure proposed by the User Parties would be reasonable for use in a future AT&T filing proposing revisions to its Series 7000 service offerings and may

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[1] The User Parties are: The American Broadcasting Companies, Inc.; CBS, Inc.; National Broadcasting Company, Inc.; Hughes Television Network; the Commissioner of Baseball; the Association of Independent Television Stations, Inc., and Cable News Network, Inc.

[2] Also before us are the comments of: Entertainment and Sports Programming Network, Inc.; Storer Communications, Inc.; the National Basketball Association and the National Hockey League; and the National Association of Broadcasters.

provide an adequate basis for terminating this investigation. To the extent that the User Parties and AT&T continue to differ on issues of rate levels, changes in late order charges, and related matters, we believe that our ordinary tariff review processes will provide an adequate opportunity to decide each on its own merits.

Background

2. Since its inception in the late 1940's, AT&T's terrestrial television transmission service (Series 7000) has been offered on a full time and part time or occasional basis.[3] The three major television networks are virtually the only users of full time service, while part time service, which is offered at a substantially higher per hour rate, is used by occasional distributors of sports, news, and entertainment programming, as well as by the networks. For this reason, the Commission has been concerned over the years that AT&T's Series 7000 rate structure might unreasonably discriminate against part time or occasional users.

3. Our concern in this regard has led the Commission to undertake several investigations of the Series 7000 rate structure focused primarily on the discrimination issue. Over a decade ago, for example, the Review Board upheld a Hearing Examiner's finding, after a formal hearing, that full time and occasional use were "like" service under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and that the Series 7000 rate structure in effect at that time resulted in unreasonable discrimination against occasional users.[4] During the pendency of that proceeding, AT&T filed new rate schedules, which among other things, reduced the rate for occasional use and set up a sliding scale which allowed monthly contract customers to purchase service in amounts of one to 24 hours per day. Because the Commission believed that the new rates and rate structure might at least ameliorate the unlawful discrimination in the existing tariffs, it allowed the revisions to become effective while setting them for investigation in Docket No. 18684.[5]

4. Then in 1972, AT&T submitted new tariffs which proposed increases in the part time use rates and the adoption of a single full time, 24 hour per day service. AT&T claimed these revisions were necessary to prevent its largest contract users, namely the networks, from shifting to specialized microwave carriers. This tariff filing was suspended and its investigation was consolidated into the ongoing

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[3] There are three principal Series 7000 service elements: interexchange channels (IXC's), station connections (SC's), and local channels. IXC's connect AT&T Television Operating Centers (TOC's) located in cities around the United States. SC's connect the IXC's to local channels, which in turn connect the TOC's to the studio or other point of origination.

[4] Hughes Sports Network, Inc. v. AT&T, 25 FCC 2d 550 (Rev. Bd. 1970), *review granted in part*, 34 FCC 2d 691 (1972).

[5] Docket No. 18684, FCC 69-1038, released October 9, 1969.

Docket No. 18684 proceeding. However, the investigation was terminated without a decision on the merits when we accepted a stipulation of the parties to a revised tariff.[6] Under the terms of this stipulation, which was effective until December 31, 1975, AT&T retained the suspended rates, except that the increase for occasional use channels was reduced.

5. In 1977, after the 1973 stipulation had expired, AT&T filed revisions to the Series 7000 offering which would have increased part time rates substantially, while proposing much smaller rate increases or rate reductions to full time services. In rejecting these revisions, the Commission reaffirmed that full time and part time services are "like" within the meaning of Section 202(a) and concluded that AT&T had failed even to attempt a cost justification for its proposed rate structure.[7]

6. The present investigation was instituted in May 1981 after AT&T filed new tariff revisions which purportedly brought part time and full time Series 7000 services into a unified rate schedule. However, it appeared to us that under these revisions, the rate disparties between full time and part time users would continue and were not justified. Thus, we suspended these revisions and set for investigation various rate structure issues.[8] After compiling a record of written pleadings, we found the revisions unjustified or unreasonable, and therefore unlawful.[9] Accordingly, aside from across the board increases to all private line rates in 1980 and 1981, the rates and rate structure agreed to in the 1973 stipulation have remained in effect to the present. In order to finally resolve the long-standing discrimination issue, we commenced a second phase of the latest investigation for the purpose of prescribing a reasonable series 7000 rate structure. We requested comments on our proposed prescription of an interim rate structure, which could be observed in operation and form the basis for a more permanent prescription. Issues of the proper rate level were generally deferred until the question of a nondiscriminatory rate structure was resolved.[10]

7. On December 1, 1982, the User Parties submitted the Interim Settlement Proposal now before us. Under the proposal, the existing

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[6] AT&T, Docket No. 18684, 44 FCC 2d 525, 527 (1973).

[7] AT&T, 67 FCC 2d 1134 (1978), *recon. denied.*, 70 FCC 2d 2031 (1979), *aff'd sub nom.* ABC v. FCC, 663 F.2d 133 (D.C. Cir. 1980).

[8] AT&T, Docket No. 81-351, 86 FCC 2d 861 (1981). Specifically, we were concerned that the rate structure under those revisions was not sufficiently sensitive to actual usage; that the sloping rate for IXC and SC services and the special facilities construction charges for full time service would each result in higher rates for part time users; and that the form of rate averaging proposed by AT&T might result in fragmentation of the Series 7000 market according to different service attributes, such as length of service, that bear little relation to actual costs incurred.

[9] AT&T, CC Docket No. 81-351, 88 FCC 2d 1656 (1982).

[10] *Id.*

part time/full time rate structure would be basically retained. The only change would be a reduction in part time IXC rates and an increase in full time IXC rates so that 60 percent of the IXC revenue requirement would be recovered by full time IXC rates and 40 percent by part time rates.[11] Future increases in revenue requirements would also be distributed on a 60–40 basis between full time and part time IXC services. The proposed settlement also requests that pending AT&T proposals advanced earlier in this proceeding for increased late order and cancellation charges be withdrawn, that customers be allowed the option of providing their own local channels, and that the agreement remain in effect for 18 months during which time the rates would be frozen.

8. In commenting on the proposed settlement, AT&T largely agrees that the proposed rate structure could be reasonable and workable for Series 7000 service. It approves using the existing rate structure as modified by the 60/40 percent proposal, and also agrees that use of this proposal could be reasonable to allocate future increases in the revenue requirement. However, AT&T claims that the specific rates proposed by the User Parties would not generate revenues equal to existing revenues for terrestrial television transmission service and should not form the basis for any settlement. In fact, according to AT&T, rates for all Series 7000 service elements would have to be increased even further to achieve a return for this service equal to the 12.75 percent rate of return authorized for the company as a whole. It also opposes the User Parties' request that the increased late order and cancellation charges be withdrawn, claiming that customer ordering practices frequently result in a loss of revenue. Thus, AT&T asserts that modifications to the proposed settlement are necessary to enable it to recover its revenue requirement for this service. Finally, AT&T does not agree to allow interconnection of customer-provided local channels and the freezing of rates for 18 months. In response, the User Parties request that we convene a "working session" to be attended by all interested parties for the purpose of resolving the remaining differences between AT&T and the User Parties.

Discussion

9. As noted above, the purpose of this investigation has been to determine whether the disparity between part time and full time rates for terrestrial television transmission service unreasonably discriminates against part time users and, if necessary, to prescribe a rate structure for the Series 7000 offering.[12] However, the parties to

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[11] The User Parties calculate that this would result in an approximate 9 percent increase in the full time IXC rate and an approximate 25 percent decrease in the part time rate.

[12] The only issue in this investigation concerning the rate level was whether certain

the Interim Settlement Proposal, including the major part time and full time users of Series 7000 service, apparently agree that a modified version of the existing rate structure is basically acceptable to them all. Although each might prefer a rate structure more favorable to its particular interests, these parties all accept a full time/part time structure based on a 60/40 allocation of costs as reasonable and nondiscriminatory. AT&T also believes the proposed rate structure is acceptable. While a mutual understanding has thus apparently been reached on the core issue of this long-standing controversy, the parties disagree upon other issues which may or may not bear upon this basic understanding and which were not among the issues specifically designated for investigation.

10. It appears to us that the agreement has brought us close to a conclusion of this matter. We agree with the parties that the full time/part time rate structure based on a 60/40 cost allocation could be reasonable for the foreseeable future. A structure upon which the various classes of customers agree is not likely to be unreasonably discriminatory. We also believe that the rate structure issue is severable from the other remaining issues because it resolves this discrimination issue by allocating costs. The other issues largely concern the overall rate level, termination liabilities, and points of interconnection, issues not of allocation and discrimination among customers but of whether the carrier is proposing reasonable terms for all customers. Under these circumstances, it appears to us that the fairest and most expeditious way to resolve these remaining issues is the normal tariff review process. The issues on which AT&T and the User Parties disagree are, for one thing, outside the scope of those originally set for investigation and have not been fully presented for public scrutiny or considered in context. The normal tariff review process is also limited in time, while negotiations might continue indefinitely or fail. We see no persuasive reason to substitute negotiations on these other points for the statutory process set out in the Communications Act and our Rules. If AT&T wishes to propose the rate increases and other tariff changes it claims are necessary, it will be required to submit the usual justification, and the User Parties will then have an opportunity to address the reasonableness of these proposals.

11. We are assuming that the 60/40 allocation and rate structure as filed will be generally acceptable to users, though they may disagree with AT&T on other issues. If, however, the User Parties are unwilling to accept this allocation absent a favorable resolution of the other issues, and believe it in fact to be unreasonable when

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investment in lines should be allowed as part of the rate base. *See* 86 FCC 2d 861 at 872–73. We have already decided that issue, *see* 88 FCC 2d 1656 at 1676–77, and it is not contested here. We also considered and resolved certain cost issues raised by the networks, although those issues were not specifically raised in the designation order.

taken alone, we will consider their comments on AT&T's next tariff filing, assuming it incorporates the 60/40 split, and decide at that time whether to allow it to become effective, and if rate structure questions persist, whether to move forward with Commission prescription of a Series 7000 rate structure. We defer further proceedings in this docket until the tariff review process is completed or until AT&T informs us that it is unwilling to use the 60/40 rate structure. We will issue a further order at that time.

12. In view of the foregoing, !T IS ORDERED, That the filing date for reply comments in this investigation IS DEFERRED until further notice.

13. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the FEDERAL REGISTER.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Amendment of, After Designation, Rejected
Comparative Hearing
Estoppel
FM Station, Authorization
Review by Review Board
Transmission First Local

> **Review Board affirms Initial Decision and grants FM construction permit to applicant proposing a first local transmission service, pursuant to Sec. 307(b) of Communications Act. Board rejected losing applicant's post-hearing amendment, which sought to change proposed community of license to preferred community, for lack of good cause; doctrine of judicial estoppel applies.**
>
> *–Beaufort County B/cing Co.*
> BC Docket No. 80–775

FCC 83R–51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Carmen D. Trevitt and Calvin R. Means d/b/a	
BEAUFORT COUNTY BROADCASTING COMPANY Beaufort, South Carolina	BC Docket No. 80–775 File No. BPH-790918AC
BARNACLE BROADCASTING LTD. Port Royal, South Carolina	BC Docket No. 80–776 File No. BPH-800519AF
For a Construction Permit for a New FM Station	

Appearances

Lawrence J. Bernard, Jr. for Beaufort County Broadcasting Company; and *Frank J. Martin, Jr.* and *David A. Gross* for Barnacle Broadcasting Ltd.

DECISION

(Adopted: July 15, 1983; Released: July 22, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. After a trial-type comparative hearing, Administrative Law Judge Frysiak in a comprehensive 40 page Initial Decision, FCC 82D-77, released December 10, 1982, concluded that Section 307(b) of the Communications Act as interpreted by Court and Commission precedent required the grant of the application of a new FM radio station for the community of Port Royal, which does not have its own local station. The other community involved, Beaufort, South Carolina, has three other local stations. *See I.D.*, paras. 158–161. Briefs and exceptions were filed January 31, 1983; replies on February 15 and 16; and oral argument was held March 25. Subsequently, on May 13, 1983, the Beaufort applicant filed an amendment proposing to change its station location to the 307(b) preferred community of Port Royal. In essence, the Board has concluded that the Beaufort applicant has not shown good cause for its unprecedented and very belated request to change the location of its proposed station, and that the ALJ correctly found that Section 307(b) required a grant to Port Royal which does not have its own local station. *See, e.g., Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977); and *Harrell* v. *FCC*, 267 F.2d 629, 18 RR 2072 (D.C. Cir. 1959).

2. *Background*: The two communities in this case, Beaufort, population 8,634, and Port Royal, 2,977, are both located in Beaufort County, population 65,364. Both the county and communities are located on a triangular peninsula some 50 miles southwest of Charleston, but are not part of an urbanized area. When the two applications were filed in 1979 and 1980, a Class A low power FM channel was assigned to Beaufort. By virtue of the Commission's rules then in effect the FM channel could also be applied for in Port Royal. See former Section 73.203(b). In accordance with Commission practice at that time a hearing was ordered to determine which community had a greater need for a station. *See, e.g., Casey Broadcasting Co.*, 89 FCC 2d 618, n. 2 (Rev. Bd. 1982). *See also Campbell & Sheftall*, 7 FCC 2d 658, 9 RR 2d 999 (Rev. Bd. 1967).

3. After the filing of the applications, the Commission in a separate rulemaking proceeding, deleted the Class A FM channel from Beaufort and substituted in its place a Class C higher power station which would cover a larger area. *Beaufort-Ridgeland, S.C.*, 48 RR 2d 1559 (Br. Bureau 1981). Both applicants were permitted to amend their application to substitute the new chnnel for the deleted channel. They did so, but, as was the Commission's practice at that time, the rulemaking proceeding did not resolve which of the two communities had a greater need for a station. While both applicants were aware of the rulemaking and filed limited comments, neither

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sought to foreclose the other from utilizing the channel in the other's community.[1]

4. At the hearing, the competing Beaufort applicant twice attempted to demonstrate that the Port Royal applicant was motivated by a desire to serve Beaufort. On both occasions, the ALJ denied the "Berwick doctrine" issue because the threshold showing had not been made. A major point in the Beaufort brief is that the ALJ erred in refusing to add that issue "despite uncontradicted evidence that [the] sole reason for filing a Port Royal application was to gain a 307(b) advantage" Br. 21–30. However, at oral argument the Beaufort applicant acknowledged that this point had become moot because of a recent Commission policy decision which retroactively deleted the Berwick issue from all hearings. *See Suburban Community Policy, Berwick Doctrine, Etc.*, 53 RR 2d 681 (1983); Tr. 1171.

5. From the beginning of the hearing through the oral argument before the Review Board the Beaufort applicant continued to press its major point that Section 307(b) does not require the grant of a higher power Class C FM station to the small town of Port Royal (Br. 4–21). Then in an ironic *volteface* following oral argument the Beaufort applicant filed an amendment proposing to switch its station location from Beaufort to Port Royal. Recognizing the belated nature of its amendment it argued that good cause exists here because the Commission's retroactive abolition of the "Berwick doctrine" had a substantial impact on its application by depriving it of the opportunity to challenge the *bona fides* of the competing application for Port Royal. Petition pp. 3 and 5. The Port Royal applicant opposed the amendment noting that twice the ALJ had ruled as a matter of fact that the Beaufort applicant had not justified the addition of a *Berwick* issue; that the Beaufort applicant had vigorously prosecuted its application for Beaufort on a different legal theory, and only after an unfavorable Initial Decision on the Section 307(b) issue, did it propose the amendment "gambit to avoid a final adverse determination of the 307(b) comparative issue." Reliance was also placed on estoppel or preclusion because of Beaufort's inconsistent position or opportunistic reversal of theory during litigation. *See* 1B Moore, *Federal Practice*, at 765 et seq. (2d Ed. 1971); and *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166–68 (4th Cir. 1982). Opposition, pp. 5–7, 16–17.

6. *Discussion*: A change in station location in the FCC licensing process is considered a "major amendment" which requires that the application be returned to the end of the processing line, thereby

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[1] Recently, the Commission amended Section 73.203(b) so that, in the future, applications for communities not listed in the Commission table of FM assignments, such as that of Port Royal, will be considered in a rulemaking proceeding to change the table of assignments. *See Suburban Community Policy, Berwick Doctrine, Etc.*, 53 RR 2d 681, 693–694 (1983).

losing its place and its right to be compared with previously filed applications. *See* Section 73.3573(a)(1). No case has been cited in which an applicant was permitted to change its station location after the issuance of an unfavorable Initial Decision, and we are aware of none. Thus, an applicant who proposes such an unprecedented action must make a persuasive showing. *See Casey Broadcasting Co., supra*, 89 FCC 2d 618. This is especially true in a comparative case where a competing applicant would be prejudiced by such action. *See Commercial Radio Institute, Inc.*, 78 FCC 2d 1016 (Rev. Bd. 1980).

7. Here the Beaufort applicant has not shown good cause for its amendment. As the competing applicant points out, the Commission's abolition of the *Berwick* doctrine did not have a substantial impact on the Beaufort applicant because, prior to that time, it had twice failed to make the factual showing requiring a trial of that issue. Moreover, Beaufort's proposed amendment is inconsistent with its major argument, both at the hearing and oral argument, that the small town of Port Royal should not receive a 307(b) advantage because this case involved a Class C high power station. When the ALJ did not accept this theory it countered with an inconsistent and opportunistic switch in station location. The Commission need not play such "games with applicants." *See Fischer* v. *FCC*, 417 F.2d 551, 555 (D.C. Cir. 1969). Thus, Beaufort's amendment will be rejected.

8. Section 307(b) requires the Commission to make a fair, efficient and equitable distribution of radio facilities. *See generally Casey Broadcasting Co., supra*. In past actions the Commission has tried to insure that as many communities as possible receive at least one radio station. This objective flows from the local nature of radio and Section 307(b) of the Communications Act. In *FCC* v. *Allentown Broadcasting Co.*, 349 US 358 (1955), the Supreme Court agreed that if a Section 307(b) choice could be made between conflicting applications for different communities (here Beaufort and Port Royal) the Commission could grant the application proposing to serve the community with the greater need, without first determining which applicant is comparatively better qualified to provide radio service. The principle that each community has a need for its own radio station to act as a local outlet for self expression has hardened into a "presumption." Thus, several decisions which appeared to ignore this legal principle were reversed by the Court of Appeals which insisted on a strong evidentiary showing before a community's need for its first local outlet could be overcome. See *Harrell* v. *FCC, supra*, 267 F.2d 629; and *Pasadena Broadcasting Co.* v. *FCC, supra*. And the Review Board has held that the Commission's present practice is that a choice will be made under Section 307(b) if the record reveals "sufficient differences between the proposals to permit a meaningful 307(b) choice". *WHW Enterprises, Inc.*, 89 FCC 2d 799, 812 (Rev. Bd. 1982), *rev. pending*.

9. At the hearing it was established that Port Royal, with a growing population of nearly 3,000 persons, has been in existence for more than four hundred years—since 1562—and is a separate community without its own radio station. See ALJ's detailed Findings, paras. 51–72. Beaufort has a population of nearly 9,000 but it already has three local radio stations. Thus, under well established policy, the ALJ concluded that Port Royal is entitled to its first local outlet. *Pasadena Broadcasting Co.* v. *FCC, supra*; *Harrell* v. *FCC, supra*; *FCC* v. *Allentown Broadcasting Co., supra*, 349 U.S. at 361–362.

10. As noted above, in its exceptions and oral argument the Beaufort applicant urged that a Section 307(b) choice should not be made in this case because a high power Class C FM station was being proposed for use in the small town of Port Royal; and neither applicant should receive a Section 307(b) preference since both applicants could be considered as providing regional service to large areas and populations. Considerable reliance was placed on the Commission's decision in *Massillon Broadcasting Co., Inc.*, 36 FCC 809, 2 RR 2d 409, 415–16 (1964), and our recent decision in *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *rev. denied*, FCC 83–235, released May 18, 1983.

11. These and similar cases involved applicants for suburban communities located near the dominant central cities, *e.g.*, Massillon and Cincinnati Shaker Heights and Cleveland. Here the ALJ's findings establish that both Beaufort and Port Royal are isolated from Charleston, and some 50 miles away. Port Royal is a very old and growing community, although it is smaller than Beaufort. On the record before him, *I.D.*, paras. 51–72, the ALJ correctly concluded that Port Royal needs its first local station more than Beaufort, with approximately three times the population, needs its fourth station. *See Service Broadcasting Corp.*, 36 FCC 1085 (Rev. Bd. 1964), where the Board held that Zion, Illinois with a population of 11,941 needed its first local outlet more than Kenosha, Wisconsin, population 67,899, needed its second competing local station. Here, as in *Service, supra*, 36 FCC at 1089, without substantial evidence we cannot presume that Port Royal's need for a first local transmission facility is being met by stations located in other communities. *See also Harrell* v. *FCC, supra*.

12. Nor can we accept Beaufort's arguments that the Class C FM station involved in this case should be treated like the television channel involved in *Cleveland Television Corp., supra*. Both the Commission and the courts have recognized that because of policy considerations applicants for television stations should be treated in a different manner.[2] Television channels are much more scarce than

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[2] The Board has previously noted that "Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments,

FM and AM radio facilities and are expected to serve much broader areas whereas the many more radio stations can concentrate on localized service. See *e.g.*, authorities discussed in *Cleveland Television Corp.*, *supra*, 91 FCC 2d at 1136–1137. See also *Stone* v. *FCC*, 466 F.2d 316, 327–328 (D.C. Cir. 1972). Beaufort has simply failed to rebut Port Royal's presumptive need for its own first local radio station, *Harrell* v. *FCC*, *supra*, and we therefore affirm the ALJ's conclusion that the application "for Port Royal is preferred under the Section 307(b) issue, and this case can be decided under such issue." *I.D.*, para. 161. *FCC* v. *Allentown Broadcasting Co.*, *supra*. We have reviewed Beaufort's other objections and agree with the ALJ's dispositions of those points.

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend Application filed on May 13, 1983, by Beaufort County Broadcasting Company, IS DENIED; that the application filed by Beaufort County Broadcasting Company (File No. BPH-790918AC) IS DENIED; and that the application of Barnacle Broadcasting Ltd. (File No. BPH-800519AF) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

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and require larger audiences to attract more advertising revenues." Moreover, "the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries.'" Unlike AM or FM radio stations, television provides "an areawide, rather than a localized service." *Cleveland Television Corp.*, 91 FCC 2d at 1137. A recent Commission report shows that the Commission has licensed some 1,000 television stations and more than 9,000 radio stations.

FCC 82D-77

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Carmen D. Trevitt and Calvin R. Means d/b/a BEAUFORT COUNTY BROADCASTING COMPANY Beaufort, South Carolina	BC Docket No. 80-775 File No. BPH-790918AC
BARNACLE BROADCASTING LTD. Port Royal, South Carolina	BC Docket No. 80-776 File No. BPH-800519AF
For a Construction Permit for a New FM Station	

Appearances

Lawrence J. Bernard, Jr. on behalf of Beaufort County Broadcasting Company; *Frank J. Martin, Jr.* and *David Gross* on behalf of Barnacle Broadcasting Ltd.; and *Arthur I. Steinberg* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

(Issued: November 30, 1982; Released: December 10, 1982)

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of Carmen D. Trevitt and Calvin R. Means, d/b/a Beaufort County Broadcasting Company (BCBC) requesting authority to construct a new Class C commercial FM broadcast station on channel 259C at Beaufort, South Carolina, and Barnacle Broadcasting Ltd. (Barnacle) requesting authority to construct a new commercial FM broadcast station on channel 259C at Port Royal, South Carolina. Channel 259C is assigned to Beaufort, South Carolina in the Commission's Table of FM Channel Assignments, Section 73.202(b) of the Commission's Rules.[1] Barnacle's application was filed pursuant to Section

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[1] As originally filed, these applications requested permission to construct a new station on FM channel 285A. However, in the *Hearing Designation Order*, 46 Fed. Reg. 7439, published January 23, 1981, the Commission indicated that there was then pending a proposal in BC Docket No. 80-214 to replace channel 285A with

73.203(b) of the Commission's Rules which makes channel 259C available for use at Port Royal because that community's boundaries are adjacent to Beaufort and thus within the 15-mile radius in which an assigned FM channel may be used.

2. By *Hearing Designation Order*, 46 Fed. Reg. 7439, published January 23, 1981, the aforementioned applications of BCBC and Barnacle were set for hearing. Subsequently, pursuant to various orders of the presiding judge,[2] issues were added to this proceeding and modified. Thus, the issues involved herein now read as follows:

> 1. To determine whether Carmen D. Trevitt and Calvin R. Means dba Beaufort County Broadcasting Company has failed to comply with Rule 1.65 by not reporting an adverse determination by the FAA as to its proposed tower and, if so, the effect of such noncompliance on the applicant's comparative qualifications.
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> 2. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.
>
> 4. To determine whether Barnacle Broadcasting Ltd. has failed to comply with Section 1.65 or Section 73.3514 of the Rules by not reporting to the Commission that Mrs. Wilson conducted a part of the community leader survey, and if so, the effect of such noncompliance on the applicant's comparative qualifications.
>
> 5. To determine whether Beaufort County has made misrepresentations or abused Commission processes or been lacking in candor with respect to a document submitted to the Commission purporting to be the affidavit of Mrs. Catherine Vaughn dated February 10, 1981.
>
> 6. To determine whether Beaufort County has made misrepresentations or abused Commission processes or been lacking in candor with respect to the affidavits of Jack Queener dated February 11, 1981 and Charlotte L. Green dated February 10, 1981.
>
> 7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. A prehearing conference was held on April 14, 1981, and a further conference was held on July 2, 1981. Hearing sessions were

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either channel 261A or channel 259C, and stated that in the event either of the proposed channel changes was made, the applicants would be granted leave to amend their applications to specify operation on the new channel. Subsequently, in *Beaufort-Ridgeland, South Carolina*, 48 RR 2d 1559 (1981), the Commission amended Section 73.202(b) by substituting channel 259C for channel 285A, and each of the applicants amended their applications to specify operation on the new channel.

[2] *Memorandum Opinion and Order* FCC 81M-1164, released April 20, 1981; *Memorandum Opinion and Order* FCC 81M-1526, released May 14, 1981; and *Order* FCC 81M-2096, released July 9, 1981.

held in Washington, D.C. on November 9, 10, 12, 13 and 20, 1981. The record was closed on November 20, 1981. Proposed findings of fact and conclusions of law were filed on May 3, 1982 by the Broadcast Bureau and on May 7, 1982 by the applicants, and reply findings were filed by the applicants on June 2, 1982.

Findings of Fact

The Applicants

Beaufort County Broadcasting Company

4. BCBC is a general partnership formed under the laws of the state of South Carolina. The three partners of the company and their ownership interests are: Carmen D. Trevitt - 75%; Fred Washington, Sr. - 15%; and Calvin R. Means - 10%. BCBC Exh. 9, p. 1.

5. Two of the partners of BCBC have interests in other communications media. Mr. Trevitt is the president, a director and the owner of 80% of the stock of Cohutta Broadcasting Co., Inc., licensee of FM radio station WQMT, Chatsworth, Georgia. WQMT operates with 3 kW power from an antenna located 300 feet above average terrain and provides service to Murray County, Georgia and portions of Gilmer, Whitfield and Gordon Counties in Georgia, as well as a small portion of Polk County, Tennessee. WQMT does not provide service to any portion of the state of South Carolina. Chatsworth, Georgia is approximately 208 air miles northwest of Beaufort, South Carolina. BCBC Exh. 9, p. 1. Mr. Trevitt is also a partner and owner of a 90% interest in Chatsworth Cablevision Company, the operator of a CATV system serving Chatsworth and portions of surrounding Murray County, Georgia. The system has approximately 1,050 subscribers, but does not originate local programming. BCBC Exh. 9, p. 2.

6. Mr. Means owns the other 20% of the stock of Cohutta Broadcasting Co., Inc., is an officer and director of that company and serves as the general manager of WQMT. Mr. Means also is a partner with a 10% interest in Chatsworth Cablevision Company. Other than the above-described interests, neither Mr. Trevitt nor Mr. Means owns or has any connection with any media of communications. BCBC Exh. 9, p. 2. Mr. Washington does not have any interest in or association with any existing media of communications. BCBC Exh. 7, p. 2.

7. Mr. Trevitt, the owner of a 75% partnership interest in BCBC (BCBC Exh. 9, p. 1), will move his place of residence to the Beaufort area if BCBC's application is granted and will supervise construction of the station. When the station begins operations, Mr. Trevitt will become its full-time general manager, devoting at least 40 hours per week to the supervision of the day-to-day operation of all aspects of the station, including the coordination of sales efforts and the production of entertainment, news and public affairs programming.

He will serve as chief financial officer of the station and will hire all employees after consultation with Mr. Washington, who will supervise the implementation and administration of the station's Equal Employment Opportunity Program. BCBC Exh. 10, pp. 3–4; Tr. 477–80.

8. Mr. Trevitt was born in Dalton, Georgia on September 22, 1927. He attended the public schools of Dalton and was graduated from the Capitol Page School in Washington, D.C. while serving as a page in the U.S. House of Representatives. He attended Mercer University in Macon, Georgia, graduating in 1950 with an A.B. degree. He served in the U.S. Army in 1946 and 1947 and again in 1950 and 1951 during the Korean conflict. He married in 1951 and lived in Forsyth, Georgia from 1951 until 1979. He has five sons, ranging in age from 10 to 29 years. During the time he lived in Forsyth, Mr. Trevitt taught school and coached basketball on the high school level in the Forsyth County school system. He also owned and operated a dairy farm near Forsyth from 1952 until 1969 and engaged in other farming activities. While in the dairy business, he served on the Board of Directors and was treasurer of a dairy business in Atlanta, Georgia. He was also on the Board of Directors and was president of the Tri-County Artificial Breeders Association, was on the Board of Directors of the Monroe County Chapter of the Georgia Farm Bureau, and was on the Area Committee of the Farmers Home Administration. He was a charter member of the Monroe County Junior Chamber of Commerce, a member of the Forsyth Lions Club, a director and president of the Monroe County Chamber of Commerce, and president of the Mary Persons Touchdown Club. BCBC Exh. 10, pp. 1–2.

9. From 1960 until 1980, Mr. Trevitt was president and 100% owner of Village Outlet Stores, Inc., the operator of ladies sportswear outlet stores in Forsyth and several other Georgia cities, including Dalton, Smyrna, Gainesville and Commerce. BCBC Exh. 10, p. 2.

10. In 1973 Mr. Trevitt, through his wholly-owned company, Forsyth Broadcasting Company, received a permit from the Commission to construct a new Class A FM broadcast station in Forsyth. He supervised the construction of that station, WFNE-FM, and it began operating in November 1973 as the first broadcast station licensed to Forsyth. He was active in the day-to-day management and operation of WFNE until it was sold in November 1979. BCBC Exh. 10, p. 2; Tr. 497.

11. In 1975 Mr. Trevitt formed Cohutta Broadcasting Company, and now owns 80% of the stock of its successor, Cohutta Broadcasting Co., Inc. In 1975 Cohutta Broadcasting Company was granted a permit by the Commission to construct a new Class A FM broadcast station in Chatsworth, Georgia. In 1976 Mr. Trevitt and his partner, Mr. Means, built the station, WQMT-FM, and it began operations on November 13, 1976 as the first broadcast facility licensed to

Chatsworth. In 1978 Messrs. Trevitt and Means formed Chatsworth Cablevision Company which received a cable television franchise from the Chatsworth city government. BCBC Exh. 10, pp. 2–3.

12. After the sale of WFNE, Forsyth, Georgia, in 1979, Mr. Trevitt moved to the Chatsworth area and continues to reside there. He moved because his main business interests were then in the Chatsworth area and he wanted to be able to supervise their operation on a day-to-day basis. He presently supervises the operation of WQMT on a day-to-day basis in consultation with Mr. Means, who serves as the general manager of the station. Mr. Trevitt also supervises the day-to-day operation of the cable company. BCBC Exh. 10, p. 3; Tr. 484.

13. Messrs. Trevitt and Means have not yet decided precisely how Mr. Trevitt's duties at WQMT and the cable television system will be assigned after Mr. Trevitt moves to Beaufort. However, two options are available. One option would be to have Mr. Means assume more of the responsibility for the cable company in which he owns a 10% interest and reduce his responsibility at the radio station. Another option would be the possibility of selling the radio station so that Mr. Means could devote his full time to the cable system. Mr. Means was in charge of both the radio station and the cable system on a day-to-day basis for a period of time prior to Mr. Trevitt's move to Chatsworth. Tr. 480, 483.

14. Upon grant of BCBC's application, Mr. Washington, the owner of a 15% partnership interest in the applicant, will become the community affairs director for the station. He will also assume responsibility for the administration and implementation of the station's Equal Employment Opportunity Program and will produce some public affairs programs to be broadcast over the station. BCBC Exh. 7, pp. 2–4.

15. Mr. Washington is a black resident of Beaufort, South Carolina. He was born in Ritter, South Carolina, approximately 30 miles from Beaufort, on October 12, 1913. His parents were farmers and natives of the area where he was born. In 1927 he came to Beaufort County to attend the Beaufort County Training School from which he was graduated in 1932. After graduation he continued to live in Beaufort and began working as a waiter at the Gold Eagle Tavern, a world-renowned eating establishment in Beaufort. He is married and has seven children, all of whom graduated from high school and college and three of whom have obtained advanced college degrees. BCBC Exh. 7, p. 1.

16. Mr. Washington continued to work for the Gold Eagle Tavern until he was drafted into the U.S. Marine Corps in 1944. He remained in the Marine Corps for 26 years before retiring in 1970 with the rank of Master Gunnery Sergeant, the highest enlisted rank in the Marine Corps. While serving in the Marine Corps, he was Chief Steward for two years to the Assistant Commandant in

Washington, D.C. and for four years following that he was Chief Steward to the Commandant of the Marine Corps. During the $5^{1}/_{2}$ years prior to his retirement, he managed the Marine Corps School for Stewards. While in the Marine Corps, Mr. Washington kept his home in Beaufort, and his family continued to reside there for most of that time. All of his children were graduated from high school in the city of Beaufort. BCBC Exh. 7, p. 1.

17. Mr. Washington has been a lifelong member of the African Methodist Episcopal Church and is now a member of the Grace A.M.E. Church in Beaufort, where he has taught Sunday School and been on the Board of Trustees for the past eight years. He has also been Chairman of the Beaufort District Layman Organization of the A.M.E. Church for the past eight years. He has served on the Beaufort Housing Authority for the past six years. He has also served on the Board of the Beaufort Day Care Center for more than the past six years, and has been a member of the Advisory Committee of the Neighborhood Youth Center to the Beaufort City Council for the past ten years. BCBC Exh. 7, pp. 1–2.

Barnacle Broadcasting Ltd.

18. Barnacle is a corporation organized and existing under the laws of the state of South Carolina. It has one class of common stock, with one hundred shares authorized and subscribed. Its officers, directors and shareholders are as follows:

Name	*Office*	*Shares Subscribed and Percentage of Voting Stock*	
Frieda R. Mitchell	President and Director	20 Shares	20%
Audubon Broadcasting Company, Inc.	–	80 Shares	80%
Pegram Harrison	Treasurer and Director	–	–
Ann M. Harrison[3]	Vice President, Secretary and Director	–	–

Barnacle Exh. 7, p. 14; Exh. 8, p. 4; Tr. 677, 810.

19. Audubon Broadcasting Company, Inc., licensee of WNOK-AM and WNOK-FM in Columbia, South Carolina, is organized under the laws of the state of South Carolina. It has one class of common

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[3] Ann M. Harrison is Mr. Harrison's wife. She has no interest in the media of mass communications other than her interest in Audubon Broadcasting Company, Inc., and through that, her interest in Barnacle. Barnacle Exh. 9.

stock, with one hundred thousand shares authorized and issued. Its officers, directors and shareholders are as follows:

Name	*Office*	*Shares Subscribed and Percentage of Voting Stock*
Pegram Harrison	President, Treasurer and Director	51,000 Shares 51%
Ann M. Harrison	Vice President, Secretary and Director	49,000 Shares 49%
Earl D. Hewlette[4]	Director	– –
William L. McElveen[5]	Vice President	– –

Barnacle Exh. 7, pp. 14-15; Exh. 8, pp. 4-5.

20. Frieda R. Mitchell, president, a director and 20% stockholder of Barnacle, will serve as full-time general manager of Barnacle's proposed station. Upon completion of construction, Mrs. Mitchell will resign her present position as Director of United Communities for Child Development and will devote full time (*i.e.*, 40 hours per week or more) to running the station. Her duties will include superintending the station's staff, developing program formats, selecting music and supervising the station's programming, including public affairs. Barnacle Exh. 7, p. 16; Exh. 8, p. 6.

21. Mrs. Mitchell resides in Sheldon, South Carolina, which is in Beaufort County. She was born in Sheldon, South Carolina on June 20, 1925. She is divorced and the mother of two daughters. She is also the grandmother of two children. Barnacle Exh. 7, p. 1.

22. Mrs. Mitchell attended Mather School for Girls, a private boarding school in Beaufort, for five years. She graduated at the head of her class there in 1944. The Mather School for Girls is no longer operating, but has been replaced by a Technical Education College. Barnacle Exh. 7, p. 1.

23. Mrs. Mitchell attended Allen University in Columbia, South Carolina. The only career offered by this university was that of public school teacher, and she took general education courses in preparation for teaching in the public schools. Barnacle Exh. 7, p. 1.

24. During 1946 through 1947, Mrs. Mitchell taught elementary

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[4] Mr. Hewlette is an attorney in Columbia, South Carolina, whose only interest in or connection with the media of mass communications is as a director of Audubon Broadcasting Company, Inc. Barnacle Exh. 9.

[5] Mr. McElveen is general manager of WNOK-AM and WNOK-FM. He has no other interest in or connection with the media of mass communications. Barnacle Exh 9. He assisted with Barnacle's application in the early stages and will assist Mrs Mitchell in getting the proposed station off the ground. Tr. 775–76.

school in Jasper County, South Carolina; and in 1947 through 1948, she taught school in the Beaufort County School District. In 1948 she went to New York and did factory and domestic work and odd jobs until 1951. Beginning in 1951, she worked as a Supervisor of Ward Clerks at Grasslands County Hospital in Valhalla, New York until July 1952. In July 1952, she returned to South Carolina and was unemployed until 1959. From 1959 to 1961, she was a receptionist for the Clemson Extension Service, U.S. Government, in Beaufort. From 1961 to 1963, she was employed by the Beaufort County Board of Education, Dale Elementary School, Dale, South Carolina. From 1963 until 1974, she was employed by the Penn Community Services, Inc. located in Frogmore, South Carolina; and from 1974 to the present, she has been employed as Executive Director of United Communities for Child Development in Beaufort. Barnacle Exh. 7, pp. 1–2.

25. In 1963 Mrs. Mitchell was the primary organizer of the residents of Sheldon Community and formed a non-profit corporation which provided a number of services to the community. Barnacle Exh. 7, p. 2.

26. Mrs. Mitchell served as chairman of a citizens organization formed in 1965 which was largely responsible for preparing the community for making the transition from a segregated to an integrated school district. As a result of the activities of this organization, the second highest number of black students in all school districts in South Carolina transferred to integrated schools under the "Freedom of Choice" plan. Barnacle Exh. 7, p. 2.

27. Mrs. Mitchell has also served on the School Desegregation Task Force in South Carolina, a project sponsored by the American Friends Service Committee. Barnacle Exh. 7, p. 2.

28. Mrs. Mitchell served as a consultant to many community and state groups and organizations dealing with a variety of matters, but mainly pertaining to community organization. She served as a consultant to the Education Staff Seminar of the U.S. Office of Education, Title I, NAACP Legal Defense Fund, and as a consultant to the University of South Carolina School Desegregation Center. Barnacle Exh. 7, p. 2.

29. Mrs. Mitchell has served on numerous boards and committees at the state, regional and national levels. She has also served on the Advisory Committee of the Children's Defense Fund, a national non-profit child advocacy organization. Barnacle Exh. 7, p. 3.

30. Mrs. Mitchell served as chairman of a coalition consisting of several national private organizations which came together to protest the exclusion of poor and minority people by the U.S. Office of Child Development in the process of revising the National Licensing Standards for Publicly Funded Day Care Centers. The Office of Child Development appropriated funds to hold ten workshops across the country to allow the excluded groups to review the

proposed changes in the codes and make their recommendations. Barnacle Exh. 7, p. 3.

31. Mrs. Mitchell served two two-year terms on the Board of Directors of the South Carolina Council on Human Relations. She has also served on the South Carolina Advisory Committee to the U.S. Commission on Civil Rights for four years. Barnacle Exh. 7, p. 3.

32. While at Penn Community Services, Mrs. Mitchell directed a project in community development serving rural, poor and predominantly black people in the Low Country of South Carolina. During this period, her field activities led her into many extremely poor communities where families were experiencing hardships which she testified were unbelievable. She assisted poor blacks to organize child care centers where their very young children could be cared for while they were out to seek work. Barnacle Exh. 7, p. 3.

33. In two years, Penn Community Services was able to obtain foundation grants to assist in giving technical aid to these groups. In 1971 a federation of community day care centers was organized under Mrs. Mitchell's direction. This federation is currently operating as an independent agency servicing approximately 200 preschool children. Major funding for the program is derived from federal funds under Title XX, as well as a combination of local, state and private funds. Barnacle Exh. 7, p. 4.

34. Mrs. Mitchell served as Chairman of the United Communities for Child Development, a federation of community-operated child care centers in South Carolina, until it received public funding in 1974, at which time she became Executive Director. Barnacle Exh. 7, p. 4.

35. Mrs. Mitchell was elected to the Beaufort County Board of Education in 1968, and she is currently serving her thirteenth year on that board. Mrs. Mitchell testified that she believes that she and another black woman elected at the same time were the first black women to be elected to a public office in the state of South Carolina. Barnacle Exh. 7, p. 4.

36. In 1977 Mrs. Mitchell was one of seven recipients, out of 125 national nominees, of the 1977 Rockefeller Public Service Award for Outstanding Public Service. Barnacle Exh. 7, p. 4.

37. Recently Mrs. Mitchell served as a gubernatorial appointee to the South Carolina Committee for the International Year of the Child, and she was also a member of the Beaufort County Planning Committee of the White House Conference on Families. Barnacle Exh. 7, p. 4; Tr. 941, 989–91.

38. Mrs. Mitchell now serves on the Board of Directors of Beaufort County United Funds; the Budget and Allocations Committee of Beaufort County United Funds; the Advisory Council for Coastal Speech and Hearing; and the Beaufort County Literacy Program of which she is a board member. Barnacle Exh. 7, pp. 4–5.

39. Mrs. Mitchell is also currently serving a four-year gubernato-

rial appointment to the Citizens Participation in Education Task Force, and is a member of the South Carolina Mental Health State Plan Advisory Committee. Also she is serving as a member of the Advisory Board for the Adult Education Program, as Secretary on the Board of Directors of the Sheldon Community Center, and as a member of the Task Force to Review Minimum Defined Programs for the State of South Carolina. Barnacle Exh. 7, p. 5.

40. Mrs. Mitchell has no interest of any kind in any mass medium of communications other than her interest in Barnacle. Barnacle Exh. 7, p. 5. She has no experience in broadcasting apart from her role in connection with Barnacle's application. Barnacle Exh. 10, p. 1.

41. Pegram Harrison, treasurer and a director of Barnacle, will not devote full time to the station, but will devote 20 hours or more per week to the management and operation of the station. He will visit the station on the average of once a month, or more often, during the start-up period. Barnacle Exh. 7, p. 16; Exh. 8, p. 6.

42. Mr. Harrison was born on January 4, 1934 in New Orleans, Louisiana. He is married and has four sons. He resides in Atlanta, Georgia. Barnacle Exh. 8, p. 1.

43. Mr. Harrison received his primary education at public schools in Atlanta, Georgia. From 1947 to 1951, he attended Episcopal High School in Alexandria, Virginia, from which he graduated with academic honors. From 1951 to 1955, he attended Washington & Lee University in Lexington, Virginia, from which he also graduated with academic honors. While there he was involved in varsity athletics and served as president of his social fraternity. He was a lieutenant in the U.S. Naval Reserve from 1955 to 1957 and he served as Executive Officer and Navigator of the U.S.S. Albatross. From 1957 to 1960, he attended the Harvard Law School in Cambridge, Massachusetts, and graduated in the upper third of his class. Barnacle Exh. 8, p. 1.

44. Mr. Harrison was employed from 1960 to 1964 by Miller, Martin, Hitching & Tipton in Chattanooga, Tennessee, a firm involved in the general practice of law. During this time, he was Chancery Court Special Master for Professional Ethics and served on various civic and corporate boards. He was also a Trustee of the Hunter Gallery of Art and the Chattanooga Symphony Association and was an Assistant Professor of English at the University of Chattanooga. Barnacle Exh. 8, p. 1.

45. Mr. Harrison was employed with the firm of Royall, Koegel and Rogers in New York, New York from 1964 to 1967. His practice there involved corporate litigation, securities registration, acquisitions and mergers. He participated as counsel and principal in the formation of a group broadcasting company, and was a member of the Bar of all New York courts of record. He was also a member of

the Association of the Bar of the City of New York, the Harvard Club and the River Club of New York City. Barnacle Exh. 8, p. 2.

46. From 1967 to 1971, Mr. Harrison was a partner with the firm of Jones, Bird & Howell in Atlanta, Georgia, specializing in general corporate practice, including private and public corporate finance and municipal bond issues, and in criminal appellate work. He was trial counsel for Southern Railroad Company and general counsel for Pacific and Southern Broadcasting Company. Barnacle Exh. 8, p. 2.

47. Mr. Harrison practiced law individually from 1971 to 1978, representing a variety of corporate and individual clients and administering personal and family business interests in real estate and bottling. Barnacle Exh. 8, p. 2.

48. During 1975 Mr. Harrison served as Director of the Bureau of Planning and Administration of the Department of Aviation for the City of Atlanta. He administered relations between the city and concession operators at the second busiest airport in the world. He negotiated agreements between the city and the State Department of Transportation, the Federal Highway Department and the Federal Aviation Administration to finance and accomplish relocation of Interstate Highway I-85. He participated in the development of architectural and engineering plans for the recently completed Atlanta airport. He negotiated airport use agreement terms with airlines and represented the Department of Aviation before the Mayor and the City Council. Barnacle Exh. 8, pp. 2–3.

49. From 1978 to present, Mr. Harrison has been president of the Audubon Broadcasting Company and has been actively engaged in the management of radio stations WNOK-AM and WNOK-FM in Columbia, South Carolina. He owns no other interest of any kind in any mass medium of communications other than his interest in Barnacle. Barnacle Exh. 8, p. 3.

50. Mr. Harrison has been a member of the Vestry of All Saints Episcopal Church, a Trustee of St. Jude's House for Alcoholics and a member of the Georgia Ornithological Society and the Atlanta Humane Society. He is a private pilot, instrument rated. Barnacle Exh. 8, p. 3.

The Communities: Section 307(b) Issue

51. A Section 307(b) issue was designated because the applicants have filed for different communities. Specifically, BCBC has filed for Beaufort, South Carolina as its community, whereas Barnacle has specified Port Royal, South Carolina.

52. The town of Port Royal and the city of Beaufort are neighboring municipalities located in Beaufort County, South Carolina. BCBC Exh. 3; Exh. 4; Tr. 179–80. The 1970 and 1980 populations of Beaufort and Port Royal, and the percentage of change from 1970 to 1980, are as follows:

	1970	*1980*	*Change*
Beaufort	9,434	8,634	-8.5%
Port Royal	2,865	2,977	+3.9%

BCBC Exh. 11, p. 2.
The number of housing units in Beaufort and Port Royal in 1970 and 1980, and the percentage of change from 1970 to 1980, are as follows:

	1970	*1980*	*Change*
Beaufort	3,366	3,533	+ 5.0%
Port Royal	1,017	1,209	+18.9%

BCBC Exh. 11, p. 2.

53. The town of Port Royal was founded in 1562. Tr. 218. In 1874 the town was incorporated and its physical limits established by the state of South Carolina. Barnacle Exh. 6; Exh. 6A. In 1932 the town surrendered its Charter and accepted incorporation. Barnacle Exh. 6C, p. xiii.

54. Port Royal operates on the "council-manager" form of municipal government, with a mayor and four council members elected at large for a four-year term. The mayor and council members are not full-time employees of the town, and are paid a token salary of $150 and $75 per month, respectively. Barnacle Exh. 6C, p. 59; Tr. 189. The council is the legislative body of the town (Tr. 190) and is empowered to adopt ordinances and resolutions considered "necessary or proper to the proper functioning and benefit of the town." Barnacle Exh. 6C, p. 64. The town manager is appointed by and serves at the pleasure of the council. Barnacle Exh. 6C, p. 66. The town manager is the "executive" (Tr. 190) and is responsible for the "proper administration of all affairs of the town." Barnacle Exh. 6C, p. 67. The council also appoints the town "clerk and treasurer." Barnacle Exh. 6C, p. 68.

55. The Public Safety Department of Port Royal is headed by the Director of Public Safety and includes the town's police officers and firefighters. Barnacle Exh. 6C, p. 70. At present the town has 13 full-time employees in this department.[6] Barnacle Exh. 6D; Tr. 191. In addition, there are 9 volunteer firemen and 10 volunteer "reserved" police officers who are not employees of the town. Barnacle Exh. 6D; Tr. 192, 203–04, 206.

56. Port Royal has a municipal court, established for and having jurisdiction over the trial and determination of all cases arising out of the Code of Ordinances of the town. The court also has the same jurisdiction in criminal matters as is conferred by state law upon magistrates. The court has no jurisdiction in civil matters. Barnacle Exh. 6C, pp. 76–77. The municipal judge is elected by the council for

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[6] Included in this figure is the Director of Public Safety, Bruce Drawdy, who is also the Acting Town Manager. Tr. 169–70.

a term of four years (Barnacle Exh. 6C, p. 75) and is paid an annual retainer of $2,400. Tr. 192. The present judge also engages in the practice of law and has offices located in the city of Beaufort. Tr. 192–93.

57. The Town Attorney is appointed by and serves at the pleasure of the council. The Town Attorney is the chief legal advisor to the town and represents the town in all legal proceedings. Barnacle Exh. 6C, p. 60. Port Royal presently retains a law firm to act in this capacity. The law firm has its offices in the city of Beaufort and is paid an annual retainer of $500-$1,000. Tr. 193, 197.

58. The Board of Adjustment and Appeals is composed of five persons, appointed by the mayor and council, who serve on an unpaid, voluntary basis. The Board meets whenever there is a controversy or disagreement as to zoning. Although the Board is not empowered to change the zoning, it can make adjustments thereto. The Elections Commission is composed of three persons who serve on an unpaid, voluntary basis. Barnacle Exh. 6C, p. 360; Exh. 6D; Tr. 204–06.

59. The town of Port Royal owns two or three buildings, as well as small areas of real estate. The employees of the town work in either the municipal building or the public works building. Tr. 200–01.

60. In addition to those enumerated above, Port Royal employs the following numbers of persons on a full-time basis in the capacities indicated: one custodian who is responsible for the care of the municipal building; two persons responsible for streets and sanitation; one mechanic; and eight persons in the water department. Barnacle Exh. 6D; Tr. 202–03.

61. The Code of Ordinances of the town of Port Royal, effective August 13, 1980 (Barnacle Exh. 6C, p. ix), contains chapters relating to: animals and fowl (*Id.* at pp. 127–38); buildings, construction and related activities (*Id.* at pp. 189–207); cemeteries (*Id.* at p. 255); civil emergencies and disaster preparedness (*Id.* at pp. 305–08); elections (*Id.* at pp. 359–62); finance (*Id.* at p. 413); health and sanitation (*Id.* at pp. 563–68); mobile homes, mobile home parks, apartments and other rental dwellings (*Id.* at pp. 619–21); occupational licenses and regulations (*Id.* at pp. 671–709); offenses and miscellaneous provisions (*Id.* at 761–71); personnel (*Id.* at pp. 817–48); streets and sidewalks (*Id.* at pp. 899–904); taxation of property (*Id.* at pp. 955–61); traffic (*Id.* at p. 1011); and utilities and services, including water, sewers and refuse collection (*Id.* at pp. 1061–1107). In addition, the town of Port Royal has a zoning ordinance, a subdivision ordinance and ordinances granting a CATV franchise and an electricity franchise. *Id.* at pp. 1157, 1257, 1357.

62. The town of Port Royal levies its own taxes to provide such services to its residents as police and fire protection. The tax bills are sent out and collected by Beaufort County on behalf of Port Royal.

The town pays the county a fee for performing these functions. Tr. 224, 228. The town owns, operates and maintains all of its sewer lines and is responsible for billing its customers. Tr. 237–38. Port Royal's sewage is treated at a sewage treatment plant located in the city of Beaufort. Tr. 218. This plant was built with funds allocated by the Federal Government to both Port Royal and the city of Beaufort. The city of Beaufort bills Port Royal for its proportionate share of the costs of operating, maintaining and administering this plant. Tr. 256–57.

63. The Port Royal Elementary School is located in the town of Port Royal and is attended by approximately 150–200 students in grades 1 through 6. The students are residents of Port Royal. Tr. 183, 246. The school is operated and the building and facilities are maintained by Beaufort County. Tr. 188, 207, 233. The Beaufort County Board of Education operates all public schools in the county, and all county residents are taxed equally to support those schools. Tr. 188–89, 233. According to Bruce Drawdy, the acting town manager (Tr. 170), the possibility of closing this school has been mentioned in the past few years. However, the citizens of Port Royal have submitted written objections to the school Board stating that they would like this school to remain open. Tr. 244–46. If this elementary school ever closes, the building and the real estate upon which it is built will become the property of Port Royal. Tr. 207–08. Port Royal children attend junior high school and high school in the city of Beaufort. Tr. 183–84. There are no private schools located in Port Royal. Tr. 233–34.

64. The town of Port Royal owns, operates and maintains a recreational facility located on the grounds of the elementary school and has built tennis and basketball courts at that facility. Tr. 207–08, 235. Port Royal also owns and operates another park, approximately two years old, which has a baseball field, a basketball court, swings, slides and water fountains. Tr. 234. In addition, two other parks have been planned and funded, but have not as yet been built. Tr. 234–35. There is a municipal swimming pool located in the city of Beaufort which residents of Port Royal may use. This pool was built by the city utilizing funds from the Federal Government. Tr. 224. There are no private country clubs, pools or tennis courts located in Port Royal. Nor does Port Royal have a YWCA or a YMCA. Tr. 235. There are no movie theaters located in Port Royal. Tr. 212. The Beaufort County Library is located in the city of Beaufort. Tr. 229. The Live Oak Recreation Club, located in Port Royal, provides entertainment and recreation for senior citizens and the youth of Port Royal. Tr. 271. The Ribaut Recreation Club plays an important role in communicating with the senior citizens and the youth of Port Royal. Tr. 243.

65. Located in the town of Port Royal are between 8 and 13 houses of worship of various denominations. Tr. 235. There are also boy and girl scout troops, a fire department ladies auxiliary and an

Eastern Star located in Port Royal. There are several Masonic Lodges located in Port Royal and a Masonic Hall is located in the city of Beaufort. An Amvets Post, chartered in Port Royal, is also located in the city of Beaufort. Tr. 239–40. The United Way Campaign is a Beaufort County endeavor in which Port Royal participates. Tr. 240–41.

66. According to the acting town manager, there are no attorneys, medical doctors or dentists with offices located in Port Royal. Tr. 209. Medical emergencies are handled by the Beaufort County Memorial Hospital which is located in the city of Beaufort. Tr. 232–33; BCBC Exh. 3. However, the U.S. Naval Hospital, which is the largest medical facility in the county, is located in Port Royal. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 239. Also located in Port Royal are a county-owned and operated speech and hearing clinic providing care and training for handicapped children from Beaufort County and a state-operated community rehabilitation center providing training for mentally retarded persons. Tr. 238–39, 259–60.

67. The business area of Port Royal is located along Ribaut Road, which is South Carolina highway 281. This road goes through and serves both Port Royal and the city of Beaufort. There is also a business district along Paris Avenue in the old part of Port Royal. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 209-10, 230, 266. In addition, the Royal Oaks Shopping Center is located in the northern part of Port Royal. Tr. 210–11. The Bank of Beaufort has a branch office located in that shopping center. There are no other banking facilities located in Port Royal. Tr. 222. Some of the chain stores operating in Port Royal are: A&P grocery store, Mack's Variety Store and Majik Market. Tr. 250–51. The South Carolina Ports Authority operates a shipping terminal in Port Royal. Although the land and the terminal are owned by the state, they are leased to and operated by private shippers. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 214, 235–36.

68. Harris Atlantic Seafood Company, operated by Blue Channel Corporation, is one of the largest wholesale and retail seafood processors and is the largest canner and shipper of blue crab meat in the United States. Tr. 251, 268–69. Harris has its main office and a receiving plant in Port Royal. Harris is presently developing a 300-foot extension to its dock in Port Royal. Tr. 251, 268. Until approximately two or three years ago, Harris had its processing plant in Port Royal. This has been moved, however, to the Burton area, which is approximately five miles northwest of Port Royal. BCBC Exh. 4; Tr. 267.

69. There is no chamber of commerce in Port Royal. Businesses located in Port Royal are members of the Beaufort County Chamber of Commerce. Tr. 221, 252. There are no automobile dealerships or newspapers in Port Royal. Tr. 221–22. However, the *Beaufort Gazette* is published five days a week in the city of Beaufort. Tr. 237. There are two motels located in Port Royal, the Beaufort Court Motel and

the Port Royal Inn, having approximately 15 and 40 rooms, respectively. Tr. 212–13. There are 38 apartments being developed on the west side of highway 281 near Hillside Court. Barnacle Exh. 6B; Tr. 249. The town of Port Royal is served by a county-operated bus system which runs through the town as well as through the remainder of Beaufort County. Tr. 233. A U.S. Post Office and the South Carolina Wildlife Department are located in Port Royal. Tr. 235–36.

70. There is a proposal by the South Carolina Ports Authority to build a seafood industrial park in Port Royal. Tr. 213–15. If completed, this project will be one of the largest seafood receiving and processing plants on the east coast. Tr. 273–74. Federal funds in the amount of $2 million were appropriated for the planning of this project. Tr. 334. In addition, Port Royal received a $280,000 grant from HUD and has built a sewer line for the purpose of providing sewage services to the seafood industrial park as it develops. The sewer line also provides services to the residences in that area. Tr. 215–17. According to James G. Thomas,[7] a lifelong resident of the city of Beaufort, funds for this project as well as others were included in a bill passed by both houses of the South Carolina legislature and sent to the Governor for his signature. The Governor, however, vetoed this bill, stating that the reason for his action was a shortage of funds. The Governor's veto was not overridden by the legislature. Tr. 330–32, 335–37. According to Mr. Thomas, the seafood industrial park is a "pet project" of a "very influential" state senator who has "vowed" to "push" this project through. Tr. 331–32. Mr. Thomas, however, was of the opinion that the project is now "almost dead." Tr. 330.

71. The McTeer Bridge, which crosses the Beaufort River, is located in the northeast portion of Port Royal and connects Port Royal on the west with Ladies Island on the east. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 246–47. The bridge serves as the main roadway for traffic flowing from Paris Island (located to the south and southwest of Port Royal) to Ladies Island and Frogmore (located to the east of Port Royal). BCBC Exh. 4; Tr. 248. The bridge allows motorists to bypass the city of Beaufort (Tr. 264), and has increased the traffic flow through Port Royal. Tr. 248. There are approximately 24 acres of land at the Port Royal end of the bridge, and there is a proposal to build 55 townhouses on 9 of those acres. The remainder of the 24-acre tract is being cleared for future development. A drawing has been submitted to Port Royal for a complete shopping center for that area, and an inquiry has been made with respect to obtaining a building permit for an $800,000 building. Tr. 247. The completion of the McTeer Bridge has also caused business people to

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[7] Mr. Thomas is 64 years old (Tr. 337–38) and has been a participating attorney for 41 years. Tr. 317.

inquire into Port Royal's zoning ordinaces and the acquisition of land, which was not previously available, for commercial development. Tr. 248–49, 265.

72. Port Royal has no local broadcast transmission service of any kind. The city of Beaufort has three such transmission services as follows:

WQLO-FM, Channel 254, 36 kW, 225 feet, Class C
WBEU-AM, 960 kHz, 1 kW, Day, Class III
WSIB-AM, 1490 kHz, 0.25/0.5 kW-LS, U, Class IV

Barnacle Exh. 5, p. 2. WQLO and WBEU are co-owned and operated. Tr. 567. The town of Port Royal and the city of Beaufort receive the same number of services. Tr. 60.

Rule 1.65 Issue Against BCBC (Issue 1)

73. BCBC's application was filed with the Commission on September 18, 1979. The application proposed the construction of a guyed antenna tower having an overall height above ground (including obstruction lighting) of 298 feet. The application indicated that the FAA office in Atlanta, Georgia had been notified of the proposed construction. Barnacle Exh. 1, pp. 1, 4 and 7. On November 30, 1979, the FAA issued a Determination of No Hazard To Air Navigation approving construction of the tower proposed in BCBC's application. Barnacle Exh. 2, p. 15. However, on December 28, 1979, an official of the FAA informed BCBC that a petition for discretionary review of the determination of no hazard had been filed and that, pending consideration of the petition, the no hazard determination would not become final. Barnacle Exh. 2, p. 14. On February 12, 1980, the FAA issued a Notice of Petition For and Grant of Review indicating that a review of the no hazard determination would be conducted and inviting interested persons to submit information in writing on or before March 13, 1980. However, BCBC's engineer, Palmer A. Greer, to whom the applicant had delegated authority to deal with the FAA, did not receive the notice until March 8, 1980. Barnacle Exh. 2, pp. 9, 11–13; Tr. 93, 146.

74. After the decision to review the no hazard determination was made, Mr. Greer talked with an FAA staff member who indicated that in the event the determination of no hazard was reversed, the FAA would approve a tower on the same site with height reduced to 139 feet. Tr. 134. Mr. Greer then determined that BCBC could, if necessary, amend its application to propose the lower height and still meet all of the technical requirements in the Commission's Rules for a station licensed to Beaufort. He also determined that an amendment proposing the reduced tower would not be a "major" amendment under the Commission's Rules. BCBC Exh. 1, p. 3; Tr. 113, 150–53.

75. During March of 1980, Mr. Greer was aware of a pending

petition for rulemaking requesting deletion of channel 285A from Beaufort and the substitution of another channel, either 261A or 259C, in lieu thereof. Tr. 94–95. Mr. Greer knew that if channel 259C were substituted for channel 285A, BCBC would be required to find a new antenna site because the site specified in its application did not meet the mileage separation requirements of the Commission's Rules for channel 259C. BCBC Exh. 1, p. 3; Tr. 94–95.

76. On March 27, 1980, Mr. Greer filed comments with the FAA on behalf of BCBC urging that the determination of no hazard be affirmed. Barnacle Exh. 2, p. 7. However, on May 7, 1980, the FAA ruled against BCBC, reversed its earlier determination of no hazard and issued a determination that the proposed tower would be a hazard to air navigation. Barnacle Exh. 2, pp. 3–6. By letter dated May 12, 1980, this determination was forwarded to BCBC in a letter which suggested that the applicant contact the FAA to discuss an acceptable site location for the tower. Barnacle Exh. 2, p. 2.

77. Two days later, on May 14, 1980, the Chief of the Broadcast Bureau's Policy and Rules Division released a *Notice of Proposed Rule Making* in BC Docket No. 80–214 (45 Fed. Reg. 34934, published May 23, 1980), proposing to delete channel 285A from Beaufort, South Carolina and substitute channel 261A or channel 259C in lieu thereof. The notice acknowledged that the BCBC application was pending and that BCBC could not operate on channel 259C from the site proposed in its application. The Commission noted that while the substitution of channel 259C for channel 285A would further the public interest by eliminating the intermixture of Class A and Class C channels in Beaufort, it believed that an alternative proposal to assign a Class A channel should be included so that BCBC ". . . would have an opportunity to indicate whether it would apply for the Class C assignment or whether it desires to amend its application specifying Channel 261A." BCBC was requested to submit comments on the alternative proposals and, if it desired to apply for the Class C channel, to submit additional technical data describing the impact such an assignment would have on the Commission's ability to make additional FM channel assignments in the future. Mr. Greer prepared an engineering statement which was filed with the Commission with BCBC's comments in response to the notice. BCBC urged the Commission to substitute channel 259C for channel 285A. Barnacle also filed comments in BC Docket No. 80–214 indicating its willingness to amend its application[8] to specify either of the alternative channel assignments proposed by the Commission. Barnacle had made a determination that it would rather have the Class C channel substituted than the Class A and, therefore, did not oppose the substitution of channel 259C. No comments were filed

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[8] The Barnacle application proposing the use of channel 285A at Port Royal was filed with the Commission on May 19, 1980.

with the Commission opposing the assignment of channel 259C to Beaufort (*Beaufort-Ridgeland, South Carolina*, 48 RR 2d 1559 (1981)). BCBC Exh. 1, p. 3; Tr. 635–37.

78. Mr. Greer was of the opinion in May of 1980 that the Commission would ultimately assign channel 259C to Beaufort and knew that if the substitution was made, BCBC would be required to obtain a new tower site and submit an entirely new engineering statement to the Commission in order to amend its application to propose operation on the channel. BCBC Exh. 1, p. 3; Tr. 143–44. After learning of the FAA's action determining that the proposed tower was a hazard to air navigation, Mr. Greer talked with a member of the FAA's staff in Atlanta and again reviewed the maximum tower height the FAA might approve at the site specified in the application. In this conversation, Mr. Greer was again assured that a tower height of 139 feet at the location specified in the application would still be acceptable to the FAA. Tr. 135. After considering the proposed action of the FCC and the FAA hazard determination, Mr. Greer discussed BCBC's options with Mr. Trevitt and the applicant's communications counsel. They considered several options: (a) BCBC could obtain a new antenna site and submit to the Commission a new engineering amendment specifying use of a 300 foot tower at the new site; (b) it could submit an engineering amendment reducing the height of its proposed tower at the site already specified in the application; or (c) it could wait until the Commission acted on the rule making proposal, at which time Mr. Greer felt it would be necessary to find a new site and submit to the Commission a new engineering statement proposing use of channel 259C. Since Mr. Greer was confident that the Commission would ultimately make the Class C channel assignment, he considered the first two alternatives to be a duplication of effort and expense. Therefore, at Mr. Greer's suggestion, BCBC decided to wait until the outcome of the rule making proceeding before preparing and filing an amendment to its application. BCBC Exh. 1, p. 3; Tr. 95, 98, 144, 146–47.

79. During the discussions which led to this decision, no one mentioned reporting the FAA's determination to the Commission. Mr. Greer has dealth with the FAA and its predecessor agencies on matters concerning the erection of broadcast towers for some 35 years. It has been his experience that FAA hazard determinations were routinely reported to the FCC by the FAA. Since he knew the FCC would learn of the hazard determination from the FAA, Mr. Greer never considered filing a duplicate notification on behalf of BCBC. In his discussions with Mr. Trevitt and communications counsel, no one mentioned the possibility of reporting the matter to the Commission. BCBC Exh. 1, pp. 3–4; Tr. 96–97, 107, 111.

80. On or about August 27, 1980, Mr. Greer received a telephone call from a staff attorney in the FM Branch of the Commission's

Broadcast Bureau who indicated that an amendment to the BCBC application should be filed in order to alleviate the airspace problem facing the BCBC application. Mr. Greer informed the attorney that he had discussed the matter with the FAA and believed the FAA would approve a tower on the site proposed in the application as long as the tower did not exceed a height of 139 feet. The Commission attorney indicated that while the last date for filing major amendments to the BCBC application was August 28, 1980, an amendment reducing the height of the proposed tower to 139 feet would be a "minor" amendment which could be filed after that date. After this telephone call, Mr. Greer discussed the matter with his client and BCBC's attorney and they decided to go ahead and prepare an amendment specifying a reduction in antenna height at the site proposed in the application. Thereafter, on September 2, 1980, Mr. Greer prepared the engineering portion of the amendment and forwarded it to the applicant's attorney in Washington, D.C. BCBC Exh. 1, p. 2; Tr. 85, 105.

81. Meanwhile, on August 23, 1980, Mr. Trevitt had signed an amendment to the BCBC application which was later filed with the Commission on August 28, 1980. The amendment did not make any reference to the FAA determination. However, in his letter transmitting the amendment to the Commission, counsel for BCBC made the following statement:

> It should also be noted that there is presently pending before the Commission a Notice of Proposed Rulemaking in BC Docket No. 80-214 which proposes to amend the Commission's FM Table of Assignments by deleting Channel 285-A from Beaufort, South Carolina and replacing it with either Channel 261-A or Channel 259-C. The referenced application and that of Barnacle Broadcasting Ltd. both propose to construct new stations on Channel 285-A. However, all of the parties filing comments in the Rulemaking Proceeding urged the Commission to replace Channel 285 with Channel 259-C. Both Beaufort County Broadcasting Company and Barnacle Broadcasting Ltd. took the position that their status as "cut-off" applicants should not be disturbed in the event the Commission determines that the assignment of Channel 259-C to Beaufort in place of Channel 285-A is in the public interest, and that they should be permitted to submit new engineering data for their applications without losing their protected positions. . .

Barnacle Exh. 3, pp. 1–6.

82. Subsequently, on September 5, 1980, Barnacle filed a petition with the Commission requesting dismissal of the BCBC application for failure to report the FAA hazard determination under Rule 1.65. Since Barnacle had filed its petition on September 5, 1980, and Mr. Greer had prepared the engineering portion of the amendment on September 2, 1980, he was not aware of Barnacle's petition at the time he prepared the amendment. Mr. Trevitt was not aware of a specific rule requiring the reporting of significant changes in an application to the FCC within 30 days until after the filing of Barnacle's petition. While he was generally aware of a reporting

requirement, he relied upon his counsel and engineer to advise him concerning the applicability of such requirements. BCBC Exh. 1, p. 2; Tr. 105, 111, 113, 499–500, 502–03, 518.

83. The *Hearing Designation Order* containing this issue was released on January 15, 1981. Subsequently, on February 11, 1981, the Chief of the Broadcast Bureau's Policy and Rules Division released the *Report and Order* in *Beaufort-Ridgeland, South Carolina*, 48 RR 2d 1559 (1981), deleting channel 285A from Beaufort and substituting channel 259C in lieu thereof.

Rule 1.65 Issue Against Barnacle (Issue 4)

84. Mrs. Mitchell, who has had no experience in broadcasting apart from her role in connection with the Barnacle application, was first contacted by Pegram Harrison in the fall of 1979. As a result of their discussions, she agreed to join with him and Mrs. Harrison in an application for permission to use FM channel 285A to establish a radio station in Beaufort. She agreed, among other things, to help with the required ascertainment of community needs. Mr. Harrison furnished her with the FCC's 1971 *Ascertainment Primer* and with other materials relating to applications for broadcast stations. Barnacle Exh. 22, p. 1.

85. When the Harrisons and Mrs. Mitchell met later in Beaufort in early January 1980 to begin interviews (Tr. 681–83, 900), Mrs. Mitchell realized that there were two categories of interviews, namely, leader interviews and general public survey interviews, and that while the latter could be done under her supervision by prospective employees of the station (Tr. 930–31), the former were to be done in person by Mr. or Mrs. Harrison, or herself, *i.e.*, by principals. Barnacle Exh. 22, p. 1. All interviews done in early January 1980 when the Harrisons and Mrs. Mitchell met in Beaufort were done either by Mr. or Mrs. Harrison or by Mrs. Mitchell and the interview sheets used by Barnacle for its survey were signed or initialed by the interviewer, as well as by a reviewer, and then forwarded to Barnacle's communications counsel. BCBC Exh. 17. Among leaders interviewed by Mrs. Mitchell before April 1980, which interviews were ultimately used for Barnacle's Port Royal survey, were Messrs. Parker, Goodwine, Murray, Sergeant Coldwell, Major Paulson and Ms. Drake. Barnacle Exh. 22, pp. 1–2. Persons interviewed by Mr. and Mrs. Harrison, which interviews also were ultimately used in Barnacle's application, included Ms. Sides, Mr. Dore and Mrs. Green. Barnacle Exh. 22, p. 2.

86. Mrs. Mitchell arranged later for Sally Wilson, who was and is a prospective employee of the station (Barnacle Exh. 22, p. 2; Tr. 701–02, 885–86, 933–34, 948), to do some general public interviews pursuant to Mrs. Mitchell's direction and under her supervision. Mrs. Wilson was in early 1980 and is currently employed by the United Communities for Child Development as Mrs. Mitchell's

secretary. Mrs. Wilson, who has held this position since 1975, in fact functions as Mrs. Mitchell's office manager and administrative assistant. Mrs. Wilson's duties at the radio station will be similar to her duties at the United Communities for Child Development at the present time. Barnacle Exh. 22, p. 2. Mrs. Wilson did telephone interviews and filled out interview sheets by hand. With a few exceptions she did not sign these. Barnacle Exh. 20; Tr. 908. Mrs. Mitchell sent these interview sheets to Mr. Harrison with an undated note saying that she had paid to have them done. Mr. Harrison wrote back immediately on February 18, 1980 asking how much she had paid so that he could reimburse her in accordance with his promise to bear all such expenses. BCBC Exh. 19, pp. 1–2; Tr. 704–05. Mrs. Mitchell did not supply this information until April 1980. BCBC Exh. 19, pp. 3–5. Mr. Harrison forwarded the leader and public survey interview sheets furnished him by Mrs. Mitchell to Barnacle's communications counsel in Washington, D.C. Tr. 710.

87. In early April 1980, after a draft application (complete except for the legal, engineering and financial portions) for the city of Beaufort had been prepared, it was determined that additional categories of leaders should be interviewed. Tr. 988–89. Mrs. Wilson volunteered to do some of the interviews for Mrs. Mitchell, who was unusually busy at the time (Tr. 940–41, 947, 955), and Mrs. Mitchell accepted her offer (Tr. 946). Under Mrs. Mitchell's supervision, Mrs. Wilson interviewed Messrs. McTeer, Dafler, Kookman and Queener on April 7 and 8, 1980. At about the same time, April 8–11, 1980 (Tr. 941–42, 978), Barnacle determined that instead of applying for a station in the city of Beaufort, to which channel 285A was then assigned but which already has three radio stations, it could and should apply to use the same vacant channel to establish a first broadcast service for the town of Port Royal, which does not have a station. Barnacle Exh. 22, p. 2. Mrs. Mitchell accordingly undertook additional personal interviews for Port Royal to be used in place of interviews previously done for the city of Beaufort. Barnacle Exh. 22, p. 3. Mrs. Wilson also did some of these interviews under Mrs. Mitchell's supervision. Tr. 978–79, 1044.

88. Mrs. Mitchell was unusually busy during April 1980 because, in addition to her duties as executive director of United Communities for Child Development, she was preparing to be a panelist at the pre-conference meeting of the White House Conference on Families on April 9–11, 1980. Tr. 941, 947, 955. Mrs. Wilson realized this and volunteered to help. Since Mrs. Wilson had done a good job previously on the general public survey, Mrs. Mitchell happily accepted her offer. Tr. 947. She did not advise or consult with anyone about this decision. She had forgotten that leader interviews were to be done by other principals of Barnacle or by herself personally as a principal, and that only general public interviews were to be done by prospective station employees. Tr. 1061. Mrs. Mitchell believed that

it was all right for Mrs. Wilson to do interviews for her as long as she conducted the overall effort. She did not remember the different rules regarding who was to do the actual interviewing for purposes of the different categories of interviews. From April 1–8, 1980, Mrs. Mitchell interviewed Ms. Woodward, Dr. Washington, and Messrs. Ford and Washington. Mrs. Wilson, acting under Mrs. Mitchell's supervision, interviewed Messrs. McTeer, Kookman, Queener and Dafler on April 7 and 8, 1980, before the decision was made to apply for Port Royal, and Messrs. Vaughn, Waddell, Murray, Paskoff, Drawdy, Hough and Redmond, as well as Ms. Bishop, Ms. Parker, Ms. Boulware and Ms. Vaughn, on April 25, 1980, after the decision to apply for Port Royal had been made. Barnacle Exh. 22, p. 3.

89. The first interview sheets done by Mrs. Wilson in her April face-to-face leader interviews were not neat, and for that reason Mrs. Mitchell copied them over when she reviewed and signed them. Tr. 947. Other sheets done by Mrs. Wilson in April were neat and were not copied over. Mrs. Mitchell also reviewed and signed all these sheets, both those she had recopied and those that were in Mrs. Wilson's handwriting, to indicate that she took full responsibility therefor, but not intending to mislead anyone as to who had actually done the interviewing. Tr. 951. Had she intended to mislead anyone, she would not have sent Mrs. Wilson to interview people Mrs. Mitchell knew (Tr. 951), nor would she have forwarded most of the Wilson interview sheets written out by Mrs. Wilson, nor would she have dated her signature after the date shown on the sheets for the interviews. BCBC Exh. 21, pp. 6–11. Mrs. Mitchell then either forwarded the sheets to Barnacle's communications counsel in Washington, D.C. or sent them to Mr. Harrison who did so.

90. As a result of the decision to apply for a Port Royal station instead of another station for the city of Beaufort, the general public interviews done in the city of Beaufort by Mrs. Wilson in January were not used, nor were the previously done leader interviews unless they related to Beaufort County or surrounding areas at large. Barnacle Exh. 22, p. 4; Tr. 1106.

91. Mrs. Mitchell had her daughter, Karen Hawkins, who was and remains a prospective employee of Barnacle's proposed station, do a new general public survey. Mrs. Mitchell reviewed and signed all the interview sheets done by Mrs. Hawkins, indicating beside her signature the date of her review and signature which, as in the case of leader interviews done by Mrs. Wilson, was frequently different from the date shown on the face of the sheet for the interview itself, plainly indicating review, not performance, of the interview. Thus, in at least 20 out of 30 cases, the date of Mrs. Mitchell's review and signature was different from the date shown on the interview sheet written out by Mrs. Hawkins. BCBC Exh. 22, pp. 1–4, 14–18, 20–30.

92. The March leader interviews were not used unless they related to Beaufort County or surrounding areas at large. Barnacle

Exh. 22, p. 4; Tr. 1106. The March draft of Barnacle's application was amended to reflect the change to Port Royal and to reflect additional interviews and the needs and interests which were ascertained in Port Royal. However, it did not occur to Mrs. Mitchell in April, or when she signed Barnacle's application for Port Royal in May, to check to make sure that statements in the ascertainment portion concerning the conduct of interviews reflected that, while she had conducted the overall effort, Mrs. Wilson had done the leader interviews in April. Tr. 1069. She did not realize that this was important and so she did not think to do so. She did not intend to mislead the Commission or anyone. Tr. 1037. Barnacle Exh. 22, p. 4.

93. The first time Mrs. Mitchell realized that Barnacle's application as originally filed could be read to indicate that all leader interviews were actually done by the Harrisons, or by herself personally, was in the latter part of February when she learned of BCBC's first motion to enlarge issues. Tr. 1074–75.

94. As soon as Mrs. Mitchell became aware of this, Barnacle amended its application on March 20, 1981, over Mrs. Mitchell's signature, to explain in detail who had performed Barnacle's interviews, when and under whose direction. Among other things, it was stated in that amendment that in April of 1980 Mrs. Wilson performed 16 interviews of community leaders. Barnacle Exh. 23, p. 9.

95. Mr. Harrison was aware that Mrs. Wilson had helped with the January 1980 Beaufort general public survey (Tr. 795), but he was not aware that others had helped Mrs. Mitchell with the April 1980 Port Royal public interviews (Tr. 795, 1036), or that anyone other than Mrs. Mitchell had done leader interviews (Tr. 804), until after BCBC had filed its first motion to enlarge issues in February of 1981. Tr. 796. He had in fact been under the impression that Mrs. Mitchell had done the interviews. Tr. 740, 805.

96. Mr. Harrison did in late April, in response to his request of two months before relating to the January general public survey done by Mrs. Wilson, receive from Mrs. Mitchell receipts signed by Mrs. Wilson totaling $85. The receipts show that they were for interviews done in January and April 1980, but Mr. Harrison did not at the time focus on the differences of language (*i.e.*, telephone interviews and personal interviews) (Tr. 722–21), or on the times when the interviewing in question had been done. Tr. 804. The Wilson receipts were sent to him by Mrs. Mitchell in April of 1980 as a result of his insistence back in February on knowing the amount of Mrs. Mitchell's out-of-pocket expenditures for the general public survey done by Mrs. Wilson, because he was anxious to reimburse her (Tr. 720, 804) in accordance with his promise to bear all such expenses. BCBC Exh. 16, p. 1. When he received the receipts, he simply added up the dollar figures shown and sent Mrs. Mitchell a check for the sum. Tr. 721.

The Misrepresentation/Abuse of Process/Lack of Candor Issues Concerning BCBC (Issues 5 and 6)

97. On February 17, 1981, BCBC filed a motion to enlarge issues against Barnacle. BCBC requested an issue to determine whether Barnacle's application contained misrepresentations of fact concerning its efforts to ascertain the needs and problems of Port Royal and surrounding areas. In support of its request, BCBC noted that Barnacle's application stated that its community leader interviews were conducted by three of its principals, Frieda R. Mitchell, Ann M. Harrison and Pegram Harrison. However, BCBC claimed that 8 of the 29 leaders listed in Barnacle's application were not in fact contacted by any of these principals. BCBC supplied the affidavits of the eight leaders in question. Three of these leaders, Catherine Vaughn, Charlotte Green and Jack Queener, stated that they were not contacted by anyone concerning a proposed radio station in Port Royal. The remaining five leaders each stated that he or she was contacted by a young black female between 23 and 28 years of age. BCBC claimed that this description eliminated the possibility that any of these five leaders was contacted by the Barnacle principals named above. Barnacle Exh. 12.

98. Catherine Vaughn's affidavit (Barnacle Exh. 12, p. 12) read as follows:

> I am Mrs. Catherine Vaughn. I am the owner of the Vaughn Beauty Salon in Port Royal. I do not remember anyone interviewing me about a radio station. I know Frieda Mitchell, and she has not talked to me about a radio station. I do not remember giving anyone my views about establishing a radio station in Beaufort.

Mrs. Vaughn's affidavit contained the following jurat:

> SWORN to before me this *10* day of February, 1981.
>
> James G. Thomas [signed]
> Notary Public for South Carolina
>
> My Commission Expires: 4–11–89.

99. Charlotte Green's affidavit, dated February 10, 1981 (Barnacle Exh. 12, p. 19), read as follows:

> I am the Director of the Beaufort County Council on Aging. I have not discussed with Frieda Mitchell about a FM radio station in Port Royal. However, I do know her. To the best of my knowledge, I have never been interviewed by anyone about a radio station in Port Royal. I do recall being interviewed by a white man for a Beaufort radio station approximately two years ago.

100. Jack Queener's affidavit, dated February 11, 1981 (Barnacle Exh. 12, p. 18), read as follows:

> I was formerly with the Clemson Extension Service in Beaufort County, S.C. I now work in that capacity in Pickens County, S.C. In regard to the community leader survey for the proposed FM radio station for Port Royal, S.C., I was never interviewed by Frieda Mitchell, and I know her personally. To the best of my knowledge, I was never interviewed by anyone representing the proposed station

in Port Royal. I have worked in radio in the past and actually helped with ascertainment work.

101. On March 12, 1981, Barnacle filed a motion to enlarge issues[9] against BCBC requesting the addition of misrepresentation/abuse of process/ lack of candor issues. Barnacle's motion was based upon BCBC's February 17, 1981 motion, discussed above. In support, Barnacle provided more recent affidavits from Mrs. Vaughn, Mrs. Green and Mr. Queener. Barnacle contended that these more recent affidavits established that Mrs. Vaughn, Mrs. Green and Mr. Queener had been contacted by Barnacle and that BCBC knew of that fact at the time it submitted the original affidavits in support of its motion to enlarge. Barnacle also alleged that Mrs. Vaughn's original affidavit contained a false jurat.

102. Mrs. Vaughn's more recent affidavit, dated February 26, 1981 (Barnacle Exh. 11, p. 1), read as follows:

> I, Mrs. Catherine Vaughn, recalled talking with Mrs. Sally Wilson early last year concerning community interest and a radio station in the Beaufort area.
>
> In February of this year I signed a prepared statement which was brought to me by Mr. Fred Washington Sr. Mr. Washington's visit was during my lunch hour at the kindergarten. I read the statement hurriedly. When I signed the statement I thought it was referring to Mrs. Frieda Mitchell and my conversation only. When I hurriedly read the statement, I did not realize that the words *any one* were included, because I thought the statement referrd [sic] to a conversation between me and Mrs. Mitchell.
>
> Mr. James G. Thomas was not present when I signed the statement.
>
> A copy of the statement referred to in this affidavit is attached.

103. Mrs. Green's more recent affidavit, dated February 26, 1981 (Barnacle Exh. 15, p. 1), read as follows:

> I am the same Charlotte Green who signed the attached affidavit of 10 Feb. 1981.
>
> Ann Harrison came to my house on the evening of Feb. 25, 1981 and I recognized her as the person who interviewed me on behalf of a radio applicant early in January of last year.
>
> Mr. Thomas, who took my attached statement of 10 Feb. 1981, asked me if I had been interviewed by Frieda Mitchell. I told him I had been interviewed by someone but it was not Frieda Mitchell.

104. Mr. Queener's more recent affidavit, dated March 10, 1981 (Barnacle Exh. 18, p. 1), read as follows:

> I am the same Jack Queener who signed the February 1981 affidavit, a copy of which is attached.
>
> At the time I signed the attached affidavit, I recalled, and I now recall, being interviewed about a broadcast station by a young black woman; but I did not

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[9] Barnacle's March 12, 1981 motion to enlarge issues against BCBC is officially noticed.

> then, and do not now, recall the young woman's name, or on whose behalf she interviewed me. I so informed the person who telephoned me requesting the attached affidavit. This person and I agreed that since my recollection of the interview was vague and uncertain, it would serve no purpose to mention it in the affidavit.
>
> I later received the attached affidavit written out in another person's handwriting based on the conversation just referred to. I signed it in the presence of a notary and returned it to the person who had sent it to me.

105. By *Memorandum Opinion and Order* FCC 81M-1526, released May 14, 1981,[10] Barnacle's March 12, 1981 motion to enlarge issues was granted, and issues were added to this proceeding to determine whether BCBC made misrepresentations to, abused the processes of, or was lacking in candor with the Commission with respect to the submission of the original affidavits of Mrs. Vaughn, Mrs. Green and Mr. Queener.

106. On February 9, 1981, a meeting was held in the offices of James G. Thomas in Beaufort, South Carolina. The purpose of the meeting was to investigate the ascertainment survey done by Barnacle. Present at this meeting were Mr. Thomas, Carmen D. Trevitt and Fred Washington, Sr. Tr. 283–84, 290, 392–94. Messrs. Trevitt and Washington are two of the three partners of BCBC. BCBC Exh. 9, p. 1. Mr. Thomas is an attorney and has practiced law in Beaufort for more than 40 years. Mr. Thomas is also licensed as a notary public by the State of South Carolina and has been so licensed for more than 40 years. Mr. Thomas was retained by Mr. Trevitt to assist BCBC in this investigation, and Mr. Thomas worked closely with Mr. Trevitt and Mr. Washington during the course of this investigation. BCBC Exh. 5, 6, 8; Tr. 317.

107. During the February 9, 1981 meeting, Mr. Washington telephoned Catherine Vaughn. Mrs. Vaughn had been listed in the Barnacle application as having been contacted by a Barnacle principal. Mrs. Vaughn and Mr. Washington had known each other for approximately 25–30 years. BCBC Exh. 6, p. 1; Barnacle Exh. 13, p. 3; Tr. 372.

108. According to both Mr. Washington and Mrs. Vaughn, Mr. Washington asked Mrs. Vaughn if she had been contacted by Frieda Mitchell or anyone else concerning a proposed new radio station. Mrs. Vaughn replied that no one had contacted her about a radio station and she did not know anything about the proposal. BCBC Exh. 6, pp. 1–2; Barnacle Exh. 13, pp. 4–5, 10–11; Tr. 283, 291, 293, 351, 354, 366–67, 402–05. According to Mr. Washington, at the close of their conversation, he told Mrs. Vaughn that he would appreciate her giving him an affidavit that she had not been contacted, and said that he would meet with her personally at a later time. BCBC Exh. 6, p. 2. According to Mrs. Vaughn, however, Mr. Washington did not

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[10] *Memorandum Opinion and Order* FCC 81M-1526 is officially noticed.

indicate that he would be coming to see her and she did not expect to see him. Barnacle Exh. 13, p. 11.

109. After concluding his telephone conversation with Mrs. Vaughn, Mr. Washington told Mr. Thomas that Mrs. Vaughn had stated that she had not been interviewed by Frieda Mitchell concerning a radio station; that she did not know anything about a proposed radio station; and that, to the best of her knowledge, no one had interviewed her concerning such a proposal. Based upon Mr. Washington's representations, Mr. Thomas prepared a draft affidavit for Mrs. Vaughn. BCBC Exh. 5, p. 2; Exh. 6, p. 2; Tr. 293.

110. On February 10, 1981, Messrs. Washington, Trevitt and Thomas drove in Mr. Trevitt's car to Mrs. Vaughn's "Little People's College," a daycare center and nursery school in Port Royal. BCBC Exh. 5, p. 2; Exh. 6, p. 2; Barnacle Exh. 13, p. 3; Tr. 354, 356, 406. Mr. Trevitt parked the car about 75–100 feet from the building. Mr. Washington got out of the car, taking with him the draft affidavit Mr. Thomas had prepared, and walked to Mrs. Vaughn's place of business. Messrs. Trevitt and Thomas remained in the car. Mr. Washington knocked on the door of Mrs. Vaughn's school and, after a short conversation with the woman who answered, entered the building. BCBC Exh. 5, pp. 2–3; Exh. 6, p. 2; Tr. 293, 300, 407.

111. Mrs. Vaughn was in the process of serving lunch to her 15–20 students. Barnacle Exh. 13, pp. 5, 12. According to Mrs. Vaughn, her students were "terrible" that day. They had just had a birthday party and it was "too hectic." Barnacle Exh. 13, p. 17. Mr. Washington stated that the children were "finiging around" and Mrs. Vaughn was trying to quiet them down. Tr. 357. Mr. Washington asked Mrs. Vaughn if she had been contacted by Mrs. Mitchell or anyone else concerning a proposed radio station in Port Royal, and Mrs. Vaughn stated that she had not been contacted. Mr. Washington handed Mrs. Vaughn the draft affidavit which had been prepared by Mr. Thomas and asked her to read and sign it. BCBC Exh. 6, p. 2; Barnacle Exh. 13, pp. 5, 12; Tr. 355, 357–58, 367–68. According to Mrs. Vaughn, she read the affidavit "hurriedly" (Barnacle Exh. 13, pp. 5, 12) and then signed it. Barnacle Exh. 13, pp. 5, 12; Tr. 356–58, 367. Mrs. Vaughn made no comments to Mr. Washington after having read or after having signed the document. BCBC Exh. 6, p. 2.

112. After Mrs. Vaughn had signed the affidavit, she accompanied Mr. Washington outside the door of the building. Mrs. Vaughn and Mr. Washington conversed for several moments on the steps of the building. Both Mr. Thomas and Mr. Trevitt observed them from the car. BCBC Exh. 5, p. 3; Exh. 6, pp. 2–3; Tr. 325, 358, 407. At the end of the conversation, Mr. Washington returned to the car. As Mr. Washington approached, Mr. Thomas got out of the car and asked Mr. Washington if the woman to whom he had been talking on the steps was Mrs. Vaughn and if she had signed the affidavit Mr.

Thomas had prepared. Mr. Washington answered yes to both questions and handed Mr. Thomas the signed affidavit. BCBC Exh. 5, p. 3; Exh. 6, p. 3; Tr. 293–94, 300, 324–25, 358–60, 407–09, 412. Mr. Thomas notarized the affidavit on the hood of Mr. Trevitt's car. Tr. 294, 325.

113. According to Mr. Thomas, he and Mr. Washington had an arrangement whereby Mr. Washington would call Mr. Thomas into the building to notarize Mrs. Vaughn's statement after she read and approved it. Tr. 324–25. Indeed, when Mr. Washington returned to the car with the signed statement, Mr. Thomas suggested that he should have gone into the building with Mr. Washington. Tr. 360–61. However, when Mr. Washington told Mr. Thomas that Mrs. Vaughn had already signed the affidavit, Mr. Thomas thought it would have been "ridiculous" for him to have gone into the building, asked Mrs. Vaughn if she was in fact Mrs. Vaughn and if she in fact signed the document. Tr. 324–25. In addition, Mr. Thomas has been acquainted with Mr. Washington for many years and knew him to be "an honest man with a good reputation for honesty in the community." BCBC Exh. 5, p. 3. Having seen the person identified to him by Mr. Washington as Mrs. Vaughn, and having heard Mr. Washington state that Mrs. Vaughn had signed the affidavit, Mr. Thomas considered these facts satisfactory evidence under South Carolina law that Mrs. Vaughn was the person acknowledging and executing the affidavit. Further, Mr. Thomas did not have any concern that the affidavit was false or that it had not been signed by Mrs. Vaughn, and he did not indicate to either Mr. Trevitt or Mr. Washington that the affidavit was faulty in any manner. BCBC Exh. 5, pp. 3–4.

114. Before the submission to the Commission of Mrs. Vaughn's affidavit, Mr. Trevitt had had no discussion with anyone concerning its validity. Nor did he have any reason to believe that the affidavit was not notarized in accordance with South Carolina law. Although from Mr. Trevitt's previous experience in Georgia it was usually the practice to sign affidavits in the presence of a notary, Mr. Trevitt had no knowledge of how that matter was handled in South Carolina. Mr. Trevitt stated that he hired Mr. Thomas for the purpose of handling the affidavits, and he felt it would have been presumptuous of him to have told Mr. Thomas how to handle the legal work he was retained to do. Tr. 434–36.

115. Sometime subsequent to the filing of BCBC's February 17, 1981 motion to enlarge issues, Mrs. Vaughn was contacted by Sally Wilson with respect to Mrs. Vaughn's original affidavit. Barnacle Exh. 13, p. 8. Mrs. Wilson was Frieda Mitchell's executive secretary, functioning as her office manager and administrative assistant. Mrs. Wilson had interviewed Mrs. Vaughn as a part of Barnacle's ascertainment efforts. Barnacle Exh. 10, pp. 2–3; Exh. 22, pp. 2–3; Tr. 885, 947–48. During the course of this visit, Mrs. Wilson brought to Mrs. Vaughn's attention the fact that they had previously spoken.

Mrs. Vaughn then remembered that fact. According to Mrs. Vaughn, at the time she spoke to Mr. Washington and signed her original affidavit, she had forgotten about her earlier conversation with Mrs. Wilson and was not aware of that conversation until reminded of it by Mrs. Wilson. Mrs. Vaughn handwrote her new affidavit and gave it to Mrs. Wilson. Later Mrs. Vaughn signed a typewritten copy of her new affidavit. Barnacle Exh. 13, pp. 7–9, 14.

116. At the February 9, 1981 meeting mentioned above, Mr. Thomas telephoned Charlotte Green, whom he had known for at least 20 years. Mr. Thomas asked Mrs. Green if she had been contacted by Frieda Mitchell or anyone else about a radio station in Port Royal. BCBC Exh. 5, pp. 4–5; Barnacle Exh. 14, p. 6; Tr. 289.

117. Prior to the time of this telephone call, Mrs. Green had spoken to a man and about a month later to a woman about a radio station. Barnacle Exh. 14, p. 9. Mrs. Green associated the woman with the man, that is, Mrs. Green believed that they were with the same organization. Barnacle Exh. 14, pp. 6, 8, 27–28. Mrs. Green was under this impression when she was contacted by Mr. Thomas. Barnacle Exh. 14, p. 29.

118. According to Mr. Thomas, Mrs. Green stated in response to his question that she had not been contacted by Mrs. Mitchell, whom she knew. Mrs. Green did state, however, that she had been contacted by "someone" concerning a Beaufort radio station. BCBC Exh. 5, p. 5; Tr. 284.

119. According to Mrs. Green, she responded to Mr. Thomas' question by stating that she had not been contacted by Mrs. Mitchell. She told Mr. Thomas that she had been contacted by a man whose name she did not remember; that a lady also contacted her; that they were talking about the same radio station; and that the lady was with the man. Mrs. Green stated that she described the man to Mr. Thomas. Barnacle Exh. 14, pp. 6–9, 27.

120. After the conversation ended, Mr. Thomas told Mr. Trevitt that Mrs. Green recalled being contacted by someone concerning a Beaufort radio station. Mr. Trevitt checked the BCBC application and discovered that Mrs. Green had been interviewed in BCBC's ascertainment survey by Calvin R. Means, a BCBC partner. Mr. Thomas had never seen Mr. Means, and Mr. Trevitt described him to Mr. Thomas as "a large white man." On February 10, 1981, Mr. Thomas called Mrs. Green again and asked if the "someone" she recalled as having interviewed her was a large white man. Mrs. Green answered in the affirmative. Based upon these telephone conversations, Mr. Thomas prepared a draft of Mrs. Green's original affidavit. BCBC Exh. 5, p. 5; Exh. 9, p. 1; Tr. 285–87, 318–19, 396–400.

121. On February 10, 1981, Mr. Thomas visited Mrs. Green and presented her with the draft affidavit he had prepared. Mrs. Green read the affidavit and signed it without indicating any disagreement with its contents. Mr. Thomas notarized the affidavit and gave it to

Mr. Trevitt. BCBC Exh. 5, p. 5; Barnacle Exh. 14, pp. 9–10; Tr. 289–90.

122. On the evening of February 25, 1981, subsequent to the filing of BCBC's motion to enlarge issues, Barnacle principal Ann M. Harrison and Barnacle attorney Frank J. Martin, Jr. visited Mrs. Green at her residence. Barnacle Exh. 16, p. 1. Mrs. Green was making her supper at the time they arrived and was "perturbed," but agreed to talk with them. Barnacle Exh. 14, p. 17. According to Mrs. Harrison, Mrs. Green recognized her as the person who interviewed her in early January 1980 on behalf of a radio applicant. Mrs. Green stated that Mr. Thomas had asked her if she had been interviewed by Frieda Mitchell; that she had told Mr. Thomas that she had been interviewed by two people, one woman and one man; but that the person who interviewed her was not Mrs. Mitchell and did not mention Mrs. Mitchell. Barnacle Exh. 16, p. 1.

123. Later that evening, Mrs. Harrison returned to Mrs. Green's residence with a draft affidavit based upon what Mrs. Green had stated earlier. Accompanying Mrs. Harrison was Mary A. Gray, a notary public and the auditor of Beaufort County. According to Mrs. Harrison, Mrs. Green read the statement and noticed that the name at the bottom was wrong. Mrs. Harrison changed this, Mrs. Green signed the statement, and Mrs. Gray notarized it. Mrs. Gray stated that a notarial seal should be affixed since the affidavit was to be used out of state and suggested that the affidavit be brought to her office at the courthouse the next morning so that she could affix her seal. Barnacle Exh. 16, pp. 1–2; Exh. 14, pp. 13–15, 18–19; Tr. 303.

124. The affidavit that Mrs. Green signed the evening of February 25, 1981 (Barnacle Exh. 17, p. 2) read as follows:

> I am the same Charlotte L. Green who signed the attached affidavit of 10 Feb. 1981.
>
> Ann Harrison came to my house on the evening of Feb. 25, 1981, and I recognized her as the person who interviewed me on behalf of a radio applicant early in January of last year.
>
> Mr. Thomas, who took my attached statement of 10 Feb. 1981, asked me if I had been interviewed by Frieda Mitchell. I told him I had been interviewed by two people, one of whom was a lady, and the other a man. But I told him that neither of the people who interviewed me was Frieda Mitchell, or mentioned Frieda Mitchell.

125. The next morning Mrs. Green was upset. She "couldn't get all this business out of [her] mind." She went to the courthouse on her way to work and sought out Mrs. Gray. She told Mrs. Gray that she did not "want to put [herself] in jeopardy over any radio stations, any tv stations or anything else." Barnacle Exh. 14, pp. 15–16, 20. At about 8:00–8:30 a.m., Mrs. Gray called Mr. Thomas at home. Barnacle Exh. 14, pp. 20–21; Tr. 303, 320. Mr. Thomas was told that Mrs. Harrison had been to see Mrs. Green and that Mrs. Gray had been asked to notarize a statement. Tr. 321. This was the first time

Mr. Thomas learned that Mrs. Green had been approached by Barnacle with respect to her original affidavit. Tr. 319–20. Mrs. Gray told Mr. Thomas she thought he should know about the matter because Mrs. Gray did not feel comfortable notarizing the statement and Mrs. Green did not feel comfortable about it either. Tr. 321.

126. Although Mr. Thomas was not asked to come to the courthouse, he had to be there on other business and decided to talk to Mrs. Gray about the telephone call. Tr. 322. Mrs. Green was still in Mrs. Gray's office when he arrived and Mr. Thomas was surprised to see her there. Tr. 303, 322. Mrs. Green told Mr. Thomas that a lady had come to see her and asked if she recognized her. According to Mr. Thomas, Mrs. Green stated that she recognized her as "the lady [she] talked to down at the radio station." Tr. 303. Mrs. Green stated to Mr. Thomas that she told him earlier that she had been interviewed by a lady and a man. Mr. Thomas told Mrs. Green that she did not tell him about any woman, just about one white man. According to Mr. Thomas, Mrs. Green stated that she thought she had told him about two people. Tr. 304, 322, 325–26.

127. Mrs. Green had with her a copy of her February 25, 1981 affidavit and showed it to Mr. Thomas. Tr. 304, 313, 322. Mr. Thomas objected to the last two sentences of that affidavit and with Mrs. Green's consent made changes in those sentences. Tr. 306, 313–14, 323. Subsequently, Barnacle principal Pegram Harrison arrived at the courthouse for the purpose of having Mrs. Gray affix her notarial seal to Mrs. Green's February 25 affidavit. Mr. Harrison had the original of that affidavit in his possession. Mr. Harrison found Mr. Thomas and Mrs. Green with Mrs. Gray, and called Barnacle's attorney who joined them at the courthouse. Barnacle Exh. 17, p. 1; Tr. 780–81, 785–86.

128. According to Mr. Harrison, after he arrived Mrs. Green said that she did not want to give Barnacle her February 25 affidavit anymore. Mr. Harrison stated that it was "vital" to Barnacle to show that Mrs. Harrison had, in fact, interviewed Mrs. Green. Mrs. Green was willing to state that, and an agreement was reached whereby Barnacle would "give up" Mrs. Green's February 25 affidavit in exchange for another one. Tr. 786.

129. The changes that Mr. Thomas had made in Mrs. Green's February 25 affidavit were not acceptable to Mr. Martin, Barnacle's attorney. Messrs. Thomas and Martin re-wrote the sentences in question in a form that was acceptable to both of them. The affidavit was retyped, Mrs. Green signed it and it was notarized by Mrs. Gray. Barnacle Exh. 15, p. 1; Tr. 308, 310. This affidavit, the one Mrs. Green executed in the courthouse, was Mrs. Green's February 26 affidavit. Tr. 310.

130. According to Mrs. Green, Mrs. Harrison was also present at the courthouse on February 26, 1981. Barnacle Exh. 14, pp. 16, 20–22. Mrs. Green stated that as soon as she saw Mrs. Harrison at the

courthouse, she realized that Mrs. Harrison was not associated with the man to whom she had spoken about a radio station, and that she had been mistakenly associating the two with each other. Barnacle Exh. 14, pp. 22, 28.

131. According to Mr. Thomas, until the February 26, 1981 meeting in the courthouse, he never knew that Mrs. Green had spoken to two people about a radio station. Tr. 314. Mr. Thomas stated that Mrs. Green did not mention having been interviewed by anyone other than the man he described to her, *i.e.*, Mr. Means. Tr. 289. Had Mrs. Green told him that she had been interviewed by both a man and a woman, he would not have attempted to obtain her original affidavit. Tr. 314, 325–26.

132. As part of the investigation into Barnacle's ascertainment efforts, BCBC partner Carmen Trevitt telephoned Jack Queener from Beaufort on February 10, 1981 and visited Mr. Queener's office in Pickens, South Carolina on February 11, 1981. BCBC Exh. 8, p. 2; Tr. 392, 412–13, 417.

133. During the course of either the telephone conversation, the visit or both, Mr. Trevitt identified himself and his affiliation with BCBC and mentioned the competing application of Barnacle and the names of the Barnacle principals. Mr. Trevitt stated that he thought Barnacle had not followed the Commission's application procedure as strictly as it should have been followed in that Barnacle had presented "ascertainments" performed by non-principals. Mr. Trevitt asked if he could clarify certain matters with Mr. Queener. Barnacle Exh. 19, pp. 14–15, 29, 43–45; Tr. 421.

134. Mr. Trevitt asked Mr. Queener if he had been interviewed by anyone concerning a proposal to establish a new radio station in Port Royal and whether Frieda Mitchell had personally interviewed him in Barnacle's ascertainment survey. Mr. Queener responded in the negative. BCBC Exh. 8, pp. 2–3; Barnacle Exh. 19, pp. 15–16; Tr. 413–15, 421–22, 427. Mr. Trevitt indicated that other people had signed affidavits stating that they had not been personally interviewed by Mrs. Mitchell, or that they had been contacted by a young black woman. Barnacle Exh. 19, pp. 17, 24, 40, 42; BCBC Exh. 8, p. 3.[11] Mr. Trevitt and Mr. Queener discussed the possibility that Mr. Queener might have been contacted by a young black woman. BCBC Exh. 8, p. 3; Barnacle Exh. 19, pp. 17, 40, 42. Mr. Queener recalled such a contact, but only after having his recollection refreshed by Mr. Trevitt. Barnacle Exh. 19, pp. 18, 40, 42; Tr. 422, 424, 427, 446.

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[11] According to Mr. Trevitt, he showed these affidavits to Mr. Queener in his office in Pickens, Queener read them and they discussed them. BCBC Exh. 8, p. 3; Tr. 420–22, 424, 427, 452–54, 456. According to Mr. Queener, these affidavits were discussed over the telephone and he did not recall seeing, reading or discussing them in his office. Barnacle Exh. 19, pp. 17, 24–25, 41–42.

However, Mr. Queener thought that this woman was a CETA worker doing ascertainment work for an educational television station,[12] did not connect this contact to Barnacle, and so informed Mr. Trevitt. Barnacle Exh. 19, pp. 18, 30, 40, 42, 44. Since Mr. Queener's recollection of his contact with this young black woman was so vague, Mr. Queener and Mr. Trevitt decided not to mention it in Mr. Queener's original affidavit. BCBC Exh. 8, p. 3; Barnacle Exh. 18, p. 1; Tr. 422, 446.

135. Mr. Trevitt partially constructed a draft of Mr. Queener's original affidavit while waiting for Mr. Queener at his office in Pickens. Tr. 418. Mr. Trevitt completed the draft after the discussion. BCBC Exh. 8, p. 5. Mr. Queener read the draft thoroughly and, except for the name of the county in the hearing, made no modifications thereto. Barnacle Exh. 19, p. 22; Tr. 447. Mr. Queener then executed the affidavit before a notary public. BCBC Exh. 8, p. 5; Barnacle Exh. 19, pp. 26–29.

136. According to Mr. Trevitt, had Mr. Queener mentioned with any degree of certainty that he recalled being contacted by a young black woman, he would have been "more than willing" to put it in the original affidavit. Likewise, Mr. Trevitt would have been "delighted" to include this contact had Mr. Queener made "even a slight suggestion" that it be included. BCBC Exh. 8, pp. 3–4; Tr. 422, 426, 446. Mr. Trevitt had been advised by BCBC's Washington communications counsel that if anyone other than the Barnacle principals had made contacts with community leaders, then Barnacle had "materially misrepresented" its ascertainment efforts to the Commission. Therefore, according to Mr. Trevitt, it made no difference to him whether Mr. Queener had been contacted by a young black woman or whether he had not been contacted at all, as long as he was not contacted by a Barnacle principal. BCBC Exh. 8, p. 4; Tr. 404, 427, 429.

137. Mr. Queener stated that the inclusion in his original affidavit of this contact with the young black woman was not "essential" to him "since [his] recollection was vague and [he] did not know who the young lady was." Barnacle Exh. 19, p. 42. Mr. Queener further stated that he did not connect this young black woman "in [his] mind . . . with this set of applications and set of interviews, . . . and, to [him], including her as a possibility would merely [have been] a matter of muddying the water," and would have been "misleading." Barnacle Exh. 19, p. 44. Mr. Queener also stated that "as long as [he did not] know that she was connected with this particular application . . . then [he did not] say that it [had] to be in the affidavit; . . . if [he] were convinced in [his] own mind that she was,

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[12] In his job with the Clemson University Extension Service in Beaufort County, Mr. Queener was interviewed several times per year in ascertainment surveys. Barnacle Exh. 19, p. 5; BCBC Exh. 8, p. 3; Tr. 422.

then [he] . . . would have placed it in the initial affidavit." Barnacle Exh. 19, p. 30.

138. Moreover, Mr. Queener stated that the portion of his original affidavit which declared that he "was never interviewed by anyone representing the proposed station in Port Royal" reflected his memory and was to the best of his knowledge and belief at the time. Barnacle Exh. 19, p. 43. According to Mr. Queener, there is no conflict between his original and new affidavit, and his new affidavit did not represent a change in his initial position. Barnacle Exh. 19, pp. 45–46. Finally, Mr. Queener stated that he was still uncertain as to whether the young black woman was connected with Barnacle. Barnacle Exh. 19, pp. 18–19, 37.

Ultimate Findings and Conclusions

139. This proceeding involves the mutually-exclusive applications of BCBC and Barnacle. BCBC has designated Beaufort, South Carolina as its specified community, whereas Barnacle has specified Port Royal, South Carolina. In addition to the Section 307(b) and contingent comparative issues, the *Designation Order* and the subsequent orders of the presiding judge specified issues as to whether BCBC had complied with Rule 1.65 regarding the FAA's adverse determination; whether Barnacle had complied with Rules 1.65 and 73.3514 as to its ascertainment; and whether BCBC had made misrepresentations or abused Commission processes or been lacking in candor with respect to the Vaughn, Queener and Green affidavits. Because only basically qualified applicants are entitled to Section 307(b) and comparative consideration,[13] the basic qualifying issues specified against BCBC will first be considered.

Misrepresentation/Abuse of Process/Lack of Candor Issues

140. *Catherine Vaughn.* In her original affidavit, Mrs. Vaughn stated that she had not been contacted by Frieda Mitchell or "anyone" else concerning the proposed radio station. She persisted in this belief until she was revisited by Sally Wilson. Upon seeing Mrs. Wilson the second time, Mrs. Vaughn recalled that she was previously interviewed by Sally Wilson. Mrs. Vaughn then executed a second affidavit which reformed the first affidavit. Although the original affidavit misstated the facts, the record does not disclose any intent to deceive on the part of Catherine Vaughn. Nor can any such intent be imputed to BCBC. The affidavit prepared by Mr. Thomas accurately reflected Mrs. Vaughn's stated recollection.

141. The question whether attorney Thomas properly acknowledged Mrs. Vaughn's signature on the original affidavit need not be resolved. BCBC retained Mr. Thomas to help in the investigation of

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[13] *Louis Adelman*, 29 FCC 1223 (1960), *aff'd sub nom.* Guinan v. Federal Communications Commission, 297 F.2d 782 (1961).

Barnacle's ascertainment. efforts and to draft affidavits in conjunction with that investigation. BCBC relied on Mr. Thomas' experience and expertise, and there is no evidence that any of the BCBC principals had any knowledge that the Vaughn affidavit was improperly notarized.

142. *Charlotte Green*. Originally, attorney Thomas stated that Charlotte Green informed him that she had been contacted by "someone" who Mrs. Green later confirmed to be a "large white man." Subsequently, during her deposition testimony, Mrs. Green stated that she informed Mr. Thomas that she had been contacted by two persons, a man and a woman, about the proposed radio station.

143. As noted by the Bureau, this conflict in testimony cannot be resolved. Mrs. Green was too ill to attend the hearing. Because of her involuntary absence, her deposition was received into evidence. Mr. Thomas did appear at the hearing and appeared to be a credible witness. Inasmuch as the presiding judge did not have the opportunity to observe Mrs. Green testifying, sufficient weight cannot be given to Mrs. Green's deposition as to offset Mr. Thomas' testimony and support the charge of misrepresentation. Moreover, the findings also establish that Mrs. Green read the draft of her original affidavit before she signed it and that she signed it voluntarily.

144. *Jack Queener*. Jack Queener's original affidavit stated that he had never been interviewed by Frieda Mitchell or anyone else concerning a proposed station in Port Royal. Mr. Queener's new affidavit stated that at the time he signed the original affidavit, he recalled being interviewed by a young black woman and he so informed the person who obtained his original affidavit, *i.e.*, BCBC principal Carmen Trevitt. It was alleged that BCBC withheld from the Commission the fact that Mr. Queener had been interviewed by a young black woman.

145. The record establishes, and it is concluded, that BCBC did not withhold information from the Commission. Mr. Queener's recollection of the contact with the young black woman was so vague that Mr. Queener and Mr. Trevitt decided not to include it in the original affidavit. Thus, Mr. Queener did not know who the woman was, did not connect her with the Barnacle/BCBC applications, and did not know on whose behalf she interviewed him. Mr. Queener thought she was a CETA worker doing ascertainment work for an educational television station. Further, Mr. Queener stated that he is still uncertain as to whether the woman was connected with Barnacle. Moreover, Mr. Queener stated that to have included this contact in his original affidavit would have been a matter of "muddying the water" and would have been "misleading."

146. In addition, the record establishes that Messrs. Queener and Trevitt discussed the draft of his original affidavit, Mr. Queener read the draft thoroughly before signing it, made a change in the heading

of the draft and signed it voluntarily. Finally, Mr. Queener's original affidavit represented his best recollection at the time it was signed.

147. In view of all these circumstances, it cannot be concluded that BCBC misrepresented facts to, abused the processes of or lacked candor with the Commission with respect to the submission of Mr. Queener's original affidavit.

148. Although no qualifying issues have been specified against Barnacle,[14] BCBC argues that the record discloses a number of discrepancies of decisional significance which question the veracity of Mrs. Mitchell's testimony and Barnacle's candor with the Commission in its opposition to BCBC's motion to enlarge issues.

149. Specifically, BCBC charges in its proposed conclusions that Mrs. Mitchell testified "falsely" throughout this proceeding when she maintained that she "forgot" the requirement that principals conduct community leader interviews. BCBC bases its conclusion on the fact that Mrs. Mitchell was provided with a copy of the *Primer* and a detailed memorandum; that subsequently she had conversations with principal Harrison when these requirements were discussed; that the interview sheets Mrs. Mitchell used were fail proof; that Mrs. Mitchell remembered the requirements when she instructed Mrs. Wilson to conduct telephone interviews with the general public; and that Mrs. Mitchell entered misleading dates on the questionnaires describing the Wilson interviews.

150. BCBC's allegations are unmeritorious because they are based on sheer speculation. Mrs. Mitchell's testimony is credible and is given full weight. There is no evidence that indicates that she in fact did not forget the requirement that principals conduct community leader interviews. There is no evidence that Mrs. Mitchell dated the interview sheets in an effort to mislead anyone. As a matter of fact, Mrs. Mitchell dated her signature after the date shown on the interview sheets. BCBC Exh. 21, pp. 6–11, 18.

151. BCBC also argues that Barnacle's actions in this proceeding evince a lack of candor with the Commission in at least three instances, all related to its opposition pleading to BCBC's motion to enlarge issues.

152. First, BCBC states that Barnacle lacked candor in not admitting to certain allegations made by BCBC in its motion to enlarge issues regarding Barnacle's ascertainment efforts. This is demonstrated, BCBC avers, by Barnacle's principals admitting these same allegations at hearing. It appears, however, and it is so ruled, that Barnacle's response to BCBC's motion constitutes a legal argument and does not contradict the testimony presented by Barnacle's principals at hearing.

153. Secondly, BCBC argues that Barnacle represented to the Commission in its opposition to BCBC's motion to enlarge issues that

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[14] Issue 4 was specified only on a comparative basis.

it had completed a full ascertainment effort for the Beaufort draft prepared in March of 1980 and that when a decision was made to apply for a station at Port Royal, additional interviews, using different procedures, were taken; and the subsequent misrepresentation (that all interviews were done by principals) resulted from an inadvertent failure to correct the Beaufort draft to reflect the actual procedures utilized in the survey. According to BCBC, the fact is that Barnacle's draft was changed before it was filed and it was changed so that the application would conform with the requirements of the *Primer*.

154. BCBC's charge doesn't wash. There is no contradiction between Barnacle's assertion that the misrepresentation resulted from the inadvertent failure to correct its Beaufort draft in one regard and the fact that it did correct the draft in other regards. Nor is any intent to mislead the Commission apparent on the face of the facts alleged.

155. Finally, BCBC argues that Mrs. Mitchell's amendment of prefiled testimony at the hearing resulted in a material revision of the factual basis for Barnacle's defense in the aforementioned opposition filing. In the affidavit attached to the opposition, Mrs. Mitchell stated that her secretary, Mrs. Wilson, did not participate in the ascertainment survey until after the decision to file for Port Royal was made. BCBC asserts that the record reflects that she did interviews before the decision to file for Port Royal was made and that this change is significant because Barnacle's reliance on Mrs. Mitchell's "inaccurate excuses" persuaded the former presiding judge that the intentional misrepresentation issue requested by BCBC should not be added. BCBC adds that the cause of the misrepresentation was that Mrs. Mitchell signed her name as interviewer on each of the interview sheets and that Barnacle was aware in February of 1981 that Mrs. Mitchell signed her name as interviewer on sheets describing interviews done by Mrs. Wilson. Thus, BCBC concludes that Barnacle chose to present the former presiding judge with a version of facts it knew or should have known to be misleading.

156. This complaint, too, fails. The motion to enlarge issues charged that someone other than Barnacle's principals had apparently interviewed several of the leaders listed in the application. In its response, Barnacle candidly admitted that Mrs. Wilson had conducted leader interviews and gave considerable detail about who conducted all interviews and when. Barnacle further stated that Mrs. Mitchell did not realize the importance of stating in the application just who actually did the interviews and that this was why she did not check to see that the exhibit, which had been drafted before Mrs. Wilson's interviews were done, was changed to reflect that Mrs. Wilson had interviewed some leaders in April of 1980. It was this admission that was the basis for specifying issue 4 on a

comparative basis. There is nothing misleading about Barnacle's opposition filing.

157. It is concluded that there is no substance to BCBC's allegations that Barnacle misrepresented facts or lacked candor with the Commission.

Section 307(b) Issue

158. BCBC and Barnacle have been found basically qualified, and it is now necessary to consider the proposals under Section 307(b) of the Communications Act of 1934, as amended. This section requires that the Commission "shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." In resolving a Section 307(b) issue, the Commission looks to both the needs of the communities involved for a transmission service and the needs of the populations to be served for a reception service. *Congaree Broadcasters, Inc.*, 42 FCC 2d 683 (Rev. Bd. 1973); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640 (Rev. Bd. 1973). In *FM Broadcast Rules*, 40 FCC 662, 664 (1962), the Commission listed three objectives to be applied in making 307(b) FM determinations in the following order of importance: (1) provision of some service to all of the nation, or as much as possible; (2) provision of as many program choices to as many listeners as possible; and (3) service of local origin to as many communities as possible. *See WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982).

159. The first two of these objectives deal with so-called reception aspects of mutually-exclusive proposals, *i.e.*, they deal with whether people to be served by one or more proposals, but not by the other or others, have a need for a first or additional reception service. *See Resort Broadcasting Co., Inc., supra*. In the instant case, it is concluded that neither applicant can be awarded a preference under the first and second objectives. The city of Beaufort and the town of Port Royal presently have available identical primary aural broadcast services. Consequently, neither BCBC nor Barnacle has a reception service advantage over the other, and neither community has a greater reception service need than does the other. However, under the third objective, *i.e.*, service of local origin to as many communities as possible, it is clear that the proposal for Port Royal must be preferred over the proposal for Beaufort. The findings establish that the town of Port Royal is a municipality organized under the laws of the State of South Carolina. It had a 1980 population of 2,977, an increase of 3.9% over its 1970 population. The town operates under the "council-manager" form of government, and has an acting town manager, a mayor and a city council. The town has its own code of ordinances, provides its own police and fire protection, has its own municipal court and levies its own taxes.

The town has a business district, houses of worship of various denominations, and civic organizations. Port Royal has no local broadcast transmission service of any kind, and a grant of Barnacle's application would result in the provision of a first local transmission service to Port Royal. On the other hand, a grant of the BCBC application will bring a fourth commercial station to the city of Beaufort, while Port Royal would remain without a local station. This is dispositive and requires that Barnacle be given a decisional preference under Section 307(b) of the Act. In *Pasadena Broadcasting Co. v. F.C.C.*, 555 F.2d 1046, 1050–51 (D.C. Cir. 1977), the Court of Appeals stated as follows:

> Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations. [Footnotes omitted.]

See also Robert J. Reverman, 78 FCC 2d 1110 (Rev. Bd. 1980).

160. BCBC would concede a decided preference to Barnacle's proposal over its own, except that it believes that Commission policies employed in the assignment of high-powered regional facilities militate against the grant of any preference under Section 307(b) to Barnacle because Port Royal is too small a community to have warranted an assignment of a Class C channel in the first place. BCBC cites *WHW, supra*, in support, but misconstrues its holding. In *WHW*, the Review Board noted that in assigning channel 299B to Kalamazoo, the Commission also explicitly rejected a contention that Portage should be treated like a suburban community to which a smaller facility is usually assigned. That does not go to say that where, as here, a Class C channel is assigned to a given community, an application for an adjoining community pursuant to Section 73.203(b) of the Rules is inappropriate or that such an applicant, because of its size, may not receive a preference under Section 307(b).

161. The Barnacle application for Port Royal is preferred under the Section 307(b) issue, and this case can be decided under such issue. Thus, while findings have been made under the contingent comparative issue, it is unnecessary to arrive at conclusions under this issue because the Section 307(b) issue is dispositive. The public interest, convenience and necessity will be served by a grant of the Barnacle application for Port Royal.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Barnacle Broadcasting Ltd. for authority to construct and operate a new FM broadcast station on channel 259C at Port Royal, South

Carolina IS GRANTED and the application of Beaufort County Broadcasting Company IS DENIED.[15]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

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[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Coverage, Misrepresentation
Ratings, Distortion of, See also Hypoing

Commission will no longer maintain policies against the misuse of audience ratings data or the use of inaccurate or exaggerated coverage maps or coverage claims by broadcast licensees.
–Broadcast Regulation

FCC 83-339

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Elimination of Unnecessary Broadcast Regulation

POLICY STATEMENT AND ORDER

(Adopted: July 14, 1983; Released: August 2, 1983)

BY THE COMMISSION:

1. This is the first in a series of Policy Statements that we expect to issue over the course of the coming months eliminating or proposing to eliminate various broadcast policies which our review indicates are no longer warranted or required by the public interest. These policies concern activities in which the Commission does not believe it should continue to expend resources, especially, but not solely, where there exist sufficient private remedies or market forces to deter the activity addressed by the particular policy. Additionally, we will be issuing one or more *Notices of Proposed Rule Making* in cases such as where the conduct is the subject of a Commission rule but contains issues closely related to those involved in policies being dealt with in this umbrella proceeding.[1] We turn now to a discussion of the specific policies addressed by this Policy Statement.

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[1] As is apparent, our action here is not being taken pursuant to notice and comment procedures. Section 553(b)(3)(A) of the Administrative Procedure Act [5 U.S.C. §553(b)(3)(A)] does not require the issuance of a notice and an opportunity for comment where, *inter alia* "general statements of policy" are involved. Further, the listing of many of the Commission's policies in Section 73.4000 *et seq.* of the Commission's Rules does not affect the need, or lack thereof, for a notice and comment proceeding. Section 73.4000 clearly states that the policies are listed, and that relevant citations are provided in the Rules, "solely for the purpose of reference and convenience. . ."

Distortion of Ratings

2. In 1963, as a result of information developed both in hearings before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce and through complaints filed with the Commission, the Commission issued a Public Notice (FCC 63-544) cautioning licensees about the improper use of ratings information. That Public Notice informed licensees that they were obliged to act responsibly in the use of such information and to ensure that survey material utilized in advertising campaigns was valid.[2] However, the Commission indicated that ordinarily it would refer complaints concerning questionable uses of ratings material to the Federal Trade Commission (FTC) for that agency's consideration and would take into account findings or orders to cease and desist entered by the FTC against licensees. Subsequently, the FTC issued guidelines regarding the use of broadcast ratings survey data. Generally, the FTC statement detailed practices that broadcasters should endeavor to avoid. For example, broadcasters were advised that it is improper to quote from an audience survey (or to quote survey data) in such a way as to create a misleading impression of the survey's results. Additionally, broadcasters were advised to refrain from making audience claims based upon data compiled in a survey which the broadcaster knows or has reason to know was not designed, conducted or analyzed in accordance with accepted statistical principles and procedures or where they know the data to be obsolete. In a 1965 Public Notice,[3] the FCC brought these guidelines to the attention of its broadcast licensees and stated that, in determining whether a licensee is operating in the public interest, it would take into consideration a licensee's operation within the FTC guidelines. The Commission also restated its existing policy of generally referring complaints involving the use of broadcast ratings to the FTC and reaffirmed its intention to consider any findings or orders to cease and desist issued against a licensee by that agency. Subsequently, the Commission

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[2] The policy being considered here involves the *use* of data by licensees (either, for example, the misleading *use* of accurate data or the *use* of data known to be invalid or inaccurate). It is not to be confused with the Commission's policy against licensee participation in deliberate attempts to alter the outcome of a rating survey by engaging in activities that undermine the validity of the sampling process. *Public Notice*, 65 F.C.C. 2d 413 (1977). In the latter policy, which is not at issue here, the conduct addressed is not the *use* of the data, but an effort to artificially affect the data themselves.

[3] "*Commission Calls Attention of Licensees to FTC Statement on Broadcast Ratings*," 1 F.C.C. 2d 1078 (1965).

commenced a rule making proceeding looking toward the adoption of rules prohibiting ratings misuse practices.[4] Although the Commission determined that the need for such a rule was outweighted by the First Amendment and Section 326 considerations which the rule would raise, it again reiterated its concern with ratings distortion practices.[5]

3. Although the Commission's general policy has been to refer complaints to the FTC, and to take findings and orders to cease and desist issued by that agency into account in assessing a licensee's qualifications to retain its license, it also has independently evaluated complaints regarding the misuse of ratings information by licensees. The Commission has, for example, granted short-term license renewals based upon such conduct even absent any findings by the FTC.[6] As a result, the Commission continues to receive, and consider, numerous complaints of misuse of ratings information in the first instance. Such complaints typically are filed by competitors alleging that the subject station is promoting itself either to the public or to advertisers and advertising agencies by making misleading claims as to the station's popularity.[7]

4. We no longer are persuaded that the Commission's limited resources are well spent by continuing to investigate and adjudicate complaints of this nature in the first instance. These types of claims are made by businesses every day as to their popularity. However, a principal difference between such claims made by broadcasters and those made by non-broadcasters is that in the broadcasting context these claims are made more to obtain advertising than to influence purchasing decisions made by members of the public at large.[8] Yet, given the availability of detailed audience rating data for both radio and television, advertisers and advertising agencies are in a particularly good position to verify the accuracy of ratings claims and to decide for themselves the significance that they will attach to claims made by the stations. Moreover, competing stations learning of a station's misuse of ratings data should be able and would likely be inclined to counteract any impact of such claims by notifying the

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[4] *Amendment of Part 73 of the Commission's Rules and Regulations to Prohibit Distortion of Audience Ratings (Docket No. 20501)*, 40 Fed. Reg. 26698 (June 25, 1975).

[5] *Report and Order* (Docket No. 20501), 58 F.C.C. 2d 513 (1976). For the application of this policy to a licensee's conduct see, *Coastal Telecommunications Corp.*, 66 F.C.C. 2d 941 (1977).

[6] *KPIK*, 14 F.C.C. 2d 267 (1968); *Marsh Media, Ltd.*, 38 F.C.C. 2d 457 (1972).

[7] Such complaints often allege that a station is informing the public or advertisers that, for example, "W is Central City's number one country music station," whereas the complainant disputes that assertion.

[8] We feel it is unlikely that viewers or listeners would be appreciably influenced in their choice of stations merely because a broadcast station claimed to have superior ratings. Rather, it is more likely that such decisions are based upon the programming fare offered by each station.

advertisers and agencies that they dispute the claims being made. Furthermore, in all business relationships such as those involved in the purchasing of broadcast advertisements, the commercial entities have a strong incentive to deal candidly with each other. In instances where this incentive proves inadequate to deter fraudulent behavior, legal recourse against the offending station by the defrauded party is available.

5. Given these non-regulatory methods of dealing with ratings abuse problems, and the commercial nature of the conduct involved, we believe that continued Commission oversight in this area in the first instance is not warranted. Accordingly, all future complaints in this area should be directed to the FTC. In addition, all pending requests for Commission action involving licensees' alleged misuse of ratings information will be forwarded to the FTC.[9] However, as in other areas where adverse determinations concerning licensee conduct are made, we will continue to consider FTC findings and orders to cease and desist relating to licensee abuse of ratings information in determining whether a licensee is acting in the public interest.[10]

Coverage Maps and Statements Regarding Stations' Coverage

6. The Commission's policy concerning misleading coverage claims or the use of inaccurate or exaggerated coverage maps by broadcast licensees was set forth in a letter to Radio Station WARO.[11] In that letter the Commission stated that it expected licensees to deal candidly with the public and with advertisers. It condemned the use of inaccurate and exaggerated coverage maps or any practice intended to deceive or mislead advertisers or the public. Licensees were warned that care should be exercised to assure that advertisers were not misled and that full disclosure of station coverage was essential in exercising this responsibility.

7. We do not condone the use of inaccurate or exaggerated coverage maps or other misleading material regarding a station's coverage in connection with the sale of broadcast air time. The same considerations, however, which led us to conclude that continuing Commission involvement in the area of ratings abuse is no longer warranted, suggest the same conclusion with respect to the use of misleading coverage maps or coverage information by broadcast licensees. Here, as there, a business relationship between a broadcaster and its advertisers is primarily at issue;[12] the same capacity

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[9] Complainants in individual cases will be formally notified of this change in policy prior to our forwarding the complaints.

[10] *See Violation of Laws of USA by Station Applicants*, 42 F.C.C. 2d 399 (1951).

[11] *Universal Communications of Pittsburgh, Inc.*, 74 F.C.C. 2d 617 (1969).

[12] Indeed, coverage maps and information are utilized almost exclusively as an aid in selling commercial time to advertisers. There is little, if any, likelihood that

for independent verification by advertisers of a broadcaster's claims exists; and, the same forceful incentive for candid dealing obtains, as does the availability of private legal remedies should this incentive fail to prevent abusive conduct. We note, moreover, that should a licensee file a misleading coverage map with the Commission, the licensee could be found to have misrepresented facts to the Commission, thus placing its license at risk, and possibly to have violated 18 U.S.C. § 1001, thus subjecting itself to criminal penalties. In view of the foregoing, we are changing our policy and, therefore, we no longer plan to investigate or adjudicate complaints involving misleading coverage claims or the use of inaccurate or exaggerated coverage maps by broadcast licensees.[13]

8. In conclusion, therefore, this *Order* implements the following determination by the Commission: (1) that allegations of ratings distortions and misleading coverage claims are more appropriately explored and decided in other forums and will be so directed in the future: and (2) that, notwithstanding this determination, we will continue to consider the effect of adverse findings on the licensee's character qualifications. We have not determined in this *Order* what weight should attach to other outcomes; *e.g.*, a proceeding terminated for failure to prosecute, or by plea of *nolo contendere* or by a consent order. The relevance of these situations to licensee character evaluation, and indeed the more general question of whether the Commission should continue to consider even adverse findings where, as here, the activities are primarily business-related rather than broadcast-related, will be resolved in the pending proceedings in Gen. Docket No. 81-500, Policy Regarding Character Qualifications in Broadcast Licensing, 87 FCC 2d 836, 848 (1981).

9. Accordingly, IT IS ORDERED, That Sections 73.4035 and 73.4090 of the Commission's Rules ARE DELETED as set forth in the attached Appendix, effective September 2, 1983.

10. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

1. 47 C.F.R., Section 73.4035, Audience ratings: Hypoing and survey misuse, is removed in its entirety.

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information derived from exaggerated coverage maps or misleading coverage claims would be addressed directly to the listening or viewing public, or in any significant way would be relied upon by them. *See* n. 8, *supra*.

[13] To the extent, of course, that a licensee's use of exaggerated or inaccurate coverage maps or other materials concerning coverage results in judicial or agency findings of a violation of law, we will continue to consider such findings. *See* n. 10, *supra*.

2. 47 C.F.R., Section 73.4090, Coverage maps, Use by licensees, is removed in its entirety.

Comparative Hearing
Review by Review Board
Settlement
Transmission First Local

> **Review Board approved settlement agreement after finding it will not impede fair, efficient, and equitable distribution of television service as required by Sec. 307(b) of Communications Act. Since the competing applications were for different suburbs of a large city and since television channels must serve broader areas than radio stations, no Sec. 307(b) preference could properly have been awarded to either applicant.**
> *–Buena Vista Telecasters of Texas, Inc.*
> BC Docket No. 81–310

FCC 83R–56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BUENA VISTA TELECASTERS OF TEXAS, INC. Richardson, Texas	BC Docket No. 81–310 File No. BPCT-800310KF
INTERNATIONAL AMERICAN BROADCASTING CO., INC. Garland, Texas	BC Docket No. 81–311 File No. BPCT-800516KK
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: August 19, 1983; Released: August 24, 1983)

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ABSENT.

1. On August 16, 1983, the two competing applicants for a new television station in the Dallas-Fort Worth urbanized area filed a joint request for approval of agreement which proposes a settlement of this comparative case. The Review Board will approve the joint request which satisfies the requirements of Section 73.3525(a) of the Commission's rules, and republication will not be required under Section 73.3525(c) for the reasons set out below, paras. 4–10.

2. In an Initial Decision, FCC 83D-1, released January 19, 1983, ALJ Luton awarded International American a decisive 47 U.S.C.

307(b) preference for bringing the first television station to Garland, the larger of the two proposed communities. The International applicant was also found to be superior when judged by the standards of the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Exceptions and briefs were filed March 4, 17, and 28, 1983, and oral argument was held April 22, 1983. On July 26, 1983, the Review Board adopted a Decision but before the Decision could be released the applicants informed the Board that a strong likelihood existed that the case could be settled, and asked that the case be held in abeyance for a short period of time.

3. In their joint request for approval of agreement filed August 16, 1983, the applicants indicate that the public interest will be served by the immediate dismissal of the Buena Vista application for Richardson, and the grant of the International application for Garland, which the ALJ had found to be superior. "Prompt approval," is alleged to be in the public interest since it will ensure "a speedy end to this litigation, thereby conserving scarce Commission resources, and allow . . . for the prompt inauguration of a new commercial broadcast service . . . ." Affidavits establish that the application to be dismissed was not filed "for the purpose of reaching or entering into an agreement whereby Buena Vista would dismiss its application." We will approve the agreement because this showing satisfies the requirements of the rules which implements the new requirements of the Communications Act. *See Oak Television of Everett*, 53 RR 2d 995 (Rev. Bd. 1983).

4. In their joint request, the applicants also allege that republication is not required by Section 73.3525(c) of the Commission's rules, because dismissal of the Buena Vista application will not unduly impede fair, efficient, and equitable distribution of television service as required by Section 307(b) of the Communications Act. We agree with this position because our analysis of the 307(b) issue in this case establishes that neither applicant is entitled to a 307(b) preference, *see Cleveland Television Corp.*, 91 FCC 2 1129 (Rev. Bd. 1982), *rev. denied* FCC 83-235, released May 18, 1983.

5. Richardson and Garland, the sites of the proposed stations, are located in Dallas County, Texas. Richardson has a population of 72,496; Garland, 138,857. Richardson is contiguous to Garland and Garland is, in turn, contiguous to Dallas (population 904,078). The proposed television station will serve between 1.5 and 2.2 million persons in the Dallas-Fort Worth urbanized area. At least four other Dallas-Fort Worth television stations provide service to these persons. *See I.D.*, paras. 6, 14, 21–22; Joint Exh. 1. As previously noted, International was awarded a decisive 307(b) preference because it would bring a first television station to Garland, which has no broadcast stations of any kind, whereas the competing applicant, Buena Vista, would provide a first television station to

Richardson, which has an existing non-commercial FM permittee as well as the smaller population (72,496 versus 138,857). *I.D.*, paras. 62–64.

6. Buena Vista, the Richardson applicant, had excepted to the award of a Section 307(b) preference, contending that circumstantial evidence suggests that International's real motive is to serve the Dallas-Fort Worth urbanized area, Buena Vista Br. at 13–30; and that, in any event, precedent establishes that the Commission has "refused to grant any Section 307(b) preference where the applicants were in fact for wide area service." Br. at 31–32. In both its reply brief and at oral argument, International defended its entitlement to a Section 307(b) preference, although counsel candidly acknowledged that he was aware of "no television case specifying contiguous suburbs and not the larger city where a decisive 307(b) preference was awarded." Tr. 429.

7. Section 307(b) requires the Commission to make a fair, efficient, and equitable distribution of radio facilities. In this case, each applicant claims that it should receive a 307(b) preference. The Richardson applicant argues that it should be preferred because it will serve the local needs of its community, whereas the Garland applicant is both designed and intended to serve the areawide needs of the Dallas-Fort Worth urbanized area. The Garland applicant responds, rather, that it should receive a § 307(b) preference because its community is nearly twice as large as Richardson and therefore has a greater need for its television station. After considering these argument in light of applicable precedent, the Review Board has concluded that neither applicant should be awarded a § 307(b) preference.

8. Our analysis does not rest on the subjective intent or the latent motives of the applicants. *Cf. Suburban Community Policy, Berwick Doctrine, Etc.*, 53 RR 2d 681 (1983) (a recent policy-making proceeding in which the Commission retroactively deleted the *Berwick* doctrine which had focused upon subjective considerations in § 307(b) determinations). More instructive, however, is a most recent comparative case involving a television applicant which sought a § 307(b) preference for providing a first station to the suburban community of Shaker Heights, Ohio. *Cleveland Television, supra*, 91 FCC 2d at 1136–1137. There, the Board reviewed the controlling authorities and concluded unanimously that a § 307(b) preference should not be awarded. Shaker Heights was $^1/_{20}$th the size of Cleveland, whereas Garland and Richardson are approximately $^1/_7$th and $^1/_{12}$th the size of the neighboring Dallas. But, the size of the suburban communities is only one of the factors considered in *Cleveland* and the other relevant cases. A critical factor is the nature of the broadcast facility sought by the competing applicants.

9. Thus, it is crucial to our instant conclusion with respect to § 307(b) that this case involves a television channel; and the Commis-

sion and the courts have recognized that such channels are scarce and must serve much broader areas than the more plentiful, less powerful, radio stations which can focus narrowly on local needs. See authorities discussed in *Cleveland, supra*, 91 FCC 2d at 1136–7; *see also Fidelity Television, Inc*. v. *FCC*, 515 F.2d 684, 694–695 (D.C. Cir. 1975). A recent Commission report establishes that it has licensed more than nine radio stations for every one television station. *See Broadcast Station Totals for June 1983*, FCC Mimeo. 1127 (the Commission has licensed 9252 radio and 1127 TV stations). And, the Board has previously noted: "Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues . . . the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries.'" Unlike AM or FM radio stations, television provides "an areawide, rather than a localized service." *Cleveland Television, supra*, 91 FCC 2d at 1137. *Compare Beaufort County Broadcasting Co.*, FCC 83R-51, released July 22, 1983.

10. This case involves two suburban communities contesting for one television channel in the Dallas-Fort Worth urbanized area. The Board has previously held that, after decades of Commission licensing experience, it would not extend a decisive § 307(b) preference in a novel setting absent a persuasive showing. *See generally Casey Broadcasting Co.*, 89 FCC 2d 618 (Rev. Bd. 1982), *rev. denied*, FCC 83–61, February 24, 1983. Here, the available precedent and the principles on which they rest dictate that neither applicant should receive a § 307(b) preference. As the court of appeals has pointed out: "It is clear that a broadcast licensee has an obligation to meet the needs and interests of its entire service area. This is particularly the case with respect to television stations, in view of the limited number of stations." *Stone* v. *FCC*, 446 F.2d 316, 327 (D.C. Cir. 1972). Thus, the logical and practical choice here should be based on an objective comparison of which applicant is better qualified to serve the needs of the 1.5 to 2.2 million Texans who would receive essentially the same area wide television service. *See* designated issues 4 and 5 (*I.D.*, para. 3). Accordingly, dismissal of the Buena Vista application will not unduly impede a resolution of the 307(b) issue.

11. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed March 4 and May 31, 1983, by Buena Vista Telecasters of Texas, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and the joint motion to defer action filed July 29, 1983, IS GRANTED.

12. IT IS FURTHER ORDERED, That the Joint Request for Approval of Agreement, filed August 16, 1983, IS GRANTED; that

the application of International American Broadcasting Co., Inc. (File No. BPCT-800516KK) for a construction permit for a new television broadcast station to operate on Channel 23 in Garland, Texas, IS GRANTED, and that the competing application of Buena Vista Telecasters of Texas, Inc. (File No. BPCT-800310KF) IS DISMISSED, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

BUENA VISTA TELECASTERS OF TEXAS, INC.
Richardson, Texas

BC Docket No. 81-310
File No. BPCT-800310KF

INTERNATIONAL AMERICAN BROADCASTING CO., INC.
Garland, Texas

BC Docket No. 81-311
File No. BPCT-800516KK

For a Construction Permit

Appearances

Robert S. Stone, Esq. and *Rudolph L. Ennis, Esq.* of McCampbell & Young, on behalf of Richardson Family Television, Inc.; *Michael J. Hirrel, Esq.* of Arent, Fox, Kintner, Plotkin, & Kahn, on behalf of Buena Vista Telecasters of Texas, Inc.; *James Gammon, Esq., Colby M. May, Esq., George H. Shapiro, Esq.* and *Mark W. Amerman, Esq.* of Gammon & Grange, on behalf of International American Broadcasting; and *Norman Goldstein, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

(Issued: January 12, 1983; Released: January 19, 1983)

I. Preliminary Statement

1. This is a proceeding involving the mutually exclusive applications of Buena Vista Telecasters of Texas, Inc. ("Buena Vista"), International American Broadcasting Co., Inc. ("International"), and Richardson Family Television ("Richardson Family") for a new commercial television station. Buena Vista and Richardson Family filed their applications to operate on Channel 23 in Richardson, Texas. International filed its application to operate on Channel 23 in Garland, Texas.

2. The Presiding Judge dismissed Richardson Family's application with prejudice by an *Order*, FCC 82M-1450, released May 6, 1982.[1] Buena Vista and International are the remaining applicants.

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[1] Since the application of Richardson Family has been dismissed with prejudice, the issues designated against Richardson Family will not be discussed herein.

3. The applications were originally designated for hearing with respect to the following issues:

(1) To determine, with respect to Buena Vista:

(a) whether it has the $988,200 needed to meet the costs of construction and operation of its proposed facility;

(b) whether, in light of the evidence adduced pursuant to paragraph (a) above, the applicant is financially qualified;

(c) whether the applicant has determined the composition of its city of license;

(d) whether the methodology used by the applicant in conducting its general public survey was random;

(e) whether, in light of the evidence adduced pursuant to paragraphs (c) through (d) above, the applicant is qualified to construct and operate its facility as proposed.

(2) To determine with respect to International:

(a) whether it has the additional $74,893 needed to meet the costs of construction of its proposed facility;

(b) whether, in light of the evidence adduced pursuant to paragraph (a) above, the applicant is financially qualified;

(c) whether the applicant has interviewed leaders of the Black and Hispanic population within the community it proposes to serve;

(d) whether the applicant proposes broadcast matter designed to meet the problems, needs and interests of the community as ascertained by the applicant;

(e) whether, in light of the evidence adduced pursuant to paragraphs (c) through (d) above, the applicant is qualified to construct and operate its facility as proposed.

(3) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of broadcast service.

(4) To determine, if it is concluded that a choice among the applicants should not be based on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

4. The financial issues designated against International (Issues 2(a) and 2(b) above) were resolved in International's favor by summary decision granted by *Memorandum Opinion and Order*, FCC 81M-3051, released September 24, 1981. Summary decision was granted in favor of International on the community ascertainment issues (Issues 2(c), 2(d) and 2(e) above) by *Memorandum Opinion and Order*, FCC 81M-3328, released October 19, 1981. The ascertainment issues designated against Buena Vista (Issues 1(c), 1(d) and 1(e) above) were resolved in Buena Vista's favor by *Order*, FCC 81M-3442, released October 29, 1981. The financial issues designated against

Buena Vista (Issues 1(a) and 1(b) above) were resolved in favor of Buena Vista by summary decision by *Memorandum Opinion and Order*, FCC 81M-3455, released October 30, 1981. Thus, the only issues remaining for resolution are the Section 307(b) issue (Issue 3 above) and the standard comparative issue (Issue 4 above).

5. Hearings were held in Washington, D. C. from January 11, 1982 through January 13, 1982. The record in this proceeding was closed by *Order*, FCC 82M-1488, released May 6, 1982.[2]

II. Findings of Fact

A. *Section 307(b) Issue - Comparison of Communities*

1. *Garland, Texas*

6. Garland, Texas, the second most populous city in Dallas County, has a population of 138,857 within its 43.2 sq. miles. Garland had 48,365 housing units in 1980 and $111,415,082 worth of building permits were issued in 1979. In 1970, Garland's population was 81,437, and it had 24,376 housing units. In 1970, $51,701,977 worth of building permits were granted. (IABC Ex. 1, p. 1).

7. Garland has a council-manager form of government, and the city council includes a mayor and eight council members. Garland's annual budget (1980–1981) is $100.6 million, and city government employs 1,261 persons. (IABC Ex. 1, p. 1). Garland's police department has 264 members, and its fire department has 154 personnel operating from six locations. Garland also has a 24-hour emergency medical service, which is operated by the fire department, and which is staffed by 28 paramedics and 15 emergency medical technicians. (IABC Ex. 1, p. 2).

8. Approximately 22,000 industrial employees work in Garland, with an annual payroll of $120,000,000. Thirty-five of the approximately 300 manufacturing firms in Garland employ more than 100 persons. (IABC Ex. 1, p. 2).

9. Retail sales in 1978 were approximately $566,076,000. (IABC Ex. 1, p. 2). Bank deposits at banks in the city rose from $72,240,071 in 1970 to $298,554,093 in 1980. Deposits in savings and loan institutions rose from $25,677,631 in 1970 to $115,738,517 in 1980. Garland's electric power needs are supplied primarily by Garland Power and Light, the third largest municipal electric utility in Texas. (IABC Ex. 1, p. 3).

10. The enrollment of the Garland Independent School District rose from 21,347 in 1970 to 30,026 in 1980, with 4 high schools, 10 middle schools, and 31 elementary schools (IABC Ex. 1, pp. 3–4, 8). Post-secondary education is available in Garland at Abilene Chris-

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[2] All references herein to the hearing transcripts in this proceeding will be abbreviated "Tr. ___ ." All references to exhibits of the parties will be abbreviated "Buena Vista Ex. ___ ," "International Ex. ___ ," or "Joint Ex. ___ ."

tian University's Dallas Campus, the East Texas State University Extension in Garland, and at Richland College, a community college which adjoins the Garland city limits. Garland's own library system includes a main library and two branches with 180,000 volumes and other materials (IABC Ex. 1, p. 4).

11. The City of Garland offers public recreation facilities, including more than 60 parks, and 5 recreation centers featuring indoor sports and instruction, 4 major swimming pools, 48 tennis courts, an equestrian park, and jogging and bike trails, totalling more than 2,000 acres. (IABC Ex. 1, p. 4).

12. Garland has more than 70 civic and service clubs, and has 3 senior citizen centers. A new civic center is planned for Garland which will include a cultural arts center. (IABC Ex. 1, p. 5). Garland has 3 hospitals, with 400 patient beds and approximately 200 physicians on hospital staff. Several dental clinics are located in Garland (IABC Ex. 1, p. 3). Eighty-five churches are located in Garland. (IABC Ex. 1, p. 5).

13. There are no radio or television stations in Garland, but a daily newspaper, the *Garland Daily News* is published there. (IABC Ex. 1, p. 5).

2. *Richardson, Texas*

14. The population of Richardson, the fourth most populous city in Dallas County, rose from 48,405 in 1970 to 72,496 in 1980. According to the 1980 United States Census, there are 25,391 household units in Richardson, an increase of 81.4% from 1970. Richardson has a council-manager form of government with a seven-member city council, an annual operating budget of $15.8 million, and 103 police officers and 115 firemen. (IABC Ex. 1, p. 6).

15. Eight of the approximately 106 manufacturing firms in Richardson have more than 100 employees. The 1977 Census of Retail Trade lists the total number of establishments in Richardson as 652 and gross sales of $264,435,000, up from the 1972 census figure of 458 establishments with sales of $98,451,000. Richardson's banks hold deposits of $436,000,000. (IABC Ex. 1, p. 7). Richardson's electric power needs are supplied by Texas Power and Light Company. (IABC Ex. 1, p. 7; Buena Vista Ex. 11, p. 3).

16. The Richardson Independent School District has thirty-five elementary schools with a total enrollment of 18,697 students, and ten junior high schools and four high schools with a total enrollment of 18,238 students (Buena Vista Ex. 11, p. 8). Private elementary and secondary schools serve 537 students. Richardson has a municipal library with approximately 155,000 volumes (Buena Vista Ex. 11, p. 11). The University of Texas at Dallas is located in Richardson and provides college education at the junior, senior and graduate levels in a variety of fields to approximately 6,000 students. Other Richardson colleges are Richland Community College (located be-

tween Richardson and Garland) and A&M Research and Extension Center at Dallas (Buena Vista Ex. 11, par. 17).

17. Richardson has 16 parks, 5 municipal swimming pools, 2 recreational centers, 17 softball fields, 28 tennis courts, and 2 public golf courses which total 206 acres. (IABC Ex. 1, p. 8; Buena Vista Ex. 11, p. 11).

18. Richardson has 1 hospital with 116 beds. Richardson also has 2 privately-owned nursing homes (Buena Vista Ex. 11, p. 12). There are 121 physicians in Richardson and 76 dentists (IABC Ex. 1, p. 7). There are 47 churches in Richardson and Shilo Airport is located in the city (IABC Ex. 1, p. 2).

19. Richardson has approximately 80 service organizations and cultural activities, including the Richardson Symphony and Meyers Charles Orchestras. In addition Richardson's Civic Center is available for cultural events. (IABC Ex. 1, p. 9; Buena Vista Ex. 11, p. 9).

20. Richardson has no standard broadcast or television stations. An FM radio assignment to St. Luke's Educational Foundation on 88.1 mHz has been made, but the station is not yet on the air. Richardson has a daily newspaper, *The Richardson Daily News*. (IABC Ex. 1, p. 9).

B. *Reception Data*

21. A comparison of the areas and populations proposed to be served by Buena Vista's and IABC's proposals reveals the following differences:

Grade B	*Population*	*Area (Sq. Miles)*
LABC	2,201,362	4,616
Buena Vista	1,511,290	2,908
Difference	690,072	1,708
LABC Advantage	+43%	+59%
Differential Area		
Areas Served Only by LABC	717,194	2,307
Served Only By Buena Vista	27,122	599

(Joint Ex. 1, p. 5).

22. All Grade B differential areas presently receive service from 4 Dallas-Ft. Worth stations. In addition, a fifth Grade B service is provided in this area from either a Dallas station or an Ardmore, Oklahoma station. Further, 3 other Dallas-Ft. Worth stations provide Grade B service to portions of the differential areas. (Joint Ex. 1, pp. 2, 5; Joint Ex. 2, p. 1).

III. *Comparative Issues*

A. *Diversification of Ownership and Control*

23. Buena Vista has no interest in any authorized broadcast facility or any other medium of mass communications. Buena Vista principal Leon Crosby owns 48 percent of the voting stock and 100

percent of the nonvoting preferred stock of Hispanic Broadcasters, Inc., licensee of Television Station KBSA-TV, Guasti, California. Buena Vista principal Debra Olivas[3] owns 21.15 percent of the voting stock of United Minority Broadcasters, Inc. which holds 52 percent of the voting stock of Hispanic Broadcasters, Inc., licensee of KBSA, Guasti, California. Leon Crosby and Debra Olivas are Chairman of the Board and President, respectively, of Hispanic Broadcasters, Inc. (Buena Vista Ex. 10, p. 1). Station KBSA-TV is not presently operational. Guasti, a suburb of Los Angeles, California, is more than 1,000 miles from Richardson, and is part of the second-ranked Los Angeles television market (IABC, Ex. 9, pp. 2–3).

B. *Integration of Ownership and Management*

1. *Buena Vista*

24. Buena Vista is comprised of the following persons holding the following percentages of voting stock and holding the following offices:

Individual	*Voting Stock Held*	*Office*	*Director*
Leon A. Crosby	25%	President	Yes
Florence Coaxum	8%	Vice President	Yes
Mamie Ewing	10%	Secretary	
George W. Fair	10%	Vice President	
Myron Watkins	8%	Vice President	
Timothy L. Crosby	7%	Vice President	Yes
Kevin McMahan	22%	None	
James L. Crawford	10%	Assistant Vice President	

(Buena Vista Ex. 1).

25. Of Buena Vista's eight stockholders, four are proposed to be integrated into the ownership and management of its station should Buena Vista be granted a construction permit.[4] Florence Coaxum, Timothy L. Crosby and James L. Crawford are proposed to be involved in station management on a full-time basis (40 hours per week), and George W. Fair is proposed to work at the station on a part-time basis (20 hours per week). (Buena Vista Ex. 3, p. 1; Buena Vista Ex. 4, p. 1; Buena Vista Ex. 5, p. 1; Buena Vista Ex. 7, p. 1).

26. Timothy L. Crosby, a holder of 7% of Buena Vista's voting stock, will be the full-time Assistant Station Manager of Buena Vista's Richardson station. He will supervise and coordinate the

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[3] Although Debra Olivas has withdrawn from Buena Vista's application, and been replaced by Kevin McMahan, for comparative purposes, Buena Vista remains charged with Olivas' ownership interest in station KBSA-TV. *See* Order, FCC 81M-3443, released October 29, 1981.

[4] The integration proposal for Leon A. Crosby was rejected by the Presiding Judge because it was at variance from Buena Vista's application. (Tr. 81–82).

work of the station's sales, production and programming staffs. His particular area of responsibility will be the sale of commercial and program time. This function will require direct supervision of the sales staff, supervision of the production staff when commercials are produced at the station, and coordination with the programming staff to develop appropriate program vehicles for the sale of commercial time. If Buena Vista is granted a construction permit, Timothy Crosby will reside in Richardson, Texas. (Buena Vista Exs. 1 and 7).

27. From June 1978 to September 1980, Mr. Crosby was Assistant Business Manager of KEMO-TV, San Francisco, California. In this position, he supervised collection of the station's receivables, was responsible for the station's banking and cash management, reviewed commercial and program time sales contracts, and advised the station's General Manager regarding the station's business functions. From June 1975 to June 1978, Mr. Crosby was a technical director and production assistant of KMOW-TV. In these positions, he directed particular commercial and program productions and operated and supervised operation of lighting, audio and video equipment. (Buena Vista Ex. 7).

28. Florence Coaxum, who owns 8% of Buena Vista's voting stock, will be the full-time Executive Administrator at Buena Vista's Richardson station. (Buena Vista Exs. 1 and 3). Ms. Coaxum will be responsible for recruitment of all personnel, reviewing the qualifications of job applicants, hiring staff personnel, recommending to the General Manager management and professional personnel to be hired, supervising the station's internal job training and promotion programs, and determining the salaries of the station's non-professional and non-management staff. She will also supervise implementation of Buena Vista's EEO program. (Buena Vista Ex. 3, p. 1). In addition, Ms. Coaxum will be responsible for reviewing and, as necessary, negotiating contracts and commercial transactions, and ensuring compliance with state and federal labor law and local libel law. She will also have on-site responsibility for advising the General Manager and other personnel regarding FCC rules and regulations. (Buena Vista Ex. 3, p. 2).

29. Ms. Coaxum is now in her second year of law school at Texas Southern University in Houston and works part-time as a law clerk for a general practice attorney in Houston. Before enrolling in law school, Ms. Coaxum worked as a counselor at an emergency crisis intervention center in Austin, Texas for approximately $1^1/_2$ years. In this position, she provided emergency assistance and counseling to individuals, particularly juveniles, who were experiencing family problems. Before holding this position, Ms. Coaxum was in the United States Army Military Police at Fort Hood, Texas for three years. She served first in patrol duty and then as a case worker, providing social counseling to military families. When she left the

Army, she held the rank of Staff Sergeant. She holds a Masters degree in social work from Our Lady of the Lake College in San Antonio, Texas. (Buena Vista Ex. 3, p. 3).

30. Ms. Coaxum is a Black female. She resides in Houston, Texas and, if Buena Vista is granted a construction permit, will move to Richardson, Texas. (Buena Vista Ex. 3, p. 4).

31. James L. Crawford, who holds 10% of Buena Vista's voting stock, will be the full-time Community Relations Director at Buena Vista's station. (Buena Vista Exs. 1 and 5). He will be responsible for representing the station at community functions. He will attend Richardson City Council meetings, as well as significant meetings of other Richardson city boards, such as boards of zoning and education. Mr. Crawford will conduct Buena Vista's community leader ascertainment interviews. He will also serve as the contact person for members of the Richardson community who have complaints and suggestions regarding Buena Vista's station. (Buena Vista Ex. 5).

32. As Community Relations Director, Mr. Crawford will direct Buena Vista's Community Out-Reach programs. Many of these programs will use Buena Vista's broadcast facilities and Mr. Crawford will coordinate and supervise, in conjunction with the Program Director, production of all such broadcast material. He will be responsible for selecting public service announcements to be broadcast on the station and, together with the programming director, will supervise the production of local public service announcements produced by Buena Vista. Mr. Crawford will report to the General Manager concerning community problems and needs. He will also assist the station's Public Service Director if necessary. (Buena Vista Ex. 5, p. 2).

33. Mr. Crawford, a Black male, now resides in Union City, California and will move to and reside in Richardson if Buena Vista is granted a construction permit. (Buena Vista Ex. 5, p. 3).

34. Dr. George W. Fair, owner of 10% of Buena Vista's voting stock, will be the Public Service Director at Buena Vista's station. (Buena Vista Exs. 1 and 4). Dr. Fair will devote at least 20 hours per week to his work at the station. As Public Service Director, Dr. Fair will plan, coordinate and supervise the production of public affairs programming. (Buena Vista Ex. 4, pp. 1, 3; Tr. 223).

35. Dr. Fair is a Black male. He has resided in Dallas, Texas since 1979 in a neighborhood adjacent to Richardson. Before moving to Dallas, Dr. Fair resided in Richardson from 1975 to 1979. (Buena Vista Ex. 4, p. 4).

36. Dr. Fair is an associate professor of special education at the University of Texas at Dallas, which is located in Richardson. He holds a Masters degree in special education and a Doctoral degree in education from the University of Pittsburgh. Dr. Fair has served as both a paid and volunteer consultant for the Richardson Independent School District and the Dallas Independent School District. He

serves on the curriculum development committee of the Richardson Independent School District and is an active member of the Board of Trustees of the Special Care School of Dallas and of the Board of Directors of the Dallas Work Opportunity Retraining Center. He has actively participated in the fund raising compaigns of the Richardson YMCA. (Buena Vista Ex. 4, p. 5).

37. Dr. Fair is chairperson of the Minority Affairs Committee for the Division on Career Development of the Council for Exceptional Children. He is also chairperson of the faculty committee for recruitment of minority students at the University of Texas at Dallas, and he was chairperson of the Minority Affairs Committee for the 1977 annual convention of the Council for Exceptional Children. He has written several articles in professional journals about the special problems of minority handicapped children. (Buena Vista Ex. 4, p. 6).

38. In 1977 and 1978, Dr. Fair was responsible for two television programs transmitted over KWU-30, an instructional fixed television service station operated by the Texas Association for Graduate Education Researchers. These courses provided graduate level instruction for public school teachers in the Dallas area. Dr. Fair assembled and prepared the material for use in the course and taught the course on television. (Buena Vista Ex. 4, p. 7).

39. The hours Dr. Fair devotes to his teaching responsibilities at the University of Texas and the hours which will be required for the performance of his duties as Buena Vista's Public Service Director are generally flexible. Dr. Fair's Mondays, Wednesdays and Thursdays are substantially free of course work and will ordinarily be available for his duties at the station. In addition, he will allocate as necessary one or two hours each weekday evening to the station's affairs. He will also be free to work at the station on weekends if required to fulfill his responsibilities as the station's Public Service Director. (Buena Vista Ex. 4, p. 8).

2. *International*

40. International is a non-profit, non-stock corporation. (International Ex. 4, Buena Vista Ex. 13, p. 24). The President and Chairman of International's Board of Directors is Dr. Elizabeth R. Vaughan. The other officers and directors are Mrs. Geri S. Morgan, Vice-President, Treasurer and Director and Miss Melinda S. Fleming, Secretary and Director. (IABC, Ex. 4). All three directors will be involved in station management should International be granted a construction permit. Geri S. Morgan and Melinda S. Fleming will be involved in station management on a full-time basis (40 hours per week) and Dr. Elizabeth R. Vaughan will work at the station on a part-time basis (20 hours per week).

41. From 1962–1970 and 1976 to the present, Dr. Elizabeth R. Vaughan has resided in Dallas. From 1970–1976, Dr. Vaughan lived

in Garland, Texas. She was born in El Paso, Texas on July 28, 1940 and is a U.S. citizen. (IABC Ex. 5, p. 1).

42. Dr. Vaughan will be employed as the part-time (20 hours per week) Program Director of International's station. (IABC Ex. 5, p. 1). In that position, she will screen programs that are to be aired, evaluate current programs, and evaluate applications for program time. (Tr. 264–265).

43. Dr. Vaughan attended grade school and high school in El Paso, Texas. She attended Texas Western College, El Paso, from 1958–1959, and attended the University of Texas, Austin, Texas, from 1959–1962, receiving her BA in English in 1962.

44. In 1966, Dr. Vaughan received an MD degree from the University of Texas Southwestern Medical School in Dallas, Texas, followed by an interneship in pediatrics (1966–1967) at Children's Medical Center, Dallas, and a residency in Ophthalmology (1967–1970) at Parkland Memorial Hospital, Dallas, Texas. After completion of her training in 1970, Dr. Vaughan began the private practice of ophthamology in the Dallas/Ft. Worth area. (IABC Ex. 5, p. 2).

45. Dr. Vaughan's civic activities include participation from approximately 1970–1972 as a member of the Pilot Club, an organization which sponsors a home in Dallas for rehabilitating mentally retarded women and which sponsored schools for deaf children. (IABC Ex. 5, p. 4; Tr. 261–262).

46. Dr. Vaughan's professional activities include staff membership since the early 1970's at the following Dallas/Ft. Worth area hospitals; Parkland Memorial Hospital; Presbyterian Hospital; Baylor University Medical Center; Mary Shiels Hospital; and Veterans Administration Hospital. In approximately 1970, Dr. Vaughan received an appointment as clinical instructor and ophthalmologist at the University of Texas Southwestern Medical School in Dallas, Texas, and she continues in that position. (IABC Ex. 5, p. 2).

47. Dr. Vaughan is a member of the following organizations: Christian Medical Society; American Medical Association; Dallas County Medical Society; Texas Medical Association; American Association of Ophthalmology; Dallas Academy of Ophthalmology; American Academy of Ophthalmology; Contact Lens Association of Ophthalmologists; International Eye Foundation; Society of Eye Surgeons; Texas Society for the Prevention of Blindness; and the American Intra-Ocular Implant Society. She has been a member of most of these organizations since the early 1970's. (IABC Ex. 5, p. 3).

48. Dr. Vaughan is co-hostees of "The End Crowd," a one-hour program featuring various guests and music which is "cablecast" on weekday evenings, Monday through Friday from 8–9 p.m. on Storer Cable TV, Garland, public access Channel 10, other Storer Cable TV outlets in the Dallas/Ft. Worth area, and on Cable Vision of Odessa, Odessa, Texas. (Tr. 258–259). In addition, Dr. Vaughan is heard on the radio program "Dr. Vaughan Presents," which is produced by

Dr. Vaughan and which is aired Monday through Friday at 5:45 p.m. on KWJS(FM), Arlington, Texas. On this program, Dr. Vaughan offers teachings from the Bible. (IABC Ex. 5, pp. 4–5; Tr. 256–257).

49. Dr. Vaughan currently devotes approximately 35 hours per week to her duties as an opthalmologist, and spends approximately five hours per week in her radio ministry activities. Dr. Vaughan will devote a minimum of 20 hours per week to her duties at IABC. (IABC Ex. 5, p. 6; Tr. 248, 255).

50. Geri S. Morgan has resided in the station's proposed service area all of her life. She will be the full-time Production Director of International's station. (IABC Ex. 6, p. 1).

51. Mrs. Morgan was employed from 1977 through 1980 as Office Manager of International Christian Center Church and she has served as Organist of that church since 1977. She was employed by Elizabeth Vaughan Ministries, Inc. from 1978 through 1981. Mrs. Morgan is currently employed as Vice-President and Treasurer of International, and works at least 40 hours per week in that position. (IABC Ex. 6, p. 2; Tr. 349).

52. Mrs. Morgan is co-hostess of "The End Crowd", a 1-hour program featuring guests and music which is "cablecast" on weekday evenings, Monday through Friday. In addition, Mrs. Morgan supervises International's production activities for "The End Crowd" program, including obtraining guests for the program, and supervising the director, switcher, and the cameramen and audio technicians. (IABC Ex. 6, p. 2; Tr. 351). Mrs. Morgan's duties as Production Director at International's station will be similar to the ones she has performed with respect to "The End Crowd." (Tr. 352).

53. From 1957 to the present, Mrs. Morgan has worked with civic and charitable organizations in the Dallas and Fort Worth metropolitan area as a pianist and organist, including: the Parent-Teachers Association; Dad's Club; Firemen's Convention in Fort Worth (1960); State Fair of Texas (1955-early 1960's); and American Heart Association. (IABC Ex. 6, p. 3; Tr. 353–356). In addition, Mrs. Morgan worked as a fund raiser for the March of Dimes for many years (through the early to mid-1970's) and for Teens Against Polio (early 1960's). (IABC Ex. 6, p. 3; Tr. 355–356). Also, Mrs. Morgan was Secretary of the House of Faith, Inc., a Dallas home for deliquent teenage girls from 1970–1975. From 1977–1978, Mrs. Morgan was Coordinator of the Mobile Prayer Chapel, a Christian street ministry.

54. Miss Melinda S. Fleming, a resident of Dallas, Texas, has lived in the proposed service area of International's station since 1977. Miss Fleming will be the full-time Sales Manager of International's station. (IABC Ex. 7, p. 1).

55. Miss Fleming lived and attended schools and college in Lindale, Texas from 1955 until 1975. In 1975, Miss Fleming received her Associate of Arts Degree in Data Processing, graduating from

Tyler Junior College in Tyler, Texas. From 1980 to the present, Miss Fleming has been employed as Office Manager by International, a salaried position. (IABC Ex. 7, p. 2; Tr. 359).

56. Miss Fleming's civic activities include: Member of Lindale Methodist Church Youth Fellowship, Secretary/Treasurer, Lindale, Texas (until 1973); Member of District United Methodist Youth Fellowship, Lindale, Texas area (until 1973); and Member of Baptist Student Union at Texas A&M University, College Station, Texas (IABC Ex. 7, p. 3; Tr. 368–370). She was a volunteer with the March of Dimes during the late 1960's in Tyler, Texas, and with the Jerry Lewis Muscular Dystrophy Telethon in Lindale, Texas. (IABC Ex. 7, p. 3; Tr. 370–371). In addition, Miss Fleming has been a member of International Christian Center Church, Garland, Texas where she is the audio tape operator and a participant in "Sisters of Love", a women's fellowship of that church. (IABC Ex. 7, p. 3).

C. *Auxiliary Power*

57. International will obtain an auxiliary power supply sufficient to allow International to continue broadcast service uninterrupted during emergencies with substantially full power. In addition, the proposed transmitter building will house both a standby power plant and a small emergency studio to ensure uninterrupted service. (IABC Ex. 4).[5]

IV. Conclusions of Law

A. *Section 307(b)*

58. In its proposed findings, Buena Vista once again presses its theory, rejected earlier by *Order*, FCC 82M-1477, released May 6, 1982, that International "intends" to provide primary service to the Dallas/Ft. Worth metropolitan area instead of Garland. Thus, Buena Vista claims that it is entitled to a decisive preference under the transmission needs aspect of Section 307(b) because it proposes to provide a first transmission service to Richardson, Texas, whereas International proposes a ninth service to the Dallas/Ft. Worth metropolitan area.

59. Buena Vista's argument respecting International's "intent" is based on *Charles J. Lanphier*, 31 FCC 212 (1961), *Island Teleradio Service, Inc.*, 30 FCC 52 (1961), and *Speidel Broadcasting Corp.*, 35 FCC 74 (1963), all cases holding that "suburban community" type considerations are part of the evaluation made under a Section 307(b) issue in *AM radio* proceedings. The suburban community policy involves an applicant's intent to direct its programming efforts and overall broadcast operations toward a nearby larger

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[5] *See*, International's November 14, 1980 Amendment of its FCC Form 301 Application.

community rather than to the smaller suburban community it has specified as its community of license. The presumption respecting an applicant's intent which arises in these instances (if certain factual elements are present) is unnecessary when specific allocations are assigned by the Commission, as is the case with FM radio and television channels. The Commission stated in *Hall Broadcasting*, 71 FCC 2d 235, 45 RR 2d 539 (1979);

> "Since channels are preassigned to communities by the Table of FM Channel Assignments (Section 73.202 of the Rules), no such presumption for FM applications has ever been established nor has one ever been necessary. This is because our assignment of an FM channel to a community located proximate to a large community reflects our recognition that operation on that channel with maximum facilities (i.e., transmitting power and antenna height) permitted may result in coverage of the larger community (footnote omitted)." *Hall Broadcasting*, at 542.

Similiarly, no "suburban community" presumption applies to television applicants since the Commission has assigned television channels (Rule 73.606). Buena Vista has shown nothing which indicates that an evaluation of International's "intent" to serve Garland is included in the designated Section 307(b) issue, and no evidence suggests that International "intends" to serve any community other than its designated community of license, Garland, Texas.

60. Buena Vista next argues that International is not entitled to a Section 307(b) preference because International will provide an "area wide" service. Buena Vista cites several cases for that proposition, among them, *Charles Vanda*, 4 FCC 2d 655 (1966) and *St. Louis Telecast, Inc.*, 22 FCC 2d 625 (1957), each of them television proceedings including an evaluation under Section 307(b). In *Charles Vanda, supra*, it was determined that, with respect to each of the competing proposals, the role of providing a local transmission outlet would be a distinctly minor one. The orentation of each of the proposals was decidely toward the Las Vegas - Henderson - Boulder City area, rather than toward the designated communities of Henderson and Boulder City:

> "Of the persons served by both proposals, 64,405 preside in Las Vegas, constituting well over 50 percent of the applicants' city grade population. Each proposal would provide a city grade signal to both Henderson and Boulder City as well as Las Vegas. A majority of the revenue of the proposed operations would be derived from non-local sources (other than Boulder City or Henderson) [footnote omitted]. In programming, both applicants propose substantial use of Las Vegas talent. Moreover, an examination of the applicants' proposed programming schedules reveals very little that can be identified as being oriented to the particular local needs and interests of the specified community as opposed to the needs and interests of the Las Vegas - Henderson - Boulder City area." *Charles Vanda, supra*, at 658.

Here, nothing suggests that International proposes such an "area wide" service. The fact that International's coverage will also serve the broader Dallas/Ft. Worth area does not undermine International's primary commitment to serve Garland. Buena Vista broadly asserts that International's advertising revenue will arise from sources outside Garland. However, other than some passing references to the possibility of acquiring revenues from some religious organizations and possible national advertisers, the record does not establish the sources nor the amounts of prospective revenues from these sources, and that is undoubtedly because such matters were not encompassed within the scope of the designated issue. Similarly, the fact that International's proposed programming will also serve the larger area does not undermine the fact that its primary service is to Garland. Again, the record does not establish the precise programming which International proposes, since the nature of the specific programming was not encompassed within the scope of the designated issue.

61. In *St. Louis Telecast, supra,* the specified community of license of the competing applicants included a large principal city and one of its contiguous suburbs. It was concluded that the suburb was not a "separate community" for Section 307(b) purposes. Here, the applicants propose to serve the communities of Garland and Richardson, Texas, respectively, communities located near the larger cities of Dallas and Fort Worth. There is simply no question that Garland and Richardson constitute separate communities, each worthy of the facility applied for.

62. The communities of Richardson and Garland are similar in every way except as to population and size. Garland's population is greater than Richardsons by a factor of almost two to one (138,857 to 72,486). Both are thriving economically, and while both Garland and Richardson are growing, Garland is growing at a substanially faster rate. Between 1970 and 1980, Garland's population increased 71 percent, while Richardson's increased 50 percent. Both Garland and Richardson have a council-manager form of government, Garland's annual budget is $100.6 million and Richardson's is $15.8 million. Garland has 264 policemen and 154 firemen; Richardson had 103 policemen and 115 firemen. Retail sales in Garland in 1978 were about $566 million; retail sales in Richardson in 1981 were about $232 million. Thirty-five of the approximately 300 manufacturing firms in Garland employ more than 100 persons; eight of the approximately 106 manufacturing firms in Richardson employ more than 100 persons. About 22,000 industrial employees work in Garland. In 1980, Garland had 48,365 housing units and Richardson had 25,371. Garland has three hospitals, with 400 patient beds and approximately 200 physicians on staff; Richardson has one hospital with 116 beds and 121 physicians. Garland has 85 churches and Richardson has 47. Garland has more than 2,000 acres of public recreation facilities, while Richardson has 206 acres. Garland has its own municipal electric utility, the third largest in the state of Texas; Richardson obtains its electricity from Texas Power and Light.

Garland has a main library and two branch libraries with 180,000 volumes; Richardson one library has 155,000 volumes.

63. There are no television or standard broadcast radio stations in Garland or Richardson. A non-commercial educational FM radio construction permit has been granted in Richardson, but the station is not yet on the air. Both Garland and Richardson have daily newspapers.

64. An analysis of the relative needs for television service in the two communities indicates that Garland's need for a television station is clearly greater than that of Richardson. The significantly greater population of Garland, as well as the existence of a non-commercial educational FM permittee in Richardson require that a decisive preference under the transmission needs aspect of Section 307(b) be granted to International.

65. The television services already available in the proposed coverage areas of the applicants (reception needs) is the second element in a standard Section 307(b) evaluation. International would provide a sixth grade B television signal to 690,072 persons not served by Buena Vista's proposal. This requires that a slight preference under the reception aspect be awarded to International as well.

B. *Comparative Analysis*

Diversification

66. The diversification criterion "is a factor of primary significance" since it constitutes the primary objective of the licensing scheme. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1908 (1965).

67. Leon Crosby, a 25 percent stockholder in Buena Vista, holds 48 percent of the voting stock and 100 percent of the non-voting preferred stock of Hispanic Broadcasters, Inc., licensee of KBSA-TV, Guasti, California. Deborah Olivas, a former 22 percent stockholder in Buena Vista whose broadcast interest is to be attributed to Buena Vista, holds 21.15 percent of the voting stock of United Minority Broadcasters, Inc. United Minority owns 52 percent of the voting stock of Hispanic Broadcasters. International has no ownership interest in any medium of mass communications.

68. The substantial stock ownership of the licensee of KBSA-TV by Leon Crosby, considered with the additional ownership of Debra Olivas, requires that a moderate diversification preference be awarded to International, in view of International's total lack of mass media interests.

Integration of Ownership and Management

69. Buena Vista proposes to integrate four of its eight stockholders into station management. Florence Coaxum, Timothy Crosby and

James L. Crawford are proposed to be involved in station management on a full-time basis (40 hours per week), and Buena Vista is entitled to 25 percent quantitative integration credit for their participation. Buena Vista is also entitled to 10 percent part-time quantitative credit for the involvement of Dr. George W. Fair, who is proposed to work at the station 20 hours per week.[6]

70. The quantitative integration of Buena Vista's principals is enhanced by their proposed local residence, history of participation in civic affairs within the community of Richardson or the larger proposed service area and their broadcast experience.

71. The integration proposals of Ms. Coaxum (8 percent stockholder) and Mr. Crawford (10 percent stockholder) are qualitatively enhanced because they are Black, and because Ms. Coaxum is a female. Timothy L. Crosby's integration is qualitatively enhanced due to his past broadcast experience. The integration proposals of all three are qualitatively enhanced because they have proposed to move to Buena Vista's proposed city of license, Richardson. Dr. Fair's part-time 10 percent quantitative integration credit is enhanced by his local residence of several years duration and by his substantial involvement in local civic affairs. Additionally, qualitative integration enhancement is awarded for Dr. Fair's minority status.

72. International is a non-profit, non-stock corporation and has three directors. With respect to nonstock corporations, "the Commission has consistently held that those persons holding relationships of personal interest and responsibility comparable to those of principals can be treated as owners". *Farragut Television Corporation*, 5 FCC 2d 93, 98, 8 RR 2d 552 (1966). Further, "the officers and directors of [a nonstock, nonprofit corporation] will be considered comparable to principals in a stock corporation [for integration purposes]". *See, Loyola University*, 12 RR 1017 (1956); *City of Jacksonville*, FCC 56–799, 12 RR 113 (1956); *Triad Television Corp.*, 25 FCC 848, 16 RR 501 (1958).

73. International is entitled to quantitative credit for 66.67 percent full-time integration since two of its directors, Geri S. Morgan (33.33 percent) and Melinda S. Fleming (33.33 percent), are proposed to work at the station full time (40 hours per week) in management positions. Mrs. Morgan will work at the station full time as Production Director and Miss Fleming will work full time as Sales Manager. In addition, International is entitled to 33.33 percent part-time integration credit for the participation of Dr. Elizabeth R. Vaughan who will be working in station management on a part-time basis.

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[6] International argues that Dr. Fair's integration proposal should not be credited. The Presiding Judge disagrees. Dr. Fair's Mondays, Wednesdays and Fridays will ordinarily permit him to work at the station. He will allocate one or two hours each weekday to the station, and will also work on weekends to fulfill his 20 hour per week commitment. (Buena Vista Ex. 4).

74. Dr. Vaughan will work at the station part-time as Program Director. International broadly attacks that proposal, claiming that no credit can be awarded for Dr. Vaughan's part-time participation because of her other time commitments. However, the evidence establishes that Dr. Vaughan's outside time commitments will be 35 hours per week in her practice as an opthalmologist, five hours per week in her radio ministry activities, and four and one-half to six hours per week (in addition to her 20 hours per week as International's Program Director) and hosting television programs broadcast on International's station, a total of 44$^1/_2$ to 46 hours per week. Dr. Vaughan's proposal to work 20 hours per week at International's station in addition to her present commitments, even including additional hours for commuting, seems clearly capable of effectuation.

75. International warrants a moderate preference on the integration criterion, since its 66.67 percent full-time integration credit exceeds Buena Vista's 25 percent full-time credit. International's credit for part-time integration exceeds Buena Vista's by 33.33 percent to 10 percent. International's integration proposal is qualitatively enhanced by the long-standing local residence of its directors, the civic involvement of Dr. Elizabeth Vaughan, and the female status of all its directors.

Auxiliary Power

76. International has made an auxiliary power proposal; Buena Vista has not. Therefore, International is entitled to a slight preference for its auxiliary power proposal.

Overall Comparative Analysis

77. Under the transmission needs aspect of the standard Section 307(b) issue, International warrants a decisive preference for its proposal to serve Garland, Texas. In addition, International garners a slight preference with respect to the reception needs aspect of the standard Section 307(b) issue because International would provide a sixth Grade B television signal to over 690,000 persons not served by Buena Vista's proposal. Thus, analysis of the proposals of International and Buena Vista requires that a grant be made to International, since it has a decisive preference under the transmission needs aspect of the standard Section 307(b) issue.

78. International is also superior to Buena Vista under the standard comparative issue. Under the diversification criterion, International is awarded a substantial preference due to the substantial stock ownership by Buena Vista principals in a television licensee, as compared to the lack of mass media interests for diversification purposes by either International or its principals. In addition, International is granted moderate preference for its proposal to integrate 66.67 percent of its principals full time, and

33.33 percent of its principals part-time, as compared to Buena Vista's 25 percent full-time integration proposal and 10 percent part-time integration proposal.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision IS TAKEN by a party or IT IS REVIEWED by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of International American Broadcasting Co., Inc. IS GRANTED and the application of Buena Vista Telecasters of Texas, Inc. IS DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD LUTON, *Administrative Law Judge*

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[7] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Candor
Financial Qualifications, Loan Commitment, Ability to Meet
Misrepresentation, Financial Qualifications

> Applicant found financially unqualified because of lack of good cause for late-filed financial amendment and failure to demonstrate reasonable assurance, on the merits, that sufficient financial resources would be available. Substantial comparative demerit assessed for lack of candor in setting forth proposed financial resources, and *prima facie* basis for remand on additional financial misrepresentation issue noted.
> *–Coastal Bend Family TV, Inc.*
> BC Docket No. 80–460

FCC 83R–46

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COASTAL BEND FAMILY TELEVISION, INC. Corpus Christi, Texas	BC Docket No. 80–460 File No. BPCT-790507KE
CHRISTIAN CHILDRENS NETWORK, INC. Corpus Christi, Texas	BC Docket No. 80–461 File No. BPCT-791026KI
For Construction Permit	

Appearances

B. Jay Baraff, Aaron Shainis, and *Lee J. Peltzman,* on behalf of Coastal Bend Family Television, Inc.; and *Leonard K. Buntrock, pro se,* on behalf of Christian Childrens Network, Inc.

DECISION

(Adopted: June 9, 1983; Released: (June 24, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Coastal Bend Family Television, Inc. (Coastal) and Christian Childrens Network, Inc. (Christian) for authority to construct a new commercial television station to operate on Channel 38 at Corpus Christi, Texas. By Hearing Designation Order, Mimeo No. 35947, 45 Fed. Reg. 65306, published October 2, 1980, the applications were

designated for hearing on a limited financial issue against Coastal and on the standard comparative issue. The financial issue was resolved favorably to Coastal in Memorandum Opinion and Order, FCC 80M-616, released December 18, 1980; however, by Memorandum Opinion and Order, FCC 81M-616, released March 3, 1981, a public file issue was added against Coastal by presiding Administrative Law Judge Tierney (ALJ), and by Order, FCC 81M-938, released April 1, 1981, and Memorandum Opinion and Order, FCC 81M-2865, released September 10, 1981, respectively, a limited financial issue and a misrepresentation and/or lack of candor issue were added against Christian.

2. The Initial Decision (I.D.), FCC 83D-3, released January 24, 1983, granted Christian's application. In reaching this result, the ALJ found Christian to be financially qualified and awarded it a substantial preference under the comparative criterion of diversification of control of the media of mass communications. He concluded that this preference outweighed whatever preference Coastal deserved under the integration of ownership and management criterion, especially when a slight comparative demerit against Coastal on the public file issue was factored in I.D., para. 59. The proceeding is now before the Review Board on exceptions filed by Coastal and a reply brief by Christian. In addition, Coastal has requested oral argument, which Christian opposes, and Christian has filed a petition for leave to amend its financial showing (April 7, 1983), which Coastal opposes. The Board has reviewed the I.D. in light of these exceptions, briefs, and other pleadings and our examination of the record. We agree with Christian that oral argument is unnecessary to further elucidate the relevant facts and points of law in this case, and we will accordingly deny Coastal's request for oral argument. *E.g., Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 53 RR 2d 1175 (Rev. Bd. 1983). Christian's petition for leave to amend will be granted to the extent indicated in paragraph 8, *infra*. We adopt the findings of fact in the I.D., except as modified herein, but disagree with the ALJ's ultimate conclusion and conclude that grant of Coastal's application will better serve the public interest, convenience, and necessity.

3. *Financial Qualifications of Christian.* At the time of hearing designation, Christian's basic financial qualifications appeared to be in order, and no financial issue was designated against it. Christian was relying on a financial plan set forth in a timely August 11, 1980 amendment to its application whereby the proposed $288,027 cost of constructing its new station and operating it for three months was to be met by the anticipated $891,500 net proceeds from the sale of "37 acres of prime real estate in downtown Corpus Christi" that "Applicant presently holds." See Coastal's November 3, 1980 petition to enlarge issues, at Exh. 4. By letter dated September 8, 1980 and filed on September 10, 1980 as part of a petition for leave to amend,

the then president of Christian, Reverend Willie Lee, Jr., informed the Commission that Christian did not hold legal title to the 37 acres in question, and requested that Christian's application be amended to delete all references to the property and to Christian's reliance on proceeds from its proposed sale as evidence of its financial qualifications. Coastal Exh. 4, at 1.[1] Recognizing the fatal impact of this amendment on its financial plan, Reverend Lee added: ". . . CCN[Christian] concedes that it is financially unqualified at this point. We are working hard to put the land transaction together and to generate other sources of financing as well." *Id.*, at 2.

4. It was in light of this revelation that Coastal petitioned to add financial qualifications and financial misrepresentation issues against Christian. In FCC 81M-938, *supra*, the ALJ added a "limited" financial issue, but declined to add any misrepresentation issue, pointing out that Christian had come forward, on its own and prior to Coastal's petition, to admit its "error" respecting ownership of the 37 acres, and that this admission belied any previous intent to misrepresent. According to Reverend Lee's September 8, 1980 letter, *supra*, Christian confused its leasehold interest in the land with legal title because all that was lacking was the giving of notice of the exercise of Christian's option to purchase and because Christian had "habitually" thought of the land as "our land."[2] Moreover, Reverend Lee explained, when Christian filed its application on October 26, 1979, it "intended momentarily" to exercise its option to purchase but the "necessary financing could not be immediately generated." *Id.*, at 2. Coastal excepts to the ALJ's failure to add the requested misrepresentation issue.

5. We have previously expressed our concern in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 807–808, 51 RR 2d 409, 415 (Rev. Bd. 1982), that assets claimed by an applicant in its financial statements must be accompanied by accurate and full disclosure of "unapparent interests in other parties." In the instant case, not only did Christian's financial plan create the "inaccurate impression" (Reverend Lee's words) that it owned an asset which it was only renting, but Christian's "inaccuracy" was aggravated by its accompanying October 20, 1979 *pro forma* balance sheet (Form 301, Exh. III-3, official notice taken), which listed the 37 acres as an asset encumbered with an (apparently phantom) $600,000 mortgage as a liability. Coastal's November 3, 1980 petition to enlarge contained allegations

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[1] The amendment was received at the Commission midway between the Hearing Designation Order's adoption on August 28, 1980 and its release on September 19, 1980. Following its refiling on February 5, 1981 as a result of discussion at a November 20, 1980 prehearing conference (Tr. 17), the ALJ accepted the amendment by Order, FCC 81M-536, released February 26, 1981.

[2] See Christian's October 19, 1979 "Lease Agreement with Option to Purchase" covering the land, which was an attachment to Christian's February 5, 1981 petition for leave to amend.

and a supporting affidavit challenging Christian's legal title, nonexistent mortgage, and option to purchase the 37 acres. We believe that these allegations and accompanying documentation presented a strong *prima facie* showing of deception sufficient to mandate the addition of a misrepresentation issue. *See Alabama Citizens for Responsive Public Television, Inc.*, 73 FCC 2d 615, 46 RR 2d 408 (1979). The necessary ingredient of a motive to deceive, *Western Connecticut Broadcasting Co.*, 47 FCC 2d 145, 30 RR 2d 453 (Rev. Bd. 1974), was also clearly present: without having alleged ownership and proposed sale of the 37 acres, Christian would have had absolutely no source of financing for its proposed station and its application would have been dismissed as patently defective. *See generally* Section 73.3566 (Defective Applications) of the Commission's Rules, 47 CFR 73.3566.[3] And we reject the notion that the retraction of apparent misrepresentations prior to detection proves lack of intent to deceive or otherwise obviates the need to examine such conduct at hearing. While Christian would have us believe that it intended its financial plan to be only "momentarily" inaccurate (see paragraph 4, *supra*), the inaccuracies were far from trivial, Christian permitted 11 months to pass before notifying the Commission of its misstatements, and other exculpatory arguments offered by Christian contradict its limp attempt at mitigation.[4] Thus, the Board concludes that a financial misrepresentation issue should have been added against Christian. But for the fact that Christian's application is being denied on other grounds, we would remand this proceeding for exploration of the effect of Christian's conduct on its basic or comparative qualifications. If proved, the alleged misrepresentations by Christian would merit heavy sanction. We again admonish all applicants to be precise, complete, and prompt in their filings with the Commission. "[W]here qualification of a representation is necessary for complete accuracy, it is better to be safe than sorry." *WHW Enterprises, Inc., supra*, 89 FCC 2d at 808, 51 RR 2d at 415.

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[3] The Commission recently emphasized the appropriateness of adding a financial issue where there is *prima facie* evidence of "misrepresentation or gross omission of an item which would render a proposal totally defective." *Muncie Broadcasting Corp.*, FCC 83-234, released May 19, 1983, at para. 15. Such evidence was glaringly present here.

[4] For example, at a remand hearing Christian would have to reconcile its September 8, 1980 contention that it meant to exercise its option to purchase the 37 acres as soon after October 1979 as the "necessary financing could . . . be . . . generated" (see paragraph 4, *supra*) with its statement in a May 18, 1981 supplement to petition for leave to amend, at 5, that Christian had "de-emphasized efforts to gain financial support to build and operate its proposed facility [beginning] in October 1979." This statement was in turn contradicted by a May 26, 1981 "erratum" which asserted, at 2, that "Since the date that its application was filed . . . CCN has diligently solicited financial support . . . ." Inquiry would also be necessary to reconcile language in Christian's lease agreement, at 2, describing the "express purpose" of the lease as being to study the feasibility of using the 37 acres for "the construction, maintenance and operation of a broadcasting facility," with Christian's contention 7 days later in its broadcast application that it would sell all of the land to finance its proposed station.

6. Turning to the limited financial issue that the ALJ did designate, we note that Christian did not oppose addition of the issue and did not file any proposed curative financial amendment prior to commencement of the hearing on May 12, 1981. Nor did Christian exchange any hearing exhibits pertaining to its financial qualifications on the April 14, 1981 exhibit exchange date. Nevertheless, on the first day of hearing (May 12, 1981), Christian filed a petition for leave to amend its application, along with a revised financial plan which listed construction and initial operation costs of $206,827 and proposed resources of $1,411,256 (corrected to $1,431,256 by Christian's May 18, 1981 supplement). That petition was briefly discussed by the ALJ and counsel at the hearing sessions on May 13 and 14 (Tr. 236–247, 452–455), but it is evident from the record that no one, including Christian's counsel, envisioned that any testimony would be taken on this matter at that time. Indeed, Christian's counsel requested and received the ALJ's permission to supplement its petition for leave to amend "on the first working day *after we have finished here*" (Tr. 453, emphasis added). Coastal and the then Broadcast Bureau opposed Christian's amendment on May 26, 1981 on grounds that the pleadings failed to demonstrate Christian's financial qualifications on the merits and, procedurally, did not meet the established six-point test of good cause for postdesignation amendments set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970):

> . . . the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

Based on these objections, the ALJ orally denied Christian's petition at a hearing conference on July 22, 1981 (Tr. 719) for failure to demonstrate good cause and memorialized that ruling in FCC 81M-2865, *supra*. Eleven months later, in its August 12, 1982 reply findings of fact and conclusions of law, at 6–7, Christian requested reconsideration of the ruling, and in paragraphs 49 and 50 of the I.D., the ALJ granted reconsideration, applied "relaxed" good cause criteria to accept the proffered financial amendment, and concluded that Christian was financially qualified based on its amended finances.

7. Coastal excepts to the ALJ's conclusion that Christian is financially qualified, renewing its previously successful arguments that Christian's amendment was not submitted with due diligence; that Christian's financial predicament and its need for an amend-

ment were voluntary; that acceptance of Christian's 28% reduced cost estimates would require modification of the existing hearing issues; and that acceptance of the amendment would disrupt the orderly conduct of the proceeding. On the merits, Coastal urges that Christian has not adequately shown that its proposed non-institutional lenders of $295,000—Messrs. William Reiff ($220,000) and John Stembridge ($75,000)—have sufficient net current liquid assets to meet their loan commitments, and that Christian has utterly failed to show that it will have available $1,086,256 in prepaid program revenues from Roloff Evangelistic Enterprises, Inc. In reply, Christian asserts that acceptance of its late amendment is dictated by the "choice among applicants" concerns of *Azalea Corp.*, 31 FCC 2d 561, 22 RR 2d 909 (1971), and *Crosthwait :fo v. FCC*, 584 F. 2d 550 (D.C. Cir. 1978). It contends that it had been diligently seeking to develop its finances since October 1979 and, most particularly, since September 1980, but that its revised financing package was not completed until May 12, 1981. Finally, Christian urges that it should be treated as a "preferred" applicant because it has substantial minority ownership,[5] and that it had reasonable assurance that the Roloff funds would be available.[6]

8. On April 7, 1983, Christian filed yet a further petition for leave to amend its finances, this time in light of the withdrawal of a $50,000 line of credit which was to have been made available by Christian Television Services, Inc. In its place, Christian proposes to increase William Reiff's loan commitment to $270,000 and includes an updated December 31, 1982 balance sheet for Reiff. The amendment also deletes Roloff Evangelistic Enterprises as a financing source. Coastal opposes acceptance of the amendment other than for purely advisory purposes (pursuant to Section 1.65 of the Rules, 47 CFR 1.65). We will grant Christian's petition and accept its 1983 amendment as a supplement to its May 12 and 18, 1981 financial amendments so that only a single good cause determination need be made and we can, if procedurally appropriate, consider the merits of Christian's latest full financial plan.

9. We agree with Coastal that Christian has not shown good cause for the submission of its May 1981 financial amendments eight months after September 1980, when it first conceded that it was financially unqualified (see paragraph 3, *supra*), and 19 months after

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[5] Because two of Christian's seven directors are Hispanic and will be integrated into the proposed station's operations in managerial roles, Christian is deemed to have 28.6% minority "ownership" in its non-profit, non-stock corporation.

[6] As to the liquidity of Messrs. Reiff and Stembridge, Christian seems to concede at page 10 of its reply brief that they are not sufficiently liquid, but asserts that neither were Coastal's sources of financing. Christian asks to be measured by the same standard. To the extent that the ALJ found Coastal's financing sources to be insufficiently liquid in Memorandum Opinion and Order, FCC 80M-2671, released December 18, 1980, he reduced their loan commitments accordingly. The liquidity of Christian's sources will be similarly treated. See paragraphs 11–12, *infra*.

it should have been aware that its finances were shaky in October 1979 (see paragraphs 3–5, *supra*).[7] Neither *Azalea* nor *Crosthwait* compels the Commission to accept curative amendments to preserve a comparative choice, *regardless of the presence or absence of good cause for late amendments. Cf. California Broadcasting Corp.*, 90 FCC 2d 800, 808, 51 RR 2d 1539, 1545 (1982) (the fact that an environmental issue is potentially disqualifying does not "entirely relieve" applicant of good cause showing). Indeed, *Crosthwait* expressly recognizes that the Commission "could properly haved snubbed" a belated attempt to repair a defective showing made at a hearing and not otherwise attended by good cause. 584 F.2d at 555. We have such a case here. Faced with a disqualifying financial issue, Christian had the burden of proof of demonstrating its financial qualifications at (or before) hearing. But it filed no advance pleadings or exhibits on this matter and introduced no documentary or testimonial evidence at hearing. Instead, it merely tendered a proposed financial amendment at the 12th hour (May 12, 1981), with no reasonable expectation or prospect that the merits of the amendment would be considered until sometime after the hearing ended. See paragraph 6, *supra*. While Christian contends that its proposal was not ready any earlier, it had between 8 and 19 months to firm up its finances prior to hearing, and it has not factually explained why it was unable to do so. Moreover, Christian's failure to exchange or introduce any evidence before or at hearing distinguishes this case from *Gilbert Broadcasting Corp.*, 68 FCC 2d 186, 43 RR 2d 51 (Rev. Bd. 1978), cited by Christian, in which the Board held that a revised financial proposal exchanged *on the hearing exchange date* without an accompanying amendment should have been permitted to be relied upon to meet a disqualifying issue. Timely exchange by Christian on April 14, 1981 would have permitted Coastal and the Bureau to address Christian's financial amendment prior to, or at least at, hearing. Christian's contrary procedure was bound to disrupt the orderly conduct of this proceeding, and succeeded. Due diligence required more. *Cf. Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203, (Rev. Bd. 1983); *Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 50 RR 2d 1546 (Rev. Bd. 1982).

10. More recently than *Azalea* and *Crosthwait*, the Commission held in *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, 49 RR 2d 1589,

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[7] In calculating this period of apparent indolence, we pass over Christian's August 11, 1980 financial amendment because that document did not introduce any additional financial sources. Indeed, to the contrary, it implicitly reported the loss of a $350,000 line of credit from International Bank, Corpus Christi, Texas, which was described in Exhibit III-2 of Christian's October 1979 application (official notice taken) as being the subject of present negotiations to finalize the terms. No loan commitment letter was included in the exhibit, and all reference to this line of credit was deleted in the August 11, 1980 financial amendment without explanation.

1594 (1981), that where, as here, an applicant is attempting to cure a disqualifying financial defect, it need not show that a curative amendment was occasioned by an involuntary act, and its diligence should be interpreted in light of the equities of the case. The Board looks to both quantity and quality of effort in measuring the equities of due diligence, *Shoblom Broadcasting, Inc., supra,*at 1206 n. 6, but can find neither in Christian's lackadaisical performance in this proceeding. Moreover, unlike the ALJ in his reconsideration action, we do not read the Commission's adoption of an abbreviated financial certification requirement in *Revision of Form 301*, 50 RR 2d 381, 382 (1981), as signaling a relaxation of the *Erwin O'Conner* good cause test when an applicant's finances have been called into question by a specially designated hearing issue. *Cf. South Florida Broadcasting Co., Inc.*, FCC 83-265, released June 2, 1983, reversing a Mass Media Bureau procedure established in *Minority Broadcasters of East St. Louis, Inc.*, Mimeo No. 5092, released July 15, 1982, which would have permitted use of an abbreviated financial certification, instead of a full demonstration of financial qualifications, when finances were questioned in a hearing designation order. Finally, while it is well established that the Commission will accord comparative qualitative enhancement credit for the participation of minority owners in station management, *WPIX, Inc.*, 68 FCC 2d 381, 411–412, 43 RR 2d 278, 315–316 (1978), minority applicants must, of course, still meet basic qualifying issues. *Cf.South Florida Broadcasting Co., Inc., supra.* Hence, good cause not having been shown for Christian's erratic and questionable amendment efforts, we conclude that the subject amendments should not have been accepted by the ALJ. Christian is therefore lacking a cognizable financial proposal and, accordingly, is financially unqualified. Nevertheless, out of an abundance of caution, we shall also examine the merits of Christian's current financial plan on the off chance that our procedural rejection of Christian's financial qualifications efforts is in error.

11. Christian's latest financial plan, filed April 7, 1983, envisions that its projected construction and operation costs of $206,827 will be met by a $270,000 loan from Christian's secretary-treasurer, William R. Reiff, and a $75,000 loan from a Mr. John Stembridge of Corpus Christi, Texas, who is neither an officer nor director of Christian and is not further identified in the record. Mr. Reiff's December 31, 1982 balance sheet shows current liquid assets of $5,653; nonliquid assets of $975,240 (real estate) and $63,023 (miscellaneous); total liabilities of $402,190; and net worth of $641,726. Mr. Stembridge's May 12, 1981 balance sheet shows current liquid assets of $5000; nonliquid assets of $20,000 (unaged loans and accounts receivable), $222,000 (real estate), and $6800 (miscellaneous); total liabilities of $29,900; and net worth of $223,900. To satisfy his loan commitment, Mr. Stembridge proposes to mortgage or sell a $95,000 property in Hollywood, Florida, which already has a $20,000 mortgage against it.

However, neither Mr. Reiff nor Mr. Stembridge has supplied any evidence of the ready marketability or liquidity of their real estate assets, which is required by *Kaye-Smith Enterprises*, 90 FCC 2d 105, 109, 51 RR 2d 875, 879 (1982),[8] if they are to be relied on as funding sources, nor has Mr. Reiff even identified which ones of his 12 properties he would attempt to sell to meet his commitment.

12. While the Commission has long held that "ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield" provides reasonable assurance of the ability to secure the required funds, *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (1966); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev. Bd. 1982); *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 53 RR 2d 953 (Rev. Bd. 1983), these cited cases the ratio between net worth and loan commitment has been exceedingly high: 54:1 in *International*; 16:1 in *Cornwall*; and 22:1 in *Cannon's Point*. In the instant case, Mr. Reiff's net worth/loan ratio is 2.4:1, and Mr. Stembridge's is 3:1. These ratios are dramatically less than what case precedent contemplates for the presumption of ready liquidity, and because the subject net worths are based almost exclusively on real estate, there is no evidence of marketability, and the properties lack adequate apraisals,[9] we cannot conclude that either Mr. Reiff or Mr. Stembridge has provided reasonable assurance that he will be able to fulfill his loan commitment. *Kaye-Smith Enterprises, supra*. Hence, Christian has failed to meet its burden of demonstrating its financial qualifications,[10] and we conclude that, on the merits, Christian is financially unqualified to be a Commission licensee. *See Revision of Form 301, supra*, at 382, where the Commission expressly held that its filing reforms were "not, in any way, modifying the underlying substantive financial criteria"; *cf. South Florida Broadcasting Co., Inc., supra.*

13. *Misrepresentation and/or Lack of Candor Issue.* In its May 12, 1981 proposed financial amendment, Christian included the following line item as a financial resource:

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[8] *But see Rose Broadcasting Co.*, 68 FCC 2d 1242, 1246 n. 9, 43 RR 2d 1317, 1325 n. 9 (1978), which suggests that "no information other than a valid appraisal" is required. In this connection, see note 9, *infra*.

[9] Mr. Reiff is an employee of the Texas Real Estate Commission and has provided his own superficial appraisals of his real estate holdings. This type of self-serving and cursory documentation cannot be credited. While Mr. Stembridge has attempted to provide an independent appraisal, it too fails, since neither the credentials of the appraisor nor the basis for his appraisal is indicated. We cannot conclude that the proffered appraisals are "valid". *Rose Broadcasting Co., supra.*

[10] It should also be noted that Christian's April 5, 1983 balance sheet shows that its corporate liabilities exceed its assets by $47,180. See Christian's April 7, 1983 petition for leave to amend. This deficit does not appear to be reflected in Christian's financial plan and would have to be satisfied from any funds made available by Messrs. Reiff and Stembridge.

"4. Revenues from programming purchased by Lester Roloff in the amount of $1,086,256 (See Attachment III-2(E))." [Coastal Exh. 5, at 2.]

Attachment III-2(E) is a copy of an April 11, 1979 Time Sales Agreement between Coastal and Roloff Evangelistic Enterprises, Inc., in which Roloff undertakes to prepay $1,086,256 to Coastal for broadcast time on Coastal's station upon issuance of a construction permit to Coastal. Neither Christian's May 12 amendment nor its May 18, 1981 supplement contained any explanation of the relationship between Christian's proposed reliance on the Roloff revenues and the contract between Coastal and Roloff (which contract nowhere references Christian). In a petition to reopen the record and enlarge the issues, filed on May 27, 1981, Coastal submitted an affidavit from Reverend Lester Roloff dated May 15, 1981 (Coastal Exh. 7), in which Reverend Roloff averred that between April 15 and May 8, 1981 he was contacted by Christian's Reverend Lee about entering into a similar time sales agreement with Christian and that Reverend Roloff refused "in no uncertain terms".[11] Because Christian's financial amendments were silent about this rejection by Reverend Roloff, Coastal requested a misrepresentation and/or lack of candor issue against Christian. Christian opposed the issue on the grounds that it had never actually "represented" that it had an agreement with Roloff, that Christian is financially qualified even without relying on the proceeds from a Roloff agreement, and that its "good faith inclusion" of the Roloff contract was based on advice of counsel. Counsel maintained that a "presumption" was appropriate that Roloff would enter into a similar contract with Christian (if Coastal did not receive the station license) in light of *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 45 RR 2d 689 (1979), where the Commission conclusively presumed that a renewal applicant's transmitter site would be available to a successful challenger. Christian's June 11, 1981 Opposition, at 2–6. The ALJ orally granted Coastal's petition in part (Tr. 729) at his July 22, 1981 hearing conference, added the subject misrepresentation/candor issue as a basic qualifying issue, and memoralized that ruling in FCC 81M-2865, *supra*.

14. The ALJ conducted a "paper hearing" on this matter, Order, FCC 82M-1029, released April 2, 1982, and made two key findings in the I.D.: (1) "the prospect of the sizeable Roloff revenue expected was far less than real" (para. 34); and (2) "The listing of expected revenues to be purchased by Lester Roloff . . . is far less worthy of

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[11] By affidavit dated January 20, 1982, Reverend Roloff subsequently informed the Commission that this conversation may have been with William Reiff, rather than Reverend Lee, and may not have taken place between April 15 and May 8, 1981. "However, the substance of the conversation . . . remains the same." Affidavit attached to Coastal's January 27, 1982 Correction to Affidavit, at 1. Reiff separately confirmed by affidavit that he had conversed with Reverend Roloff in this vein in January 1981. Coastal Exh. 9.

reasonable assurance; indeed, it would appear highly presumptuous, if not a total myth." (para. 50). However, no explicit legal conclusions were drawn therefrom. Coastal excepts to this omission, urging the Board to conclude that Christian's adversions to alleged revenue from Reverend Roloff amounted to a "total fabrication" and a disqualifying misrepresentation.

15. Because this misrepresentation issue against Christian was added on a qualifying basis, it is clear, by implication, that the ALJ concluded that Christian should not be disqualified; only basically qualified applicants are entitled to comparative consideration, and Christian's application was comparatively considered. I.D., paras. 51–63. However, more must be said about Christian's financial representations. In our view, the ALJ too charitably couched his findings in the terminology of financial qualifications—whether Christian had "reasonable assurance" of the Roloff revenues—instead of using the terminology of misrepresentation and lack of candor.

16. While misrepresentation connotes "a false statement of an objective fact intentionally made to deceive," the core of lack of candor is "omission . . . failure to be completely forthcoming in the provision of information which could illuminate a decisional matter." *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1135, 1137, 50 RR 2d 1321, 1324, 1325 (Rev. Bd. 1982), *modified*, 53 RR 2d 44 (1983). We conclude that Christian's presumptuous listing of the Roloff revenues as its own *million dollar* financial resource, without any explanatory qualification, demonstrated a serious lack of candor bordering on misrepresentation, especially when coupled with Christian's failure to report that Reverend Roloff had *specifically disavowed* any intention of entering into a time sales contract with it.[12] Christian's fanciful interpretation of *Cameron* as a justification for its "reasonable assurance" of the Roloff revenues is without support in Commission precedent. Indeed, this *Cameron* interpretation was not even offered as a "good faith" explanation of Christian's representation until after Coastal challenged Christian's financial plan. It is disingenuous for Christian to argue that it never formally "represented" that it had an agreement with Roloff; while this may be technically true, it begs the question what representation *was* intended when it deliberately listed the Roloff revenues in its

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[12] *Cf. Valley FM Radio*, 53 RR 2d 1195 (Rev. Bd. 1983), where the Board recently remanded a proceeding on site availability, lack of candor, misrepresentation, and failure to report issues where an applicant relied on a site even though he had received letters from the site's owner saying that the site was not available. Despite these letters, the applicant remained "confident" that the site would be available. *Accord, Shoblom Broadcasting, Inc.*, *supra*, at n. 4, in which the Board observed that National Park Service letters refusing use of a specified site by an applicant vitiated the applicant's reasonable asurance that the site would be available.

financial plan and attached a Roloff-Coastal contract. There is manifestly an element of hocus-pocus in such conduct. And Christian's assertion that it would have been financially qualified even without the Roloff revenues (but see paragraph 12, *supra*), is irrelevant; even useless deceptions may prove a desire to deceive, where, as here, an obvious motive to deceive exists (viz., to counter a financial issue). *See Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1100, 50 RR 2d 1251, 1258–59 (Rev. Bd. 1982), interpreting *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

17. The sole remaining question is the proper degree of sanction for Christian's lack of candor. We believe that a substantial comparative demerit is warranted, but not outright disqualification. In mitigation of the ultimate sanction of disqualification, a sanction which is appropriate where a "willful intent to deceive" is discerned, *Fox River Broadcasting, Inc., supra*, 88 FCC 2d at 1137, 50 RR 2d at 1325, we note the ALJ's observations that Christian's application has been poorly prosecuted over an extended period of time, with several unexplained removals or withdrawals of counsel and much *pro se* representation. I.D., para. 62. While Christian was duly cautioned that it would be held to the Commission's rules and policies, *see, e.g.*, Memorandum Opinion and Order, FCC 81M-616, released March 3, 1981, at n. 1, our examination of this record reveals so many blunders and miscues that they cast doubt on the willfullness of Christian's intent to deceive. In this case, the distinction between willful and clumsy lack of candor is sufficiently blurred to justify the slightly lesser sanction of a substantial demerit.[13] *Cf. Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293 (Rev.Bd. 1983) (applicant disqualified because of pattern of intentional deception).

18. *Summation.* All exceptions having decisional signficance having been considered by the Board, we conclude that Christian is financially unqualified to be a Commission licensee and that its application must therefore be denied. But for this conclusion, a remand of this proceeding for the addition and exploration of a financial misrepresentation issue against Christian (see paragraphs 3–5, *supra*) would be mandatory. Finding that Coastal is qualified to be a licensee, we further conclude that a grant of Coastal's application will serve the public interest, convenience, and necessity.[14]

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[13] Inasmuch as Christian's lack of candor appeared beyond dispute from the documentary evidence, the ALJ's conduct of a paper hearing on this issue was permissible. *See Hudson C. Millar, Jr.* v. *FCC*, No. 77–2040 (D.C. Cir., May 20, 1983), slip op. at 17–19. In any event, the exceptions do not challenge this procedure.

[14] The Board would reach the same result even if Christian had been found to be financially qualified and not subject to remand on a financial misrepresentation issue. In reviewing the ALJ's comparative conclusions, we agree that the applicants are essentially equal on the comparative integration criterion. See

19. ACCORDINGLY, IT IS ORDERED, That the request for oral argument filed by Coastal Bend Family Television, Inc. on March 28, 1983 IS DENIED;

20. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Christian Childrens Network, Inc. on April 7, 1983 IS GRANTED to the extent indicated in paragraph 8, *supra*;

21. IT IS FURTHER ORDERED, That the motion to strike filed by Coastal Bend Family Television, Inc. on April 19, 1983 IS DENIED, and the motion to accept late filed pleading and opposition to motion to strike filed by Christian Childrens Network, Inc. on April 25, 1983 IS GRANTED; and

22. IT IS FURTHER ORDERED, That the application of Coastal Bend Family Television, Inc. (File No. BPCT-790507KE) for a construction permit to establish a new television station at Corpus Christi, Texas IS GRANTED, and the application of Christian Childrens Network, Inc. (File No. 791026KI) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

I.D., para. 59. However, Christian would only be entitled to a slight diversification preference based on the 49% imputed interest of Coastal in three AM stations in Winston-Salem, North Carolina, Chattanooga, Tennessee, and Mobil, Alabama—all hundreds of miles away from Corpus Christi, Texas—rather than the substantial preference that the ALJ awarded (I.D., para. 54). *Cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 51 RR 2d 1604 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 50 RR 2d 1142 (Rev. Bd. 1982). We believe that even with Coastal's slight comparative demerit on the public file issue (which it has not appealed), Coastal is comparatively superior to Christian, whose substantial comparative demerit for lack of candor (see paragraph 17, *supra*) vitiates its slight diversification preference and overcomes Coastal's slight public file demerit. *Cf. CJL Broadcasting, Inc.*, 88 FCC 2d 750, 50 RR 2d 1159 (Rev. Bd. 1981).

FCC 83D-3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COASTAL BEND FAMILY TELEVISION, INC. Corpus Christi, Texas	BC Docket No. 80-460 File No. BPCT-790507KE
CHRISTIAN CHILDRENS NETWORK, INC. Corpus Christi, Texas	BC Docket No. 80-461 File No. BPCT-791026KI
For Construction Permit	

Appearances

Aaron Shainis, B.J. Baraff and James A. Koerner, Esqs. (Baraff, Koerner, Olender & Hochberg, P.C.) on behalf of Coastal Bend Family Television, Inc.; (Joseph E. Dunne, III, and James A. Gammon, Esqs. (Gammon and Grange), Stuart B. Mitchell, Esq., Bruce Navarro, Esq., earlier counsel since withdrawn or resigned, The Reverend Willie Lee, also withdrawn) Leonard K. Buntrock, *pro se*, on behalf of Christian Childrens Network, Inc.; and William D. Freedman and Allan Moskowitz, Esqs., on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued: January 17, 1983; Released: January 24, 1983)

Preliminary Statement

1. *Designation Order*, 45 Fed. Reg. 65306, published October 2, 1980, specified the following issues in this proceeding:

> 1. To determine with respect to Coastal Bend Family Television, Inc. (Coastal):
>
> (a) the source and availability of additional funds over and above the $5,000.00 indicated; and
>
> (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.
>
> 2. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. By *Memorandum Opinion and Order*, FCC 80M-2671, released December 18, 1980, the financial issue specified in the *Designation Order* was resolved favorably to Coastal.

3. By *Memorandum Opinion and Order*, FCC 81M-616, released March 3, 1981, the Presiding Judge added the following issues with respect to Coastal:

> (c) whether Coastal has adequately consulted with leaders of women and blacks in its proposed community of license;
>
> (d) the effect of the evidence adduced under the limited issue on the basic or comparative qualifications of applicant Coastal.
>
> (e) to determine whether applicant Coastal has failed to consistently maintain a public file in its proposed city of license as required by Commission rules, and, particularly:
>
> (1) whether applicant Coastal has harassed or intimidated members of the public attempting to inspect the public file;
>
> (2) whether the applicant has demanded an unreasonable price for copying documents contained in its public file in contravention to Rule 73.3526;
>
> (3) the effect of the evidence adduced under this issue and its subparts on the basic or comparative qualifications of the applicant Coastal.

4. By *Order*, FCC 81M-938, released April 1, 1981, the Presiding Judge added the following issue with respect to Christian Childrens Network, Inc. (CCN):

> 1. To determine, in light of reported and current conditions, whether Christian Childrens Network, Inc. (CCN) is financially qualified to effect its proposal and, premised on the evidence adduced thereunder, whether CCN is basically qualified to be an applicant.

5. By *Memorandum Opinion and Order*, FCC 81M-1514, released May 14, 1981, the ascertainment issue (added in *Memorandum Opinion and Order*, FCC 81M-616, released March 3, 1981) was resolved favorably to Coastal.

6. By *Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981, the Presiding Judge added a misrepresentation issue against CCN, to wit:

> 2. To determine whether Christian Childrens Network, Inc., misrepresented and/or lacked candor as to its reliance on pre-paid advertising commitments from Roloff Evangelistic Enterprises;
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issue, whether CCN has the requisite qualifications to be a Commission licensee.

7. Prehearing conferences were held on November 20, 1980, and January 30, 1981. Hearing sessions were held on May 12, 13, 14 and 15, 1981. A post-hearing conference was held on July 22, 1981. The record was originally closed May 15, 1981; reopened and closed, June 2, 1981; reopened at conference, July 22, 1981; and, finally, closed by *Order*, FCC 82M-1945, released June 18, 1982.

8. The parties applicant timely filed proposed findings, conclusions and replies. Counsel for the Chief, Broadcast Bureau participated in prehearing, hearing and post-hearing phases, but for otherwise valid reasons did not file proposed findings and conclusions.

9. The several counsel listed as appearing for CCN participated from time to time as changes or withdrawals occurred. Leonard K. Buntrock, who was the final counsel of record, is an officer of CCN.

10. Because of the patent inadequacy of the parties' original proposed findings of fact, especially those of CCN, the parties, particularly CCN, were directed to prepare and file appropriate submissions in conformity with the established Rules of Practice and Procedure. (*See Order*, FCC 82M-2594, released August 25, 1982; Rule 1.264 (47 CFR 1.264).) In a somewhat perplexing manner, CCN reported that that *Order* failed to reach what it termed the proper addressee. By further *Order*, FCC 82M-3090, released October 6, 1982, CCN was given an additional grace period of 30 calendar days within which to properly respond. Coastal was also extended the privilege to reply to those expected filings, Coastal having filed timely Supplemental Findings, as directed.

11. Finally, CCN on November 5, 1982, filed Revised Proposed Findings of Fact and Conclusions of Law signed by its Vice President, Leonard K. Buntrock. Coastal filed its Reply to Revised Proposed Findings on November 22, 1982, and continued its earlier urging for dismissal of CCN's application. Though government counsel on behalf of the Chief, Broadcast Bureau (now Mass Media Bureau) participated throughout the hearing sessions, for reasons of personnel austerity, the customary and generally helpful contributions of proposed findings and conclusions were not available here.

12. For the reasons set forth hereinafter, this, as an Initial Decision SHALL GRANT the application of Christian Childrens Network, Inc.; that being so, the application of Coastal Bend Family Television, Inc., IS DENIED.

Findings of Fact

Public File Issue

13. In specifying the issue, questions were raised concerning whether: (a) Coastal's public file was unavailable for a period of time, (b) members of the public were charged excessive fees to copy portions of Coastal's public file, and (c) Coastal attempted to "harass and intimidate" persons who sought to use its file.

14. At the time Coastal filed its application on May 7, 1979, its public file was located at 3833 South Staples, Suite 46, Corpus Christi, Texas (Bureau Ex. 5, p. 3). This was the address of the Professional Advertising Agency which was owned by William M. Jeffers (Coastal Ex. 3, p. 1). In the later part of August 1979, when

the file was located at this location, Reverend Willie Lee, CCN's then President, went to look at Coastal's public file (Tr. 163).[1] Mr. Jeffers did not ask Reverend Lee to identify himself and did not ask for what purpose he was looking at the file (Tr. 165). Reverend Lee asked Mr. Jeffers if he was intruding and Mr. Jeffers responded that he was not (Tr. 167). Reverend Lee stayed to look at the file for approximately 10 to 15 minutes (Tr. 171). Reverend Lee's purpose in looking at the application was to get a greater sense of what a finished application was to look like so as to enable him to prepare CCN's application (Tr. 177). Sometime in October 1979, Mr. Jeffers moved his offices and, thus, Coastal's public file was relocated to his new offices at Suite 501, 101 North Shore Line, Corpus Christi, Texas. Information was left at the South Staples address as to where Coastal's public file was located. This was done by a card being placed in the window (Coastal Ex. 3, p. 1). In December 1979, after the public file had been relocated, Reverend Lee went to inspect the file again. He wanted to see if any amendments had been filed (Tr. 178). When he received the file, Reverend Lee and his communications counsel examined the file (Tr. 194).

15. In January 1980, Mr. Jeffers moved to Knoxville, Tennessee, and took Coastal's public file with him (Coastal Ex. 3, p. 1).

16. In August 1980, Reverend Lee attemped to view Coastal's public file (Tr. 203). The purpose of this visit was to see if Coastal had amended its application prior to the "B" cut-off date (Tr. 203–204). Mr. Jeffers would have it that the relocation of the public file to Knoxville would be only a temporary measure until he could make more permanent arrangements for the file in Corpus Christi. However, he forgot about the file (Coastal Ex. 3, p. 1).

17. In August 1980, during a conversation with William Kitchen, Mr. Jeffers remembered that Coastal's public file had not been forwarded back to Corpus Christi. In August 1980, Coastal's public file was forwarded to the office of Harry Dobbs in Corpus Christi. Mr. Jeffers overlooked the republication requirement (Coastal Ex. 3, p. 2).

18. Mr. Kitchen and Mr. Jeffers were long time friends. They attended college together and worked together at CLW Broadcasters, Inc., in Chattanooga (Tr. 286). Mr. Kitchen's company, Quality Media Corporation, does broadcast consulting work. Due to his friendship with Mr. Jeffers, Mr. Kitchen advised Mr. Jeffers with respect to various matters involving Coastal's application (Tr. 287). Prior to the time he became a stockholder in Coastal, Mr. Kitchen

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[1] Reverend Lee said that when he went to Mr. Jeffers' office to view the public file he was greeted by a secretary and informed that the application was located there. Mr. Jeffers came out and invited Reverend Lee into his office to look at the file (Tr. 164). Reverend Lee claimed that his reason for looking at the file was to get a feel for what a completed application looked like (Tr. 164–165). Reverend Lee acknowledged that he was treated in a friendly manner (Tr. 248).

spoke with Mr. Jeffers about the public file. This conversation took place in July or August of 1980 (Tr. 288). He reminded Mr. Jeffers of the obligation of Coastal to keep a public file available for public inspection in Corpus Christi (Tr. 288). Mr. Jeffers informed Mr. Kitchen that he had forgotten about the file after having brought it to Knoxville. Mr. Kitchen advised Mr. Jeffers to Express Mail the file to him for review by Quality Media Corporation's staff. It would then be mailed to Corpus Christi for maintenance at the office of Harry Dobbs, an attorney (Tr. 290).

19. During the period when Coastal's public file was either located at the South Staples or North Shore Line locations, the only individuals who ever requested to see it were Ms. Mary Louise Pena, a director of CCN (CCN Ex. 1, p. 1), and Reverend Lee (Coastal Ex. 3, p. 2).

20. Around the time Coastal filed its application, Mr. Jeffers had a conversation with Robert Jensen[2] concerning the public file and the logistics involved in providing copies of it to members of the public, if requested. Having had experience with other applications, Jensen knew that there was a requirement for the maintenance of a public file in Corpus Christi (Tr.306).

21. Mr. Jeffers expressed his concern that any large scale copying would be a drain on his limited staff. It was understood that any member of the public was entitled to see the public file and physically copy information from it. During the course of the conversation, the amount of $2.00 per page was discussed (Coastal Ex. 3, p. 2). Mr. Jensen recalled that he had a brief discussion with Mr. Jeffers in his office, as to the specific policies to be followed by Coastal where members of the public wanted copies of the application (Tr. 309–310). Mr. Jensen recalls stating, as he would have it, in jest, that Mr. Jeffers could charge a couple of dollars a page (Tr. 312–314).[3]

22. This conversation was overheard by Mr. Jeffers' secretary, Ms. Janice Davis, who assumed that $2.00 per page was what was to be charged (Tr. 318). However, she was not instructed by any Coastal official to charge that amount (Coastal Ex. 3, p. 2).

23. When Mr. Jeffers was not in the office, Ms. Davis did charge Ms. Pena $47.00 for duplicating a portion of Coastal's application (Coastal Ex. 3, pp. 2–3). This occurred on October 22, 1979 (Bureau

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[2] At the time Coastal's application was filed, Robert Jensen held the office of Executive Vice President and Secretary (Tr. 304). He does not currently have any ownership interest in Coastal, but did at the time Coastal's application was filed (Tr. 303–304). Mr. Jensen sold his interest in August or September 1980 (Tr. 304). (An amendment filed by Coastal and accepted by *Order*, FCC 82M-3743, released November 26, 1982, reported the death of Mr. Jensen.)

[3] At the time this conversation took place, Mr. Jeffers' receptionist was at her desk in the office adjacent to Mr. Jeffers' office. There was an open door between the two offices (Tr. 311).

Ex. 2). After the charge had been made, Mr. Jeffers encountered Ms. Pena in the parking lot. She complained to him about the amount she had been charged for the copies. Mr. Jeffers informed Ms. Pena that the amount she had been charged was a mistake and requested that she accompany him to his office so that he could make an adjustment. Ms. Pena, however, refused to allow Mr. Jeffers to make any adjustment (Coastal Ex. 3, p. 3).

24. Ms. Pena went to look at the Coastal public file as a result of a conversation she overheard between Reverend Lee and CCN's engineer a few days earlier (Tr. 406). She offered to obtain the engineering portion of Coastal's application to assist CCN (Tr. 408). She copied those portions of Coastal's application as she was directed by Reverend Lee and CCN's engineer (Tr. 424). She did not understand what she was copying (Tr. 479–480). She, however, was aware that CCN needed the information to meet a filing deadline (Tr. 480). When Ms. Pena came to Jeffers' office, she was asked to identify the organization she was with.[4]

25. Upon learning that Ms. Pena was affiliated with a competing applicant, Mr. Jeffers was concerned because she had copied Coastal's entire equipment proposal, which consisted of 24 pages. It appeared to him that CCN was merely going to be copying a portion of Coastal's application in order to meet the filing deadline which was only four days hence (Coastal Ex. 3, p. 3). Mr. Jeffers subsequently telephoned Ms. Pena at her mother's residence and indicated that what she had done appeared to be somewhat unethical.[5] The facts would suggest that Ms. Pena, nor anyone else, was ever discouraged from viewing Coastal's public file (Coastal Ex. 3, p. 3).

Financial Issue

26. In specifying the financial issue with respect to CCN, the following was noted:

> ". . . CCN by its September 10, 1980, amendment (not earlier acted upon but allowed to be resubmitted during prehearing, November 20, 1980) admitted error respecting ownership of certain real property and related financial information. CCN's resubmitted amendment filed, February 5, 1981, covered the areas in dispute. CCN's Petition was granted and its amendment accepted by *Order*, FCC 81M-536, released February 26, 1981. . . . CCN's no longer representing ownership of certain real property, poses the notion that CCN 'is financially unqualified at this point.' Hence a showing has been made to add a *limited* financial issue against CCN to inquire as to its ability to finance its proposal." See *Order*, FCC 81M-938, released April 1, 1981.

The burden of proceeding and the burden of proof were placed on CCN.

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[4] Her response was that she was an individual wanting to see the application (Bureau Ex. 2).

[5] Ms. Pena confirmed that Mr. Jeffers was polite to her both on the phone and in his office (Tr. 485).

27. CCN failed to offer any evidence at the hearing with respect to its financial qualifications. CCN, at one point, admitted that it was not financially qualified. Specifically, CCN stated:

> "With the withdrawal of this land from our application, CCN concedes that it is financially unqualified at this point." (Coastal Ex. 4.)

28. CCN, in its Reply Findings, addresses that matter and cites the transcript of obiter language in a case seemingly misidentified:

> ". . . by the theory that if someone were to get a lucrative television facility . . . . there would be no problem in getting the necessary financing." CCN continues, "(2) If case law is supportive of CCN's use of the REE [Roloff Evangelistic Enterprises, Inc.] time-sales contract values perhaps it might be favorably found that CCN may be financially qualified as of the same moment as COASTAL on the same basis of the REE contract passing to the surviving applicant in a situation where there will be only one suitable station in the market place." (CCN's Reply Findings filed August 12, 1982, at p. 7.)

Misrepresentation Issue

29. The specification of the misrepresentation issue with respect to CCN, was predicated on CCN's representation in its May 12, 1981, amendment that it would have over one million dollars in revenue available from Roloff Evangelistic Enterprises. (*Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981, at paragraph 9.)

30. By letter dated September 8, 1980, and filed with the Commission as part of an amendment to its application, as noted in para. 27, *supra*, CCN stated, *inter alia*, the following:[6]

> "With the withdrawal of this land from our application, CCN concedes that it is financially unqualified at this point." (Coastal Ex. 4.)

31. On May 12, 1981, and May 18, 1981, CCN sought to amend its application to reflect, *inter alia*, reliance on revenues from programming purchased by Lester Roloff. Specifically, CCN indicated as follows:

> "4. Revenues from programming purchased by Lester Roloff in the amount of $1,086,256 (See Attachment III-2(e))." (Coastal Exs. 5 and 6.)

32. Prior to these submissions, Mr. Roloff[7] was contacted by either Reverend Willie Lee or William Reiff of CCN. Mr. Roloff was asked if Roloff Evangelistic Enterprises would be willing to prepay to CCN the sum of $1,086,000 upon grant of a construction permit to it

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[6] The letter was signed by CCN's then President, Reverend Willie Lee, Jr.

[7] Mr. Roloff is President of Roloff Evangelistic Enterprises, Inc. (Coastal Ex. 7.) It would seem common knowledge, certainly an object warranting Official Notice (*Cf.*, *Washington Post*, November 3, 1982, at p. B-6) that Lester Roloff and others suffered death in a tragic airplane accident at or near Normangee, Texas. Yet, for whatever reason, no one has seen fit or necessary to report that fact for this record.

by the FCC. Mr. Roloff informed the individual who contacted him that he would not be willing to enter into such an agreement with CCN. (Coastal Exs. 7 and 8.)

33. William Reiff confirmed that he spoke with Mr. Roloff concerning the possibility of negotiating a contract with CCN similar to the one which Roloff had with Coastal in the event CCN was awarded the broadcast franchise. Roloff's response, according to Reiff, was as follows:

> ". . . Brother Roloff replied that he did not feel he should talk to us and that any discussions in this vein should be had with Coastal Bend. He then went on to explain that he had made a commitment to Coastal Bend and to enter into a similar contract with us could be a violation of that commitment." (Coastal Ex. 9.)

34. But, CCN argues in its Revised Proposed Findings that absent or apart from the hoped for Roloff expected revenues, its newly submitted financial plan filed May 12, 1981, in the form of a proposed amendment (later rejected as principally untimely filed by *Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981) indicated a first quarter operating budget of $206,827 supported by loan commitments from ". . . . Bill Reiff $220,000.00 [$200,000.00], Christian Television Services . . . $50,000.00, John Stembridge . . . $75,000.00." CCN's addition of the Roloff revenue of $1,086,000, it says was "not as a matter of deception, misrepresentation, nor lack of candor, but based on a reasonable supposition in a one-Christian Station market that the buyer of Christian Time programming will go to the station granted the construction permit." (CCN's Revised Proposed Findings at p. 10.) On this score, then, it can be and is found that the prospect of the sizeable Roloff revenue expected was far less than real.

Comparative Issue

35. CCN is a non-profit corporation operated by a board of trustees and appointed officers. Leonard Buntrock is Vice President and current Chief of Operations. William R. Reiff is secretary and currently operating as Treasurer. Mary Louise Pena and Beatrice Pena are members of the Board of Directors. None of these officers or directors have any ownership interest in or control in any medium of mass communications in Corpus Christi.

36. Leonard K. Buntrock, a graduate of Texas A&I University who served in the United States Army in Europe, is also President of Glory Alleluia, Inc., a religious organization. William R. Reiff is a field representative for the Texas Real Estate Commission and an independent investor in real estate. Mary Louise Pena is a personal secretary to a Nueces County Judge. Beatrice Pena is a clerk in the county assessor's office. Both the Penas are also Hispanic. Mr. Reiff is an attorney, "but not in practice." Mr. Buntrock also worked briefly for an advertising agency and for station KZTV in Corpus

Christi as a copy writer and time salesman. Mr. Buntrock worked as a supervisor in the Collection Department of the Credit Bureau of Corpus Christi for 10 years and was later employed by Mutual of New York as an insurance salesman for 13 years. For the last three years, he has been a full-time minister.

37. Coastal has no *direct* media interests; however, Beacon Broadcasting, Inc. (Beacon) is the licensee of WBFU, Winston-Salem, North Carolina; WMOC, Chattanooga, Tennessee; and WPCY, Mobile, Alabama. Beacon is in turn owned by Quality Media Corporation, a corporation controlled by William J. Kitchen, who was a 49 percent stockholder in Coastal. Kitchen's interest in Coastal was acquired by Beacon. (*See Order*, FCC 82M-0934, released March 23, 1982.) Beacon's broadcast interests are thus attributable to Coastal.

38. Coastal is a corporation having but two shareholders, originally William F. Jeffers and William J. Kitchen. Beacon Broadcasting, Inc., having since acquired Kitchen's 49 percent interest, while Jeffers, who is President and proposed to be full time general manager of the proposed station, has subscribed to 51 percent of the stock. Jeffers also will participate in the day-to-day decision making and direct the operation of the station. Jeffers was born in Cleveland, Ohio, and moved to the Clinton/ Oak Ridge, Tennessee, area and lived there until 1963 (Coastal Ex. 1).

39. In 1960, Mr. Jeffers was employed by the Union Carbide Corporation, a contractor for the Atomic Energy Commission and the Oak Ridge National Laboratory (ORNL). At ORNL, Mr. Jeffers worked as a records clerk and machinist (Coastal Ex. 1, p. 2).

40. Due to a desire to enter the ministry, Mr. Jeffers resigned his position at ORNL and accepted the pastorate of a small Baptist Church in Augusta, Georgia. He worked part time at both driving a school bus for the Richmond County (Georgia) Board of Education and as an announcer/sales person for radio station WGUS in North Augusta, South Carolina. In 1964, he accepted a position in announcing/sales at radio station WIVK in Knoxville, Tennessee. There he was employed until 1966 when he entered the Armed Forces for two years and became Program Director of the American Forces Korea Network (AFKN) in Seoul, Korea, during 1967 (Coastal Ex. 1, p. 2).

41. After receiving an Honorable Discharge from the Army, Mr. Jeffers moved to Charleston, West Virginia, to become Music Director of radio station WCAW, and within one year, manager of the FM affiliate, WVAF (Coastal Ex. 1, pp. 2–3). After two years in Charleston, he moved to Springfield, Missouri, to enter college and became Sales Manager for station KWFC where he was employed from 1970 to 1975 (Coastal Ex. 1, p. 3).

42. In 1975, he became a broadcast consultant for the CLW Communications Group in Chattanooga, Tennessee (Coastal Ex. 1, p. 3). In October 1976, he moved to Corpus Christi, Texas, where he

formed his own advertising agency (Coastal Ex. 1, p. 3). Subsequent to this business venture, Mr. Jeffers managed radio station WITA, Knoxville, Tennessee (Coastal Ex. 1, p. 3).

43. Mr. Jeffers attended school in East Tennessee, counties of Anderson and Knox until he was 17 years of age. After graduating from Clinton High School in 1960, he attended summer school at the Moody Bible Institute in Chicago, Illinois. From May 1970 through May 1974, he attended the Baptist Bible College in Springfield, Missouri (Coastal Ex. 1, pp. 3–4).

44. Mr. Jeffers has been a member of various Baptist Churches since the age of seven, having participated as a Sunday school teacher for junior boys, intermediates, and young adults. He has also served as Pastor and Interim Pastor of four separate churches. In 1966, before entering the armed forces, he was a member of the Knoxville Optimist Club. In 1978, he was instrumental in forming a bowling league in Corpus Christi. Mr. Jeffers has been a member of several Parent-Teacher Associations through various schools in the Corpus Christi area and has also been active in youth rehabilitation activities for troubled and drug addicted young people in the Corpus Christi area (Coastal Ex. 1, p. 5).

Ultimate Findings and Conclusions

Public File Issue

45. Under the pertinent Rule (Rule 73.3526), every applicant for a construction permit in the commercial broadcast service is obligated to maintain a public file for purposes of permitting the public at large to inspect its contents. At the time Coastal filed its application, on May 7, 1979, its public file was located at 3833 South Staples Street, Suite 46, Corpus Christi, Texas, the address of Professional Advertising Agency owned by William M. Jeffers. The Reverend Willie Lee, CCN's then President, examined Coastal's file there. Lee's object was to review Coastal's file preparatory to filing CCN's application.

46. Sometime in October 1979, Jeffers moved his offices to new quarters at 101 North Shore Line, Corpus Christi, Texas, where his public file was relocated. Jeffers claims to have left a card in the window of his former address giving the new location in Corpus Christi of Coastal's public file. In December 1979, after the file had been relocated, Reverend Lee went to inspect the file again but was unable to find it. Thereafter in January 1980, Jeffers moved to Knoxville, Tennessee, and claimed to be unable to make proper arrangements for the continued maintenance of the file at Corpus Christi. Then he took the file with him to Knoxville, where it remained until August 1980, when it was forwarded to the office of Harry Dobbs in Corpus Christi. Due to his changed, new living environment and new job, Coastal would now admit that Jeffers

simply "forgot about the file." That the Coastal public file was for some months unavailable for public inspection is then quite clear. Hence, at least, the letter of the pertinent Rule was not fully honored. Coastal argues that its failure regarding the public file was experienced "for a relatively short period of time [and] does not warrant disqualification nor, for that matter, any sanction whatsoever." Disqualification, under these circumstances, would, of course, be much too much, but "no sanction whatsoever" judged in terms of a comparative contest surely would also be something less than fair. Thus, at least, a slight demerit should attach to the removal of the public file from Corpus Christi; however "inadvertent."

47. Concerning the evidence addressed to the notions of harassment and overcharging for copying by Ms. Pena, of portions of the Coastal Public File, little more appears than perhaps a mindless aberration on the part of Coastal's principal Jeffers, who may have been simply annoyed that a competing applicant was copying the Coastal application wholesale. In any event, Jeffers' conduct and conversation with Ms. Pena would suggest something far less than undue harassment. In sum, then, the entire Public File issue, save for the imposition of a slight demerit for the period of the file's removal from Corpus Christi, may be otherwise resolved in Coastal's favor. (*Cf.*, *Gross Telecasting, Inc.*, FCC 82R-63, 92 FCC 2d 204, at paras. 70–74 (Review Board).)

Financial Issue

48. This issue was added against CCN by *Order*, FCC 81M-938, released April 1, 1981. In CCN's Reply Findings filed August 12, 1982, at para. 9, CCN acknowledges rejection of CCN's Petition for Leave to Amend (filed May 12, 1981) to reflect its financial qualifications. That Petition was rejected for the reasons stated in *Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981. Further in CCN's Revised Proposed Findings filed, November 5, 1982, it reiterates that it has financial commitments for a "first quarter operating budget of $206,827 . . ." a sum, it says, more than sufficient to satisfy the first quarter's operating budget. Principally, as CCN regretfully notes, CCN's May 12, 1981, Petition was rejected because of its "untimeliness" and other criteria underlying good cause. *Erwin O'Conner Broadcasting, Co.*, 22 FCC 2d 140, 143 (1970).

49. In its Reply Findings at para. 9, CCN notes that the rejection of its Petition "left CCN substantially short of its intended financial qualification" and prays reconsideration, citing obiter words of the Presiding Judge and certain disposition in *WPIX, Inc.*, 68 FCC 2d 381 (1978). While CCN's citations are greatly misplaced and fail in great measure to support its reasoning, nevertheless, in light of current Commission policy on financial qualification—(*See*, *Revision of Application for Construction Permit for Commercial Broadcast*

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Stations, 50 RR 2d 381 (1981)—reconsideration may be and is granted by revisiting the supporting documents to CCN's Petition for Leave to Amend filed, May 12, 1981. In the further light of current Commission mandate, concerning financial qualification of applicants, surely in the given case, the otherwise abiding criteria underlying good cause in *Erwin O'Conner, supra*, may, in retrospect, be relaxed. Thus, in the search to discover and select the more qualified of competing applicants, established policy and precedent would also suggest, if not require, that all applicants be given the opportunity to meet basic qualifications to the end that the elements of comparative choice be determined, in the interest of the public with the object of selecting the one who would best or better serve that paramount interest. *Azalea Corp.*, 31 FCC 2d 561 (1971).

50. In spite of Coastal's denigration of CCN's financial supporting documents in CCN's Petition for Leave to Amend of May 12, 1981, a review of those supporting documents, particularly the financial statement of William Reiff, discloses assets having a fair market value clearly in excess of the $200,000 loan he proposes to extend to CCN; indeed, his total sums show real property market values in excess of $860,000 with a mortgage indebtedness of $388,899. Reiff verifies these sums noting that, as an employee of the Texas Real Estate Commission, he is "very familiar with real estate market values in the State of Texas." This surely would comport with the certification made now current in Commission practice. Likewise, Christian Television Services, Inc., listing a net worth of $163,824.91 and premised on the letter of its President to make a $50,000 loan to CCN is also a reasonably acceptable source of financing for CCN. In the same tenor, the handwritten commitment of John Stembridge of Stembridge Furniture, pledging real property or sales equal to the value of the premised loan of $75,000, is equally reasonable, thus an acceptable source of financing to CCN. The listing of expected revenues to be purchased by Lester Roloff on behalf of Roloff Evangelistic Enterprises, Inc., is far less worthy of reasonable assurance; indeed, it would appear highly presumptuous, if not a total myth. Nevertheless, the threshold requirement of first quarter operating expenses would appear to be satisfied by CCN's supporting financial documentation. Reconsideration of this particular feature of CCN's case is therefore GRANTED. What the prospects might be for a full operational budget for a viable UHF television station are, of course, at this point, otherwise unknown. Under the guidelines or standards currently obtaining, CCN is found to be financially qualified.

Comparative Considerations

51. At this point, the governing criteria and precedent affecting comparative considerations between the contestants at bar may be addressed. The touchstone for testing the comparative efficacy of

broadcast applicants is, of course, the *Policy Statement on Comparative Broadcast Hearings* (Policy), (1 FCC 2d 393 (1965)) and its progeny of abiding precedent. The two cardinal objectives of that Policy are "first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." *Id* at 394. To better and early shape the parameters of the Policy and those objectives, that Policy is neither set down as an absolute nor cast in a rigid mold; rather, it speaks in terms of a general policy guideline and is enlightened by a long line of case precedent. As the Court in *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 937 (1973) said in alluding to those two primary objectives ". . . not only are these objectives not exclusive of other considerations but the *Policy Statement* itself disavows an intention 'to preclude the full examination of any relevant and substantial factor.'"

52. As to the primary objective of diversification, here CCN holds no interest in any mass media of communications, while Coastal, through Beacon Broadcasting, Inc.'s acquisition of 49 percent of Coastal stock formerly owned by William J. Kitchen,[8] would now have Beacon's three broadcast stations—WBFU, Winston-Salem, North Carolina; WMOC, Chattanooga, Tennessee, and WPCY, Mobile, Alabama—attributed to Coastal for diversification purposes.

53. And though it may be true, as Coastal notes in conceding attributable broadcast interests, that "Beacon's stations are located well beyond the service area of the proposed Corpus Christi facility," the guidelines or criteria set down in the Policy Statement on this subject are:

> "Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant to a degree that they:
>
> (a) *are larger*, i.e., *go towards complete ownership and control*; and to the degree that the existing media:
>
> (b) are in, or close to, the community being applied for;
>
> (c) are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;
>
> (d) are significant in terms of regional or national coverage; and
>
> (e) are significant with respect to other media in their respective localities." (*Policy, supra*, p. 395.)

54. Measured by the primary objective or standard of diversification, CCN owning no other media interests would warrant a substantial preference over Coastal whose corporate 49 percent shareholder, Beacon, has multiple broadcast media interests, albeit not in the immediate community of Corpus Christi, Texas, but, at least, regionally in the South Eastern area of the United States. (*Cf.*,

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[8] Beacon, in turn, is owned by Quality Media Corporation, "a corporation controlled by William J. Kitchen." (Coastal's Supplement to Proposed Findings, pp. 1–2.)

Muncie Broadcasting Corporation, FCC 82R-9, released March 5, 1982, p. 8, para. 14.)

55. Though Coastal has acknowledged that the broadcast interests of Beacon are attributable to Coastal through "its principal Kitchen's control of Beacon's parent Quality Media Corporation," Coastal did not spell out or report the class or type of broadcast facilities licensed to Beacon. According to *Broadcasting Yearbook for 1982*, Quality Media Corporation is listed as licensee of three AM stations, WIXO (Coastal lists call letters "WPCY"), Mobile, Alabama; WBFU (AM) Winston-Salem, N.C.; and WMOC (AM) Chattanooga, Tennessee. In any event, the three AM stations licensed to Beacon/Quality appear to be commercial broadcast stations. Clearly, under the governing guidelines of the *Policy Statement, supra*, at least under (a), (c) and (d) then, as noted earlier on diversification grounds, CCN, holding no broadcast or other media interests, is to be preferred substantially over Coastal.

56. CCN is a non-profit corporation operated by a board of trustees. The former President, Reverend Willie Lee having resigned, currently Leonard K. Buntrock is Vice-President and "Chief of Operations." William Reiff is Secretary and "currently operating as Treasure[r]." Mary Louise Pena and Beatrice Pena are members of the board of directors and are obviously female and apparently of Hispanic origin. According to Coastal, CCN would be entitled to 42.9 percent integration credit based on CCN's proposal to have Leonard Buntrock as Sales Manager, Mary Louise Pena as Public Affairs Director and Beatrice Pena as Comptroller. Also, Coastal points out that "prior to the 'B' cut-off list, CCN had seven members on its board of directors. However, by amendments dated May 26, 1981, and June 30, 1981, three members resigned. William Reiff is not proposed for any integration credit." (Coastal's Supplement to Proposed Findings filed, September 24, 1982, fn. 3.) Apparently though not specifically claimed, Leonard K. Buntrock and the Penas are local residents of Corpus Christi, Texas, or its environs. Also, an enhancement factor or factors would attach to the qualitative attributes of CCN's proposed integration of ownership and management for female participation and the minority status of the Penas as well as the local residence of all CCN principals. Coastal's principals, it appears, reside outside the city of Corpus Christi, but are otherwise identifiable with the area of Corpus Christi. Jeffers, the 51 percent subscriber to Coastal's stock and proposed full time general manager, would be entitled to qualitative enhancement for broadcast experience as radio station manager and as an announcer/sales person at WGUS, North Augusta, South Carolina, and other broadcast related experience with the Armed Forces Korea Network in Seoul, Korea, during 1967; also for broadcast experience at station WVAF, Charleston, West Virginia; KWFC, Springfield, Missouri; and radio station WITA, Knoxville, Tennessee. Jeffers was also fairly

active in civic affairs in the Corpus Christi area, among others, in youth rehabilitation activities for troubled and drug addicted young people.

57. In sum, then, under the comparative considerations dealing with integration of ownership with management, Coastal quantitatively would be entitled to 51 percent for Jeffers as full time station manager, while CCN would be assigned 42.9 percent for Buntrock and the Pena's proposed managerial positions. Not a great disparity, arithmetically. Premised on Jeffers' past broadcast experience and his area of residence merged with his civic activities, Coastal would be credited with qualitative enhancement of Jeffers' proposed full-time participation as owner and manager but, as the *Policy Statement, supra*, notes, these factors while having some importance are of "minor significance."

58. CCN, as noted, would be credited with 42.9 percent integration of ownership with management, enhanced qualitatively by the local residence of Buntrock and the Penas, and further enhanced by the minority attributes of the Penas, female and of Hispanic origin.

59. As noted, in part, earlier, the Court in *TV 9, Inc.* v. *FCC*, (29 RR 2d 963, 965, U.S. App. D.C. (1974)) had observed "The Policy Statement [citation omitted] upon which the Commission relies is not an absolute. It expressly allows 'the full examination of any relevant and substantial factor,' thus recognizing that the Act itself, and not the Policy Statement is the Commission's basic charter." That point, of course, is and must be an accepted fiat. Yet, in the case at bar, which greatly differs with conditions in *TV 9, Inc.*, the otherwise guiding criteria or principles reposing in the *Policy Statement* and current precedent would seem sufficient to arrive at a fair and just resolution of the evidence of record affecting Coastal and CCN. Coastal would be entitled to a slight preference—51 percent—on integration of ownership and management, as enhanced, over CCN with but 42.9 percent such credit. However, on diversification grounds, a factor of primary significance, CCN would be entitled to a clear, thus substantial preference over Coastal, whose 49 percent stockholder, Beacon, owns or controls multiple broadcast interests in the South Eastern region of the United States, albeit not in or close to the community of Corpus Christi, Texas.[9] When one adds the enhancement of female and minority participation to CCN's 42.9% ownership and management, even the slight quantitative ownership/management preference of Coastal would, at least if not disappear, balance out into an even balance on integration of ownership and management considerations between the two. Clearly this would be so when the slight demerit on the

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[9] Indeed, it would also appear that Kitchen, who "sold" his interests in Coastal to Beacon, owns or controls Quality Media Corporation which, in turn, owns or controls Beacon.

Public File Issue is attributed to Coastal. And as the Review Board noted in *Nuance Corporation, et al*, FCC 81R-17, released March 5, 1981, in the weighing of record evidence in comparative situations, "It is not just a matter of adjectives—'slight' versus 'substantial'—but one of substance . . . and bear in mind the emphasis in the *Policy Statement*. . . . on the diversification criterion as 'a factor of primary significance,' this preference . . . overcomes [Coastal's] edge on the 'best practicable service' criterion." (At pp. 11–12.) On balance, then, the *residuum* of the evidence would tilt in favor of CCN. And that is the conclusion.

62. A further word or postscript seems appropriate at this point. It may seem a strained metaphor to say that this has been a trying case; certainly not because of seeming closeness of the evidence; nor because of the complexity of the given or added issues. The issues were neither complex nor abstruse. Rather it has been the protracted, perhaps painful experience, of a case poorly prosecuted, particularly by Christian Childrens Network, Inc. Indeed, this has been the single instance in over thirteen years where after repeated exhortations by the forum that the parties follow the not complicated or otherwise difficult process of ordinary Practice and Procedure, the proposals of the parties, again particularly, CCN, respecting findings of fact and proposed conclusions were found unacceptable. Added to this were unexplained removal or withdrawal of counsel for CCN during the course of this proceeding on more than one occasion. In fact, CCN's trial counsel, who, it appears, virtually at the eleventh hour was called to try its case and who did an uncommonly excellent job under the circumstances also disappeared from the scene. Though it is otherwise perfectly proper in these premises for parties to prosecute *pro se*, there are, of course, perils to be faced even in the modesties of these adversary contests. While the perils abound here, they were somehow weathered.

63. In spite of the convolutions of CCN's haphazard pursuit and other imperfections in the prosecution of its application, ultimately identifiable and sufficient grounds can be gleaned from the evidence of record to permit a discernible basis for decision. That being so, Coastal's Motion to Dismiss CCN's application filed, August 13, 1982, for the various grounds stated and which has been held in abeyance WILL BE and IS HEREBY DENIED.

For the foregoing reasons and the public interest so warranting, the application of Christian Childrens Network, Inc., for the captioned facilities at Corpus Christi, Texas, may be and IS HEREBY GRANTED; that being so, the application of Coastal Bend Family Television, Inc., must be and IS HEREBY DENIED.

IT IS SO ORDERED.[10]

FEDERAL COMMUNICATIONS COMMISSION
JAMES F. TIERNEY, *Administrative Law Judge*

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[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Advertising
Broadcast, Re-Regulation
Program Requirements
Rule Making, Notice of Proposed

Notice of Proposed Rule Making adopted soliciting comment on regulatory proposals that would amend policies with respect to commercial TV programming, commercialization, ascertainment, and program logging.
–Commercial TV Stations
MM Docket No. 83–670

FCC 83–313

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations.	MM Docket No. 83–670

NOTICE OF PROPOSED RULE MAKING

(Adopted: June 29, 1983; Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT; COMMISSIONERS FOGARTY AND SHARP NOT PARTICIPATING

I. *INTRODUCTION*

1. In this *Notice* we are soliciting comment on a number of regulatory proposals that would amend this Commission's policies with respect to commercial television programming, commercialization, ascertainment, and program logging. In taking this action, we seek the widest range of discussion on these proposals in terms of their utility in an increasingly diverse and competitive video marketplace. We also are interested in the extent to which these proposed amendments might mitigate the regulatory burdens and costs imposed on commercial television broadcasters by our present rules and policies, thereby serving the public interest.

2. In the past several years, substantial steps have been taken to reduce the regulatory burdens on broadcasters. Recently the Commission adopted a major deregulatory action relating to program-

ming guidelines, commercialization, ascertainment, and program logs for commercial radio broadcasters. *Deregulation of Radio,* 84 F.C.C. 2d 968, *recon. granted in part,* 87 F.C.C. 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ* v. *FCC,* D.C. Cir. No. 81–1032 (May 10, 1983) (hereinafter cited as *UCC* v. *FCC*). In that action the Commission deleted the delegations of authority relating to the amounts of nonentertainment programming and commercial matter aired by licensees during their license terms.[1] The Commission also deleted its formal ascertainment requirements and substituted a more informal process whereby all radio licensees are required to develop a community issues/programs list containing a listing of programs aired in response to the perceived issues of importance to a community. Finally, all program logging requirements pertaining to commercial radio stations were deleted from the Commission's rules. This issue was remanded by the court so that the Commission might determine the extent to which program logs are necessary to implement the new regulatory scheme. *UCC* v. *FCC,* slip op. at 48–56.

3. The Commission also has taken action recently to deregulate certain aspects of noncommercial radio and television broadcasting. For example, the Commission significantly decreased its intervention into many of the programming decisions of public broadcasters by modifying its rules relating to promotional programming and "on-the-air" fundraising. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations,* 86 F.C.C. 2d 141 (1981), *recon. denied, clarification and declaratory ruling granted,* 90 F.C.C. 2d 895 (1982). In August, 1981, the Commission proposed to limit its oversight of noncommercial station programming, to eliminate noncommercial stations' ascertainment obligations, and to delete the program logging requirements. *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees,* 87 F.C.C. 2d 716 (*Notice of Proposed Rule Making*). In yet another proceeding we have withdrawn many of the structural and programming requirements that previously applied to over-the-air subscription television operations (STV). *Subscription Television Service,* 90 F.C.C 2d 341 (1982), *recon. denied,* 53 R.R.2d 646 (1983).

4. The Commission's efforts to eliminate unnecessary regulation

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[1] The delegations, previously found at Section 0.281 and now found in Section 0.283 of the Commission's Rules, are instructions to the Commission's staff regarding when an application must be brought to the attention of the full Commission. Applications meeting the processing guidelines may be granted by the staff. Under the delegations recently deleted for commercial radio stations, any AM station application proposing less than 8 percent nonentertainment programming and any FM station application proposing less than 6 percent nonentertainment programming would have been subject to full Commission review. Similarly, applications proposing more than 18 minutes per hour of commercial matter (with certain exceptions) could not have been granted at the staff level.

have not been restricted to programming-related rules. Indeed, we have concluded two dockets that, taken together, substantially reduce the paperwork burdens required of all broadcasters. In the first action, the Commission adopted a streamlined and simplified license renewal form for both commercial and noncommercial licensees. *Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49 RR 2d 740, *recon. denied*, 50 RR 2d 704 (1981), *appeal pending sub nom. Black Citizens for a Fair Media, et al.* v. *FCC*, D.C. Cir. No. 81-1710. In the second proceeding, we have eliminated completely the yearly financial reporting requirement imposed on broadcasters. *Amendment of Form 324, Annual Financial Report of Broadcast Stations*, 51 RR 2d 135, *recon. denied*, 52 R.R. 2d 792 (1982).

5. We now believe it is appropriate to begin a commercial television proceeding considering the same type of actions which we recently have taken with respect to radio broadcasting and are currently proposing for noncommercial stations. We feel that exploring such options at this time is particularly justified as commercial television is the sole major broadcast service for which such review has not yet been initiated. Furthermore, the makeup of the video marketplace is changing rapidly. As explained in detail below, commercial television broadcasters are facing increasing competition from alternative media. Because these changes have taken place and additional changes likely will occur in the near future, we intend to evaluate the marketplace to determine whether the public interest can be furthered by competitive forces rather than by the Commission's existing rules and policies.

6. As in the commercial radio and noncommercial broadcasting deregulation proceedings, we are proposing several options for each of the regulations being considered, to wit, programming guidelines, ascertainment, commercial guidelines, and program logs. Each of these options is discussed in detail in Section V of this *Notice*. In general, for all four subject areas, the options represent a continuum from substantial deregulation to taking no action and leaving our present regulations in effect. We hope that by proposing the greatest possible array of options we will stimulate a constructive debate regarding which particular proposals best serve the public interest.

7. This *Notice* is divided into six segments. Following this introductory section, a brief history of the regulations under consideration will be presented. This will be followed in Section III with a discussion of the video marketplace as it currently exists and as it may exist in the near future. Section IV contains a detailed discussion of why we believe that this policy review is appropriate at this time. The actual deregulatory proposals on which we seek comment are detailed in Section V. The final section is devoted to our initial Regulatory Flexibility Act analysis, *ex parte* provisions, filing deadlines, and other procedural information.

II. *HISTORY OF THE REGULATIONS AND POLICIES AFFECTED BY THIS RULE MAKING*[2]

8. The Federal Radio Commission (FRC), predecessor agency of the FCC, acting under legislative guidelines similar to those contained in the Communications Act of 1934, decided very early in its existence that programming and commercialization issues were proper subjects for its consideration in reviewing the performance of radio broadcast stations. *Great Lakes Broadcasting,* 3 FRC Ann. Rep. 32 (1929), *rev'd in part on other grounds,* 37 F.2d 993 (D.C. Cir. 1930), *cert. denied,* 281 U.S. 706 (1930). Later, FRC consideration of programming "inimical to the public interest" was upheld as a valid criterion to consider in denying a license renewal. *KFKB Broadcast Assoc. Inc.* v. *Federal Radio Commission,* 47 F.2d 670 (D.C. Cir. 1931). A brief history of the four subject areas under consideration in this proceeding is presented below.

A. *Programming.*

9. The Commission's first major policy statement on commercial programming was the 1946 *Report on Public Service Responsibility of Broadcast Licensees,* or, as it was commonly known, the *Blue Book.*[3] In the *Blue Book,* the Commission explicitly recognized the need for broadcasters to air programs of local interest, activities and talent. The primary responsibility for determining the scheduling and content of these local interest programs was placed squarely on the individual broadcaster. The Commission did set limited guidelines for programming in the public interest. For example, the Commission stated that the public interest required an adequate amount of time devoted to the discussion of public issues. Also, some local live and sustaining broadcasts were expected. However, the Commission did not establish any quantitative standards by which it might judge whether a licensee had provided enough of a particular type of programming. Court decisions upheld the Commission's determination that both the content and the amounts of programming aired by licensees were proper subjects for FCC consideration. *Simmons* v. *FCC,* 169 F.2d 670 (D.C. Cir. 1948), *cert. denied,* 335 U.S. 846 (1948); *Bay State Beacon, Inc.* v. *FCC,* 171 F.2d 826 (D.C. Cir. 1948).

10. A second major Commission policy pronouncement concerning programming was issued in 1949. In its *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, the Commission formalized

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[2] The *Notice of Proposed Rule Making* and the *Report and Order* in the Radio Deregulation proceeding contain excellent and comprehensive historical summaries of the programming guidelines and ascertainment. *See* 73 F.C.C. 2d 457, 460-79 (1979); 84 F.C.C. 2d at 1040–42, 1073–75, 1091–93. Those detailed summaries will not be repeated here.

[3] The *Blue Book* was issued as an internal Commission document and is available in the Commission Library.

the Fairness Doctrine and permitted editorializing by broadcast licensees for the first time. At the same time, the Commission reiterated its previously stated belief that broadcasters should devote a reasonable amount of time to the discussion of public issues. Again, however, the Commission issued no quantitative guidelines, but expressly stated that programming in the public interest was the responsibility of the individual licensee. These concepts once again were sustained by the Commission in its *Report re En Banc Programming Inquiry,* 44 FCC 2303 (1960) (*1960 Programming Statement*). The Commission restated its view that the individual broadcaster had great discretion in deciding what programming to offer its community, but went a bit further and listed fourteen major elements usually necessary to meet the interests, needs and desires of the community.[4] Later case law made it clear that a licensee's discretion in programming did not include racial discrimination, *LaMar Life Broadcasting Co.* , 38 F.C.C. 1143, 1154–55 (1965), *rev'd and remanded on other grounds, sub nom., Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966), nor ignoring a strongly expressed need, *Stone* v. *FCC,* 466 F.2d 316, 328 (D.C. Cir. 1972). The Commission's policies regarding nonentertainment programming were brought to their present state by the adoption of the delegations of authority in 1973. The history of these delegations is presented in a later section of this *Notice.* [5]

B. *Commercialization.*

11. Recognizing that commercials were, at least for the present, the sole means of support for broadcasting, the Federal Radio Commission took the position that regulation had to be relied upon to prevent abuse or overuse of commercials. *Great Lakes Broadcasting Company, supra.* An early FCC decision considered overcommercialization in the context of a license renewal. *R.R. Jackson,* 5 F.C.C. 496 (1938). Regulation of commercial practices involved the number of commercial interruptions, the length of commercials, and the

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[4] The fourteen listed elements are: opportunity for local self-expression, the development and use of local talent, programs for children, religious programs, educational programs, public affairs programs, editorialization by licensees, political broadcasts, agricultural programs, news programs, weather and market reports, sports programs, service to minority groups, and entertainment programs.

[5] In 1974, the Commission also announced a special programming obligation with respect to children. Broadcasters were expected to present educational and age-specific *programming designed especially for children.* Further, broadcasters were urged to air this programming on weekdays when most child viewing occurs. *Children's Television Policy Statement,* 50 F.C.C. 2d 1 (1974). Broadcaster compliance with the *Policy Statement* was explored in a *Notice of Inquiry,* 43 Fed.Reg. 37136 (1978), and in the report of the Children's Television Task Force, released November 2, 1979. Subsequently, a *Notice of Proposed Rule Making* was adopted looking further at broadcasters' obligation to the child audience. 45 Fed.Reg. 1976 (1980). That proceeding is pending.

balance between commercial (sponsored) and sustaining (unsponsored) programs. In the *1960 Programming Statement* the Commission concluded that there no longer was any public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating a station's performance. Therefore the Commission limited the responsibility of licensees by stating that individual broadcasters need only avoid abuses with respect to the total amount of advertising time aired and the frequency of interruptions. *Id.*

12. Due in part to a lack of formalized guidelines with respect to its commercialization policy, the Commission adopted a *Notice of Proposed Rule Making,* 28 Fed.Reg. 5158 (1963), looking toward the adoption of rigid commercial standards. Although convinced that an overcommercialization problem existed, the Commission chose not to adopt standard rules, concluding that not enough facts were present to support such rules. Moreover, it was not willing to codify the existing National Association of Broadcasters' commercial guidelines. The Commission did state that it would pay closer attention to commercialization on a case by case basis, and instructed the Broadcast Bureau to bring to its attention those applications proposing the greatest amounts of commercials. *Commercial Advertising Standards,* 36 F.C.C. 45 (1964). From this time until the adoption of the current delegation in 1973, the Commission's major policy statements with respect to commercialization concerned the particular issue of program length commercials. The Commission found such commercials contrary to the public interest because they were programs presented in the interest of saleability, almost always inconsistent with a licensee's representations regarding the maximum amount of commercial matter to be aired in any given hour, and usually resulted in program logging violations. *Program Length Commercials,* 39 F.C.C. 2d 1062 (1973). Most recently, the Commission refused to initiate a rule making proceeding on the subject of overcommercialization, citing a lack of adverse viewer reaction and recent First Amendment cases recognizing that commercial speech deserves constitutional protection. *Television Overcommercialization,* 49 RR 2d 391 (1981). The Commission further noted that the industry was best regulated through self-imposed voluntary restraints and that existing Commission policies and guidelines insure that broadcasters will operate in the public interest. *Id.*

C. *History of Delegations.*

13. At its establishment in 1951, the Broadcast Bureau was given delegated authority to act on certain broadcast applications. *See* 47 C.F.R. §0.241 (1952). Beginning in the early sixties, the Commission began to reappraise its existing delegations. In order to give more guidance to the Broadcast Bureau, the Commission adopted a set of confidential notations to the delegations. *Notations re General*

Agenda, June 28, 1961. These notations limited the Bureau's authority to act on certain types of broadcast applications. According to an in-house memorandum to the Commission, the notations substantially incorporated the informal criteria that the staff had been using to screen applications. Specifically, the notations provided that the Broadcast Bureau could not act upon any application which proposed any of the following:

> (1) greater than 85 percent commercial programming;
>
> (2) less than 5 percent local live programming;
>
> (3) greater than 90 percent network programming;
>
> (4) less than 10 percent sustaining programming between 6–11 p.m.;
>
> (5) greater than an average of 12 commercial spot announcements during one hour; and
>
> (6) no programming in the following categories unless an adequate explanation was given: entertainment, religious, agricultural, educational, news, discussion (forum, panel, round table), and talks (all conversational not falling under one of the above categories).

Thus, as early as 1961, the Commission had adopted formal processing guidelines relating to broadcasters' programming obligations.[6] It is important to note, however, that even these earliest of guidelines were procedural only; they merely indicated when the full Commission was to be alerted to a particular application.

14. After a lengthy review of the delegations, the 1961 notations, and existing Commission policy and precedents, the Commission adopted its present delegations format in 1973. *Delegation of Authority,* 43 F.C.C. 2d 638. The publication of these more specific delegations gave the industry and its legal representatives, for the first time, a clear insight into the general benchmarks used in determining whether particular matters were to be referred to the Commission.[7] Neither the published Commission *Order* establishing

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[6] The actual delegation of authority contained in the Commission's published rules stated that the Bureau could grant applications ". . . which comply fully with the requirements of the Communications Act and the provisions of this chapter, accord with Commission policy and standards, are not mutually exclusive with any other applications, and concerning which no petition to deny . . . or other substantial objection has been filed." 47 C.F.R. §0.281(a)(1) (1962).

[7] The new delegations provided that applications proposing the following types of programming should be sent to the Commission for its consideration: proposals exceeding 16 minutes of commercial matter per hour, with specified exceptions during political campaigns; proposals containing less than 10 percent total nonentertainment programming; proposals containing substantial ascertainment defects that cannot be resolved on the staff level; applications proposing substantial shifts in the station's entertainment or nonentertainment formats; renewal, transfer, and assignment applications that vary substantially from prior representations with respect to nonentertainment programs or commercial practices.

the delegations nor the staff memorandum explaining the changes made much mention of how the guidelines were set, except with respect to the sixteen minute guideline for commercial practices, which was considered to be in general accord with industry standards.

15. In adopting the latest programming delegations for commercial television, the Commission added two new categories for consideration. *Delegations of Authority*, 59 F.C.C. 2d 491 (1976). In addition to the nonentertainment programming standard, the guidelines provide that applications proposing less than 5 percent local programming and less than 5 percent informational programming will be referred to the full Commission. The local guideline was added in recognition of the importance of every broadcast facility's function as a locally oriented transmission service. The informational guideline was meant to reaffirm the special contribution to an informed public opinion made by news and public affairs broadcasts. Based on information collected from the 1973 television programming report, Form 303-A, the Broadcast Bureau found that 93 percent of all VHF network affiliates, 83 percent of all VHF independent stations, and 78 percent of all UHF affiliates met the newly established guidelines. Unaffiliated UHF stations are exempt from the programming guidelines.

16. Since establishing and expanding the processing guidelines in 1976, the Commission has not been inclined to impose additional programming responsibilities on commercial television licensees. For example, in response to a petition seeking the reporting of additional programming categories by commercial television stations, the Commission reasoned that establishing additional reporting categories might imply some obligation to provide that type of programming even though the Commission does not require it. On that basis, the Commission declined to establish a new category of "community service programming." *Community Service Programs*, 82 F.C.C. 2d 130 (1980), *recon. denied*, 50 RR 2d 1245 (1982). In another proceeding, the Commission afforded broadcasters greater programming flexibility by permitting the use of public service announcements in responding to the perceived needs of the community. *Public Service Announcement*, 81 F.C.C. 2d 346 (1980).

D. *Ascertainment.*

17. The Commission's first major policy statement on ascertainment was contained in the *1960 Programming Report*. The Commission stated that all broadcasters must ascertain the needs and interests of their service areas and reasonably attempt to meet all such needs. Proper ascertainment required that broadcasters make a diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of their service areas. In setting up this procedure, the Commission intended that ascertainment would

become a formal part of every application and license renewal proceeding. Furthermore, the Commission specified not only what it expected out of ascertainment, but how the process should be accomplished. The fact that the Commission was serious about its ascertainment requirements was shown shortly after the release of the *1960 Programming Statement* when the Commission denied an application for a new FM station based on inadequate ascertainment. *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry* v. *FCC*, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962).

18. The Commission imposed a more formalized four step ascertainment process when it adopted its new television application forms. *Television Program Form*, 5 F.C.C. 2d 175 (1966). Applicants were expected to provide full information on the following matters:

> (a) the steps taken to become informed of the problems and needs of the area to be served;
>
> (b) the suggestions received as to how the station could help meet those problems;
>
> (c) the applicant's evaluation of the suggestions; and,
>
> (d) the programming proposed to meet evaluated problems and needs. *Id.* at 178.

During the next several years, the Commission became increasingly aware of the questions and problems that its ascertainment procedures were creating. Consequently, the Commission issued a *Notice of Inquiry* seeking comment on the development of a detailed ascertainment Primer. 20 F.C.C. 2d 880 (1969). A Primer containing 36 questions and answers about the ascertainment process was subsequently adopted by the Commission. *Ascertainment of Community Problems*, 27 F.C.C. 2d 650 (1971).

19. In the ascertainment Primer the Commission set out standards for determining the composition of the area to be served, consultations with community leaders and members of the general public, enumeration of community problems and needs, evaluation of the problems and needs, and relating proposed programming to the evaluated problems and needs. Several years later, a Primer was adopted specifically for renewal applicants. *Ascertainment of Community Problems by Renewal Applicants*, 57 F.C.C. 2d 418 (1975), *recon. granted in part*, 61 F.C.C. 2d 1 (1976). Although the substantive requirements of the original Primer were retained, the Renewal Primer provided for the following procedural changes:

> (a) an ongoing ascertainment process throughout the license term;
>
> (b) a community leader checklist;
>
> (c) the specific number of consultations to be made, based on the size of the community of license;
>
> (d) maintaining information on the composition of a licensee's community in its public file;

(e) annually filing a list of no more than ten problems and needs of a broadcaster's service area along with a list of programs treating those problems and needs; and,

(f) placing documentation of ascertainment procedures in the station's public inspection file.

Failure to conduct ascertainment in accordance with the requirements of the Primers has resulted in the denial of applications, and such denials have been upheld in court. *See, e.g.*, *Bamford* v. *FCC*, 535 F.2d 78 (D.C.Cir. 1976).[8]

20. In its most recent actions regarding ascertainment, the Commission declined a request to add homosexual and handicapped groups to the community checklist. The Commission did state, however, that groups coming forward for consultation must be included if the licensee considers these groups to represent a significant segment of the community's population. *Ascertainment of Community Problems*, 76 F.C.C. 2d 401 (1980). In a separate proceeding, the Commission approved the use of public service announcements in responding to problems discovered through ascertainment. *Public Service Announcements*, 81 F.C.C. 2d 346 (1980). Also, the Commission recently relieved small market (defined as communities of less than 10,000 persons and that are outside all SMSA's) television renewal applicants from the obligation to conduct formal ascertainment surveys. The Commission stated its belief that small market broadcasters are sufficiently familiar with their communities to enable them to develop responsive programming without the substantial administrative burdens associated with formal ascertainment procedures.[9] *Small Market Ascertainment Exemption*, 86 F.C.C. 2d 798 (1981), *aff'd sub nom. National Black Media Coalition* v. *FCC*, D.C. Cir. No. 80-1758 (May 10, 1983). Finally, the Commission has eliminated the requirement that all applicants for a construction permit file an ascertainment study. Now, only applicants for a broadcast license must submit such studies. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 382–83 (1981).

E. *Program Logs.*

21. Some type of program logging requirements have existed virtually since the beginning of broadcast regulation. The original program logs adopted by the Federal Radio Commission contained

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[8] Procedurally, ascertainment issues are the subject of a delegation similar to the program guidelines. The staff must refer to the full Commission commercial television proposals that contain substantial ascertainment defects that cannot be resolved by further staff inquiry or action. Section 0.283(a)(8) of the Commission's Rules.

[9] As of 1980, the Commission calculated that 29 commercial television stations would be affected by this exemption. The ascertainment requirements for all radio stations were rescinded in the *Radio Deregulation* proceeding.

only two provisions: the entry of all station and all call announcements along with the time of broadcast; and, an entry describing each program broadcast and the time of the program's beginning and end. General Order No. 106, 5 FRC Ann. Report 96 (1931). The 1934 codification of the FRC's rules contained two additions to the program logging requirements. The new rules required broadcasters to log program descriptions by categories and also required all political speeches to be entered as such with the name and political affiliation of the politician for whose benefit the speech was presented. FRC Rules and Regulations, Section 172(A) (1934).[10] Neither the 1931 nor the 1934 regulations were accompanied by any explanation of the regulatory purpose or potential effect of the logging requirements.

22. As the regulation of broadcasting became more pervasive, the program logging requirements became more detailed. For example, to implement the stated goals of the *1960 Programming Statement*, the Commission amended the logging rules to require the contemporaneous maintenance of a comprehensive record of programs by specific categories. *Amendment of Program Logging Rules for Television Broadcast Stations*, 5 F.C.C. 2d 185 (1966). Later, the Commission required that television program logs be made available for public inspection if the requestor of the information met certain procedural safeguards. *Program Logs*, 44 F.C.C. 2d 845 (1974), *recon. denied*, 45 F.C.C. 2d 781 (1974).

III. *THE TELEVISION MARKETPLACE*

23. In discussing the extent of competition in a particular industry, the scope of the market must first be defined. The relevant market has two components: product and spacial or geographic. Generally, a "relevant market" is the broadest market that is sufficiently narrow to exclude products from other producers, whether located in the same, adjacent, or remote geographical areas, that cannot compete on substantial parity with those included in the market. In terms of the geographic component, the television marketplace may in a sense be characterized as both a national and a local market. Markets for television equipment and programs may reasonably encompass the entire nation, whereas the geographic market for home viewed television programming might be extremely local. Interested parties should keep this national/local dichotomy in mind when responding to our questions on whether the increasingly competitive nature of the television marketplace makes the present level of regulation unnecessary. Because the relevant geographic market might be characterized as local, it is conceivable that certain localities may be sufficiently competitive to justify a greater degree

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[10] The 1934 Rules as well as the Federal Radio Commission Annual Reports are available in the Commission's library.

of deregulation than a less competitive geographic market. In arriving at a definition of the second component of the market, that is, the product market, substitutability among alternatives should be considered. To illustrate, if two services are substitutes they should both be included in the same market and thus be considered as competitors. As their degree of substitutability declines, they provide less competition to one another until the point where they should be classified as belonging in separate industries. There is, however, no hard and fast rule to use in drawing industry lines.

24. In the case of traditional over-the-air television broadcasting, the industry can be construed too narrowly when, in fact, the appropriate confines of the market extend beyond its traditional boundaries. Therefore, in this section of the *Notice*, we assess those technologies that may provide genuine substitutes in the viewer's mind for regular television broadcasting as well as the extent of competition within a narrowly defined over-the-air television submarket.

25. According to the FCC staff report regarding policy on cable ownership, about 90 percent of all television households receive four or more television signals.[11] A. C. Nielsen Co. reports this figure to be significantly higher at 97 percent.[12] In any case, it would appear that almost all television households have access to at least four television signals. In fact, Nielsen figures also indicate that 65 percent of television households receive seven or more signals. These figures illustrate the dramatic increase in signal availability since 1964, when only 26 percent of television households received seven or more signals and only 78 percent received four or more.

26. The total number of commercial television stations in operation has grown from a total of six in 1945 to 439 in 1955 to over 800 at present. Also, it is significant to note that the number of UHF stations in operation, over 200, has more than doubled since 1965.[13] Commercial television stations also must compete against noncommercial, educational television operations. The number of such stations in operation has grown from only 9 in 1955 to around 270

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[11] *FCC Staff Report on Cable TV Cross Ownership Policies*, November 17, 1981, pages 62–64. Tables 1 and 2 report this figure as 90.26 and 89.75 depending on assumptions; table 3 states 90 percent receive 3 or more television stations again using different assumptions.

[12] *Nielsen Television 1980; see also Wines, The Cable Revolution - Tough Choices for the Industry and the Government*, the National Journal, page 1891, October 24, 1981 (hereinafter "Wines").

[13] Appendix A, Table I shows the growth of commercial television stations on a yearly basis.

today. More than half of these stations broadcast on UHF frequencies.[14] Predictions of future growth show that most markets will have even more television stations by 1986.[15]

27. In addition to direct competition in the form of traditional over-the-air television broadcasting, other delivery systems have burgeoned and thus offer additional avenues of video product delivery to consumers. The most notable of these is cable television. Originally a delivery system designed to provide viewable television signals to remote or shielded areas of rural America, cable television has expanded into the urban and suburban markets with offerings of programming not available over-the-air. In 1952, approximately 70 systems in the United States served a total of 14,000 subscribers. The subscribers total did not reach the one million mark until 1964. Ten million subscribers were reported for 1976, and that number has almost tripled since that time.[16] The percentage of homes that subscribe to cable is predicted to increase from a current estimated 37 percent of all television households in the United States to about 50 percent in 1985.[17]

28. In addition to offering the signals of local and distant television stations, some cable systems offer cable program channels that are paid for over and above the basic cable services. It is predicted that up to 46 percent of United States television households will subscribe to these pay cable channels by 1990 (up from 17 percent by current estimates).[18] Older cable systems with 12 channels are giving way to upgraded, state of the art, systems with 36 channels or more. Newer systems can offer up to 100 channels, which can deliver an ever increasing array of satellite-delivered program services, community access programming, data information, pay services, and, of course, local and distant broadcast signals.

29. Subscription television channels also offer alternative programming to the consumer. STV is now available on 20 stations in the United States. Most of the stations are in larger markets, but now that several restrictive regulations have been removed, STV could possibly gain footholds in smaller markets.[19] STV subscribers now number about one million. Additionally, the Commission recently authorized all ABC affiliates to offer ABC's proposed Home

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[14] Appendix A, Table II shows the growth of noncommercial educational stations on a yearly basis.

[15] *New Technologies Affecting Radio and Television Broadcasting*, National Association of Broadcasters, Appendix 1, November 1981.

[16] Appendix A, Table III contains a growth chart showing the yearly increase in cable television subscribers.

[17] The actual prediction falls between 35 percent and 65 percent with 50 percent being the average. Wines, *supra. Cablevision* magazine predicts that 62 percent of all television households will subscribe to cable by 1990.

[18] *Cablevision*, November 1, 1982.

[19] *See Subscription Television Service*, 90 F.C.C. 2d 341 (1982).

View Network. This service involves the early-morning transmission of scrambled pay programming. Subscribing owners of video recorders will be able to descramble and record the programming for viewing at more convenient times.[20]

30. Multipoint Distribution Service also delivers a pay service to consumers over the air via a microwave signal. Although similar in function to an STV operation, MDS currently is regulated as a common carrier. Due to high frequency, low power operation, MDS is limited to line-of-site transmission, thereby reducing the potential audience it can serve. At present, there are approximately 500,000 MDS subscribers. The Commission recently increased the spectrum allocated to MDS and approved in principle the concept of multichannel MDS or "wireless" cable systems".[21]

31. Other new forms of video delivery systems that compete for the attention of the viewer are video tape recorders and video disk players. Video tape recorders not only use prerecorded tape but also permit the operator to record programs from other media, thus enabling the consumer to view programming at his leisure.[22] Currently, there are an estimated 3.5 million homes with video recorders representing about 4.2 percent of U.S. households.[23]

32. Video disk players are relatively new to the marketplace. Although they do not have recording capabilities, they are cheaper than video tape recorders. Prerecorded software also is cheaper for the disk player. Given its relatively recent introduction into the marketplace it would be premature to predict video disk penetration of television households. However, programming availability for both video disk and video tape players continues to expand. There are approximately 33,000 titles available now for both types of players and the potential exists for other specialized services to develop.[24]

33. Along with the multitude of services just discussed, other potential services could make significant breakthroughs that would add to the competitive nature of the video marketplace.[25] Direct

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[20] The authority for ABC stations and affiliates to operate subscription television services was granted August 4, 1982. *See* letters to American Broadcasting Companies, Inc., Mimeo Nos. 31909 and 31910, released August 10, 1982. File Nos. BSTV-820429KE-KI and KL.

[21] *See Report and Order* in Gen. Docket No. 80–112, mimeo no. 33344 adopted May 26, 1983; *Notice of Inquiry and Proposed Rule Making* in CC Docket No. 80–116, 45 Fed. Reg. 29335, published May 2, 1980. Docket 80–116 proposes options for hastening MDS assignment procedures.

[22] Copyright liability for such uses has come under court scrutiny. *Universal City Studios, Inc.* v. *Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, ___ U.S. ___, 102 S.Ct. 2926 (No. 81–1687, 1982).

[23] *Cablevision*, November 1, 1982.

[24] *New Technologies Affecting Radio and Television Broadcasting*, National Association of Broadcasters, pp. 36–37, November, 1981.

[25] Although not generally considered in conjunction with the television market,

broadcast satellite (DBS) could bring additional channels directly into the home from an orbiting satellite. Eight companies have received conditional authorizations to construct high power DBS systems, which could begin service as early as 1986. Moreover, the Commission recently has given its approval to the use of existing satellites for the delivery of video services to the home, which may result in satellite-based services becoming available even sooner.[26] The Commission also has adopted rules that would allow low power television stations to originate programming, sell time to advertisers, or operate in a pay mode. *Low Power Television Service*, 51 RR 2d 476 (1982). As originally conceived, the low power service was intended to provide additional television service to rural areas and minority groups. When fully developed, this service may provide up to 4,000 additional video outlets across the country.

IV. THE NEED TO REEVALUATE OUR REGULATIONS

34. One reason for initiating this rule making at this time is to take into account the changes taking place in the marketplace and to seek comment on whether these changes may provide sufficient justification for amending our present regulations and policies. In this regard, several specific questions come to mind. When assessing the geographic component of the relevant market, should we view the market nationally or on the basis of a local home viewing market? Might different regulatory schemes be implemented depending on the competitiveness of locally defined markets? Within the relevant geographic market, do the alternative media discussed above represent true substitutes for commercial television viewing? Is the market now, or will it be in the near future, sufficiently competitive to serve as a reliable alternative to existing Commission regulation of licensee programming and commercialization practices? With respect to the potential competition offered by such incipient services as DBS and LPTV, should we look to some future level of availability before adding them to our competitive matrix? Can we fairly make a finding of workable market competition based on these as yet potential services? Are existing or potential competitive forces strong enough to assure that the Commission's public interest objectives will be satisfied?[27] We readily admit that

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movie viewing certainly competes with television viewing as a source of entertainment. Home video games represent additional competition for over-the-air television stations. Further, at least with respect to news and public affairs, local radio stations, newspapers, and news magazines may be considered reasonable substitutes for television viewing.

[26] *See Direct Broadcast Satellite Service*, 90 F.C.C. 2d 676 (1982); *Satellite Television Corporation*, 91 F.C.C.2d 953 (1982); *CBS, Inc. et al.*, 92 F.C.C.2d 64 (1982); *First Report and Order* in Gen. Dkt. No. 80–739, FCC 83–272 (adopted June 2, 1983); *see also GTE Satellite Corp.*, 90 F.C.C.2d 1009 (1982), *recon. denied*, mimeo no. 31754. adopted June 2, 1983.

[27] Several analyses have been published which offer conflicting views on the

the television marketplace may be different from the radio marketplace, on which we based in part our recent radio deregulation actions. Interested parties may wish to comment on whether any such differences should affect our thinking with respect to amending our commercial television rules and policies. Parties also may wish to address the extent to which this agency may amend its policies even assuming no change in circumstances has taken place. *See Greater Boston Television Corp. et al.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970).

35. Given the fact that the video market is becoming increasingly competitive, the particular regulations under scrutiny in this proceeding may impede the ability of commercial television licensees to compete with other, unregulated or less regulated technologies, thereby inhibiting their ability to serve the public fully and to grow. For example, cable television system operators are not guided in their choice of programming by local, news, or nonentertainment guidelines. Our cable television rules contain no ascertainment or program logging obligations, nor do cable systems operate under any commercialization policies. With some exceptions, the programming requirements that are applicable to cable systems are similar to those that are imposed on broadcasters by the Communications Act rather than by the Commission's rules.[38] In fact, the Commission recently adopted a *Notice of Proposed Rule Making* looking toward the deletion of many of these programming requirements for cable systems. *Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems*, 48 Fed. Reg. 26472 (1983). Various pay services, regardless of whether they are delivered by cable systems, over-the-air broadcast stations (STV), or MDS, do not labor under non-statutory content restrictions. Furthermore, the Commission has deleted one peripheral programming requirement for STV stations, the rule which requires all STV stations to present at least 28 hours per week of conventional, non-pay programming. *Subscription Television Service*, 90 F.C.C. 2d 341, 351–54 (1982). We also note that no special programming requirements have been proposed or

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competitiveness of the video marketplace. *See, e.g.*, Majority Majority Staff of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, 97th Cong., 1st Sess., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 374–377 (Comm. Print 1981); FCC Office of Plans and Policy, MEASUREMENT OF CONCENTRATION IN HOME VIDEO MARKETS (1982); National Telecommunications and Information Agency, PRINT AND ELECTRONIC MEDIA: THE CASE FOR FIRST AMENDMENT PARITY (1983). Interested parties are asked to comment on the varying conclusions reached in these and other relevant studies.

[38] Under the Commission's Rules, cable systems which originate programming are subject to obligations concerning equal opportunities for political candidates, § 76.205; fairness, personal attack, and political editorial requirements, § 76.209; a lottery information prohibition, § 76.213; restraints on the presentation of material that is obscene or indecent, § 76.215, and sponsorship identification requirements, § 76.221. As to statutory programming obligations, *see* n.50, *infra*.

even recommended for emerging technologies such as Direct Broadcast Satellites (DBS) or low power television.[29] Finally, as noted previously, the Commission is proposing a substantial reduction in the programming and ascertainment responsibilities of noncommercial television stations. *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 87 F.C.C. 2d 716 (*Notice of Proposed Rule Making* 1982). Given the fact that competing technologies and emerging delivery systems are unlikely to be burdened by programming restrictions, it may not be in the public interest to continue a regimen of comprehensive program regulation for commercial television broadcasters. Such unequal treatment may result in an increasing inability to compete with other technologies and may provide a disincentive for commercial television broadcasters to experiment and innovate in their programming.

36. A third justification for this regulatory review is reflected in Congress' expression of a strong national policy against government over-regulation.[30] For example, in 1980 Congress passed the Regulatory Flexibility Act, which is designed to relieve small businesses and entities from pervasive government requirements. The findings and purposes of the Act are instructive. Among other things, Congress specifically found:

> (a) agencies should achieve stated goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
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> (b) uniform regulations and reporting requirements have, in numerous instances, imposed unnecessary and disproportionately burdensome demands upon small businesses with limited resources;
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> (c) regulations have adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
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> (d) pervasive regulations have created barriers to entry; and,
>
> (e) unnecessary regulations may lead to inefficient use of regulatory agency resources.[31]

Another major regulatory act of Congress, the Paperwork Reduction Act of 1980, lists, *inter alia*, the following purposes:

> (a) minimize the Federal paperwork burden for individuals, businesses, state and local governments;

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[29] We do recognize that insofar as it is a broadcast service, low power television would have to comply with legislative programming requirements found in the Communications Act and the U.S. Criminal Code. *See Low Power Television Service, supra*, at para. 105. The same is true for those DBS operators who are classified as broadcasters. *See Direct Broadcast Satellite Service*, at paragraph 86.

[30] The 94th Congress introduced over 100 bills dealing with regulatory reform. G.A.O., *Government Regulatory Activity: Justifications, Processes, Impacts, and Alternatives*, p. 1, June 1977.

[31] Regulatory Flexibility Act, PL 96–354, Section 2(a), 5 U.S.C. § 601, note.

> (b) minimize the cost to the Federal government of collecting, maintaining, using, and disseminating information; and,
>
> (c) maximize the usefulness of the information collected.

The stated goal of the legislation is to reduce the 1980 paperwork burden by 25 percent in three years.[32] Although these legislative pronouncements may not be directly applicable to the instant proceeding, we think the purposes and intents of these acts offer additional and compelling justification for the actions we are proposing.

37. In the preceding paragraphs we have discussed commonly held views on the detrimental nature of unnecessary government regulation: they are costly, and, in the case of the programming requirements, they impose competitive disadvantages on commercial broadcasters that may stifle experimentation and innovation. Moreover, the case for revisiting and perhaps modifying our programming policies becomes even more compelling when we remember that we are dealing with rules and regulations that relate to the sensitive area of program content. It is at least arguable that our programming guidelines and commercialization policies impinge on a broadcaster's editorial discretion even though those guidelines have no substantive effect. If the Commission's policies have limited continuing utility or if their viable purposes may be achieved by less intrusive means, then the public interest would seem better served by the elimination or modification of such policies.

38. Many of the regulatory burden figures cited herein demonstrate the costly nature of the specific regulations being considered in this proceeding. The paperwork burdens imposed by our rules, plus other, more intangible burdens such as reduced editorial discretion and licensee inflexibility suggest that the costs of retaining our present rules may not be justified in relation to their benefits. Accordingly, a straightforward cost/benefit analysis may provide yet another specific justification or rationale for our proposed actions. Parties are encouraged to conduct such analyses and to comment on the propriety of utilizing a cost/benefit rationale as an additional or alternative justification for any final action we might take. In commenting on this and other rationales as bases for our deregulatory proposals, parties should bear in mind that all rationales do not necessarily apply to all four areas that we are reviewing. Heightened competition may, for example, be directly relevant in evaluating the possible elimination of our commercializa-

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[32] Paperwork Reduction Act of 1980, PL 96-511, Section 2(a), 44 U.S.C. § 3501; Senate Report No. 96-930, p. 2. We note that, due to recent substantial decreases in our reporting requirements, the Commission has reduced its paper work burden on regulated industries by 63.9 percent since 1980. Approximately 17 million burden hours were eliminated by our abolition of the program log requirements for commercial radio stations. Office of Management and Budget, INFORMATION COLLECTION BUDGET 3, 41 (1982).

tion and programming guidelines, but of substantially less importance to our reasoning in addressing program logging or ascertainment requirements, where direct cost/benefit analysis may be most pertinent.

39. Having presented several general rationales for our regulatory review, we now wish to focus on the particular regulations and policies under consideration. We begin our review of the programming and commercialization guidelines by reiterating that the guidelines as written are theoretically procedural. They are intended solely to direct the Mass Media Bureau as to when a particular application must be presented to the Commission *en banc* for consideration. However, it is clear that the delegations have taken on substantive overtones, at least in the minds of commercial broadcasters. This fact was well evidenced by broadcasters' comments in the Children's Television proceeding, in which Commission proposals to adopt processing guidelines on children's programming were almost universally criticized as being substantive in nature.[33]

40. In many instances, however, the Commission has cautioned against relying on percentage guidelines as indicators of substantive performance. Thus, the Commission has stated that service cannot be measured by a simple program percentage test, *North American Communications Corp.*, 69 F.C.C. 2d 1756 (1978), and that it will not dictate the amount or format of news or public affairs programming. *Kaye-Smith Enterprises*, 71 F.C.C. 2d 1402 (1979). Moreover, it is clear that failure to meet the standards is not necessarily a bar to renewal. The Commission ultimately must determine whether the proposal is reasonably calculated to meet the needs of the community. *See, e.g., International Television Corp.*, 44 RR 2d 1115 (1978); *Roy H. Park*, 69 F.C.C. 2d 1603 (1978).

41. Perhaps most indicative of the Commission's attitude about programming guidelines is its reluctance to apply similar guidelines in other contexts. In explaining why it decided not to impose programming categories as an aid in determining substantial service for comparative renewal proceedings, the Commission stated its belief that almost all licensees would adopt the FCC guidelines as their own minimum standards.[34] This, opined the Commission, could result in artifically increased levels of local news and public affairs programming. The proposal was rejected as a "simplistic, superficial

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[33] *See, generally*, the comments filed by broadcasters in response to Option IV of the *Notice of Proposed Rule Making* in Docket 19142. The substantive significance of the guidelines is further highlighted by the fact that the Commission has deferred to licensee discretion whenever the guidelines have been met, even in the context of highly contested proceedings. *See, e.g., KCOP Television, Inc.*, 71 F.C.C. 2d 1430 (1979); *Commercial Radio Institute, Inc.*, 43 RR 2d 1247 (1978); *Turner Communications*, 46 RR 2d 1646 (1980).

[34] *Standard for Substantial Program Service*, 66 F.C.C. 2d 419, *aff'd sub nom. National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978).

approach" which would almost certainly encroach on the broad programming discretion enjoyed by licensees. In a more recent action, the Commission stated that general percentages or numerical guidelines were not appropriate standards for determining the weight to be given an incumbent's record in the comparative renewal context. *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 88 F.C.C. 2d 120 (*Notice of Inquiry* 1981). The Commission also declined to establish additional program categories on the basis that a new category might imply some obligation to provide that type of programming even though not required by the Commission. *Community Service Programs*, 82 F.C.C. 2d 130 (1980), *recon. denied*, 50 RR 2d 1245 (1982). All of these arguments for not establishing new guidelines and program definitions may be equally relevant to the question of eliminating the Commission's present programming and commercialization processing guidelines for commercial television stations, at least insofar as those guidelines have assumed substantive overtones. To the extent that licensees consider our processing guidelines to be substantive requirements, our judgments are being substituted for theirs. Yet, they are in a better position to determine local needs and interests than we.

42. The purpose of ascertainment, as originally stated in the *1960 Programming Statement*, was to insure that licensees took the necessary steps to inform themselves of the real needs and interests of the areas they served to enable them to provide for those needs and interests. Thus, broadcasters are required not only to ascertain, but also reasonably to respond to their findings. However, the generalized ascertainment requirement of the *1960 Programming Statement* became a more formalized four-step ascertainment procedure by the mid-sixties. This procedure eventually was transformed into the rigorous specifications of the ascertainment Primers in the early seventies. Furthermore, it often is argued that the form of ascertainment has replaced its substance. As reported in the *Radio Deregulation Notice*, the Pike and Fischer Radio Regulation Digest currently contains over sixty pages of ascertainment annotations, most of which relate to disputes over mechanistic aspects of the process. Indeed, we candidly have characterized ascertainment proceedings as "litigation over trivia." *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 383 (1981).

43. At present, all commercial television licensees except those qualifying under the small market exemption must continuously ascertain community needs and interests according to the Renewal Primer. Under our revised renewal procedures, except for those few stations submitting the long form audit, ascertainment studies need not be submitted to the Commission at renewal time, but must be included in the station's public file. *See* Section 73.3526(a)(9), (11),

and (12) of the Commission's Rules. Also, all applicants for a new television broadcast license must conduct an ascertainment study. Proposed transferees and assignees of television stations are also obligated to ascertain community needs. The data collected in our radio deregulation proceeding indicate that, for commercial radio stations, our ascertainment requirements cost anywhere from $167 to $20,000 per year. In our system of commercial broadcasting, these costs are considered when stations set their advertising rates and ultimately the consumer must pay for our requirements.[35] Thus, it appears that the costs of ascertainment to the industry and the consumer are significant.[36] We question whether these costs are justified by the benefits derived from our formal ascertainment obligations.

44. We seek comment on the question of whether ascertainment has outlived its usefulness and should therefore be discontinued or at least modified as a formal Commission policy. The process may well have provided a useful analytical tool during the industry's earlier days. Today, however, the importance of news and public affairs programming to the public is beyond dispute. In order to compete, broadcasters constantly must stay aware of the public's desire to be informed about the issues facing their communities. The increased importance of such community-responsive programming coupled with the generally heightened level of competition in the video marketplace forces the broadcaster to be aware of the needs and interests of its service area quite apart from any formal ascertainment mechanism imposed by this Commission. Television stations that fail to meet their communities' needs will most likely receive the ultimate sanction: viewers will stop viewing.

45. Another reason for reviewing our programming and ascertainment policies at this time is the fact that, on the whole, broadcasters appear to be presenting more informational, local, and nonentertainment programming than called for under our programming guidelines. For those programming categories currently covered by our processing guidelines, information taken from the 1979 Programming Report, Form 303-A, indicates that from 6 a.m. to midnight, the program schedule of the average commercial television station contained 13.9 percent news and public affairs programming, 26.1 percent total nonentertainment programming, and 10.1 percent local programming. These figures represent a rise from 1973 in all reporting categories except local programming, which was

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[35] All applicants for new television station licenses, proposed television assignees or transferees, and television renewal applicants submitting long form "audits" must file ascertainment information with the Commission. Each ascertainment study that is submitted to the Commission must be reviewed by the staff.

[36] We welcome further enumeration of the specific costs that commercial licensees incur in fulfilling their ascertainment obligations.

down from 10.5 percent in 1973. Individually, from the years 1973 to 1979, only 2.8 percent of the stations covered by the guidelines failed to present 5 percent informational programming, and 2.6 percent of the stations failed to meet the 10 percent total nonentertainment programming guidelines. However, 32 percent of the stations failed to meet the 5 percent local programming guideline, although 22.5 percent of these stations were UHF network stations.[37] Additionally, there are recent indications that commercial broadcasters are expanding their news and public affairs commitments in the face of increasing competition from emerging technologies.[38]

46. With respect to commercial practices, the staff conducted an analysis of 60 commercial television stations in Florida, Georgia, and Alabama.[39] This analysis shows that on the average, network affiliates presented just under 11 minutes of commercials per hour during weekdays. The average commercialization for the independent stations surveyed was approximately $8^1/_2$ minutes per hour. Over the entire survey, only four hours were found in which the 16 minute guideline was exceeded. This represents only 0.33 percent of the total broadcast hours for all 60 stations. A limited sample of commercial time during weekends showed that the average broadcast hour contained just over 7 minutes of commercials. These figures indicate, we believe, that market forces are acting to hold our commercial practices far below the guidelines set out in our delegations. If, in fact, this is true, there may be no further utility in preserving those guidelines.

47. In addition to the statistical data set out above,[40] corroborative evidence exists to indicate that the commercial practices of television broadcasters have been, on the whole, reasonable. Based on a study conducted by the Children's Television Task Force, the Commission's staff concluded that broadcasters have generally abided by the Commission's commercialization policy with respect to children's programming. This has led the Commission to suspend its active consideration of children's television advertising practices. *See Children's Television Programming and Advertising Practices*, 45 Fed. Reg. 1976, para. 5, (January 9, 1980). Furthermore, the ever-decreasing number of commercial-related complaints lodged by television consumers reflects less viewer dissatisfaction with the

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[37] Appendix B contains several Tables showing the extent to which commercial television stations have been meeting the current programming guidelines.

[38] *See, e.g.*, "TV Stations Expand Local Informational Programs as Competitive Weapons Against Cable's Intrusion," *TV-Radio Age*, October 19, 1981, p. 41; and "Indies Fighting Hard for News and Public Affairs Viewers," *TV-Radio Age*, August 10, 1981, p. 40.

[39] Appendix C contains a detailed narrative description of the staff survey. A copy of the survey is available for public inspection.

[40] We invite interested parties to submit any additional quantitative data on commercial broadcasters' programming and commercialization practices.

commercial practices of television licensees. *See Television Overcommercialization*, 49 RR 2d 391 (1981).

48. With respect to program logs, all commercial television licensees are required to complete and maintain a contemporaneous listing of all programs broadcast. The program type and source must also be set forth. Program logs must be maintained for a period of two years. Section 73.1840 of the Commission's Rules. As a general matter, program logs are not submitted to the Commission. However, for those renewal applicants selected to complete the long form audit, a copy of the program logs for a composite week must be submitted. These logs are perused by the Commission to determine whether the licensee has programmed in accordance with the promises made in its previous license application. The Commission also utilizes program logs on an *ad hoc* basis for special studies. For example, program logs were utilized by the staff in the preparation of the commercial time study cited in this *Notice*. According to a 1978 GAO report, the Commission's logging requirements constituted the largest government burden on business in terms of total hours per response and number of total burden hours.[41] According to our calculations, the burden currently imposed on commercial television licensees by our program log requirements exceeds 2,468,000 hours per year. Because the Commission's actual utilization of the program logs is minimal, it is possible that the burdens imposed by our present requirements may not be justified.

49. On the other hand, we are mindful that in the radio deregulation case, the court criticized the Commission for completely eliminating the program log requirements and replacing them with an issues/programs list. The court indicated that the Commission failed "to examine in an orderly fashion the information needs created by its revised scheme and the possible ways in which those needs may be met." *UCC* v. *FCC*, slip op. at 51. Accordingly, any decision on program logs cannot be made in a vacuum. Because we now are proposing to revise our regulatory scheme for television licensees, we think it entirely appropriate concurrently to consider our information needs and to reevaluate the present logging requirements.

V. *PROPOSALS FOR DEREGULATION*

50. We now turn to the specifics of our deregulatory proposals. The following paragraphs explain in some detail the policy options which we are interested in pursuing. These options are by no means

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[41] GAO, *Federal Paperwork: Its Impact on American Business*, pp. 43, 44 (1978). *But see* n. 32, *supra*.

exclusive, and commenting parties should feel free to fashion any other reasonable option for consideration.[42]

PROGRAMMING POLICY AND GUIDELINES

51. Option I. *Community Issues Programming Obligation*. Under this option, television broadcast licensees would operate under a general obligation to address issues of concern to their communities of license. This programming obligation would be identical to that now required of commercial radio stations.[43] Accordingly, the Commission would no longer officially encourage through the use of processing guidelines the presentation of specific program categories. So long as a broadcaster presented programming reasonably calculated to address issues of concern to the community, the licensee's programming obligation would be met. In approving of this type of issue-responsive programming obligation for commercial radio stations, the court expressed its satisfaction that such a requirement is "faithful to and compatible with the Act, its legislative history, and subsequent judicial and administrative interpretations." Slip op. at 29.[44] The determination of community issues and decisions on how to address the issues would be left to the reasonable discretion of the broadcaster.

52. Under this option, the Commission would not routinely consider a licensee's programming at renewal.[45] The Commission would review a renwal applicant's programming in response to a petition to deny based on the failure of a licensee to present programming designed to address community problems.[46] Petitions to deny based on programming considerations would be expected to present specific facts demonstrating the failure of a licensee to

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[42] Because we are considering such varied options, we are not following our usual procedure of including an appendix containing specific proposed amendatory language.

[43] Due to the multiplicity of formats and specialized audiences served by commercial radio stations, radio broadcasters under certain circumstances may be only responsible for responding to the needs and interests of their particular audiences. Certain television stations similarly may find it advantageous to direct their community programming to specific audiences. We seek comment on the appropriate circumstances in which television broadcasters might be entitled to specialize in the presentation of community-oriented programming.

[44] The court indicated that, at least for radio stations, this "bedrock" obligation was sufficient to meet the nonentertainment programming obligations imposed by the Act under the public interest standard. Commenters should indicate whether anything inherent in the nature of television broadcasting would lead to a different result for television licensees.

[45] We would, however, continue to require new applicants to supply a programming proposal for use in comparative proceedings when a programming issue is raised. We seek comments on the nature of the programming statement that might be required.

[46] This procedure comports with those applicable to commercial radio stations as established in the short form renewal and radio deregulation proceedings.

provide issue responsive programming. We note that the Commission is currently exploring the comparative renewal process in another proceeding.[47] Because we have proposed to eliminate program processing guidelines, those wishing to comment on the impact this action may have on our resolution of the comparative proceeding are invited to do so. In the interim we intend no departure from our present practice of designating specialized programming issues only where substantial or material differences exist between proposals. When a programming issue is raised in any context, the Commission's inquiry would focus on the licensee's presentation of issue oriented programming.

53. If this option were adopted, all of the programming delegations of authority would be eliminated. This would include not only the program content guidelines, but also the promise versus performance guideline. Sections 0.283(a)(8) and (a)(9), respectively. The guidelines would be replaced with a public file requirement expressing the Commission's record keeping requirements, whatever they ultimately might be. Programming issues raised in response to a petition to deny or in the context of a comparative proceeding still could be referred to the Commission on the authority of other existing delegation guidelines.[48] The Commission's programming policy would not be incorporated into the official rules, but would be the subject of a policy statement that would be included in the *Report and Order* in this proceeding.

54. Option II. *Retain Existing Programming Policies, but Amend Current Delegations.* This option anticipates the retention of the Commission's current programming policies as they apply to the encouragement of local, nonentertainment, and informational programming. Existing concepts of promise vs. performance utilized in the renewal context would not be amended. We might, however, based on commercial licensees' performance with respect to our individual programming delegations, reduce or eliminate particular programming categories. For example, the data discussed in Section IV of this *Notice* indicates that the vast majority of broadcasters comply with the guidelines covering informational and nonentertainment programming. Therefore, we may wish to ease those guidelines and allow a certain degree of program experimentation in those categories. This could be done by lowering the percentage standards in the delegations, or by permitting licensees to explain to the staff any proposal not meeting the guidelines. Allowing licensees to justify to the staff past performance already is permitted under the ascertainment and promise vs. performance guidelines. Similar treatment for initial programming proposals may encourage broad-

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[47] *Notice of Inquiry*, 46 Fed. Reg. 55279 (November 9, 1981).

[48] *See, e.g.*, Sections 0.283(a)(10) and 0.283(b)(1) of the Commission's Rules.

casters to innovate and allow them more easily to compete with alternative technologies.

ASCERTAINMENT

55. Option I. *Eliminate the Ascertainment Obligations.* This option contemplates the complete elimination of our formal ascertainment obligation for commercial television licensees. The rationale for such an option embodies the notion that, because the video marketplace now is workably competitive, commercial broadcasters are forced continually to ascertain community needs and interests, and program in response to those needs and interests in order to remain viable. As stated earlier, failure to react properly to community issues may result in the ultimate sanction: a turn of the tuning dial. Ascertainment related questions would come up, if at all, only in the context of determining whether a licensee acted reasonably in determining which community issues to address in its programming. This approach was approved by the court for commercial radio stations. *UCC* v. *FCC*, slip op. at 41–46.

56. In assessing the continued utility of our ascertainment requirements in light of the increased competition facing commercial broadcasters, we are particularly interested in receiving comments on the costs of complying with existing regulations. As we noted previously, the comments submitted in our radio deregulation proceeding tended to show that the burdens imposed by our ascertainment obligations were significant. We wish to pursue a similar type of cost-benefit analysis with respect to commercial television ascertainment. Procedurally, this option would be implemented by deleting all references to ascertainment in the Commission's rules and abolishing the Primers.

57. Option II. *Retain Ascertainment Obligations without Specifying Procedures.* Under this option, each television licensee would be required to ascertain the needs and interests of its community of license and would be required to document its ascertainment effort. However, unlike our present procedures, licensees would be permitted to utilize any reasonable method in making their determinations. This option recognizes that the purpose of ascertainment is to guarantee an awareness on the part of the broadcaster of the community it serves. There may be an infinite variety of ways to carry out that purpose. Should this option ultimately be adopted, the Commission would not normally inquire into the licensee's ascertainment procedures absent a valid complaint that the licensee failed to meet its programming obligations. In relation to this option, we seek comment on whether the licensee should be required to place its ascertainment survey in its public file or regularly submit it to the Commission as part of each application.

COMMERCIALIZATION

58. Option I. *Eliminate all Consideration of Commercialization.* At present, the primary reference in the Commission's rules to commercialization is the 16 minute per hour guideline found in the Mass Media Bureau delegations of authority. Section 0.283(a)(7). Under this first option, we would delete the commercial time delegations without replacing them with some other guideline or policy. Thus, the Commission no longer would consider in any fashion a television broadcaster's commercial load. This option is premised on the belief that competition within the video marketplace will serve as an adequate regulator of commercialization.[49] Also, this option would allow television licensees the utmost discretion in trying new or unconventional commercial techniques. This option thus would leave total discretion to the licensee, which, in turn, would answer only to its viewing public. With respect to radio station commercialization, the court has approved of this policy. *UCC* v. *FCC*, slip op. at 46–48.

59. Option II. *Amend the Delegations of Authority.* If we should decide to retain some direct oversight of television commercialization, we may choose to amend our delegations in an effort to give broadcasters more discretion and thereby encourage experimentation. An amended guideline might call for no more than 16 minutes of commercial matter for no less than 75 percent of the station's operating hours. In this manner, licensees would have total discretion for up to a quarter of their broadcast days to present commercial messages in any way they wished. Also, we could raise the number of minutes in our guideline to, perhaps, 20 minutes per hour. In that way, licensees would have greater leeway while the Commission would retain some power to deal with overcommercialization. Under this option, comments should focus on an appropriate commercial guideline that both encourages new applications of commercials and leaves the Commission some oversight authority.

PROGRAM LOGS/REPORTING REQUIREMENTS

60. Our program logging requirements are, in part, intended as documentation of a licensee's programming and commercialization practices. Therefore, if our programming and commercialization policies are amended, retention of the present logging requirements might be unnecessary. As noted previously, the Commission is well aware of the court's concerns that some logging requirements may be needed to implement or oversee any newly adopted regulatory regime. However, we are also mindful of the fact that the GAO has

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[49] The National Association of Broadcasters and the Justice Department have entered into a consent decree that discontinues the NAB commercial code. *U.S.* v. *National Association of Broadcasters*, 553 F.Supp. 621 (D.D.C. 1982). Commenters may wish to address how this action affects our proposals.

found our program logging requirements to be an exceedingly time-consuming and expensive burden on licensees. Therefore, interested parties are requested to assess the information collection needs of the Commission in light of the various substantive options listed above and the burdens such reporting might impose on licensees.

61. In the radio deregulation proceeding, we deleted our program logging requirements in favor of a reporting obligation taking the form of an issues/programs list that all radio broadcasters must complete during the year and place within the public file. This list includes up to ten important issues of concern to the community as ascertained by the licensee; how those specific issues were determined; and the programming presented that reasonably was calculated to address those community concerns. In *UCC v. FCC*, however, the court expressed some concern that, given the extensive shift in official Commission policy occasioned by the radio deregulation decision, the Commission had not given sufficient consideration to its new information collection needs. Slip op. at 51. Accordingly, the court remanded the program log portion of the radio deregulation decision and invited the Commission to reassess its present information needs. The Commission accommodated the court by seeking comment on an appropriate level of reporting and record keeping for commercial radio licensees. *Further Notice of Proposed Rule Making* in BC Docket No. 79–219 (*Deregulation of Radio*), mimeo no. 33492, adopted June 29, 1983.

62. Among the options we wish to explore in this television deregulatory proceeding are those specifically listed in the above-referenced Further Notice. In that document, we stated that our tentatively preferred reporting option involved an exemplary issues/programs list plus some form of log specifying the date, time, duration and issue addressed for all those programs aired that are responsive to issues of concern to the community. We also indicated that the issues/programs list alone may be sufficient to oversee and implement our newly instituted policies. Parties may wish to comment on the specific record keeping requirements originally adopted in the radio deregulation proceeding and the propriety of applying those requirements— either solely or in addition to some logging requirement—to commercial television licensees. Alternatively, commenters may wish to address whether a revised program logging rule by itself would satisfactorily meet the Commission's information collection requirements. In presenting their views, parties should keep in mind the Commission's goal of carefully tailoring any reporting or logging rules to assure the collection of truly needed information while minimizing the burdens imposed on those submitting the information.

RELIANCE ON STATUTORY REQUIREMENTS

63. In addition to the specific options addressed above, we also

seek comment on the option of relying in whole or in part on specific statutory requirements in determining whether licensees have met their public interest responsibilities. Under such a regulatory scheme, the Commission might no longer consider a licensee's programming or ascertainment activities in any context save whether that licensee complied with specific programming obligations set forth in the Communications Act and other statutes.[50] For example, applicants for new television stations might not present programming proposals, nor might programming considerations be grounds for petitions to deny the renewal of an existing station, except for showings that a licensee neglected its statutory obligations. Because programming would not be a subject of Commission consideration, programming issues would not be designated for determination in comparative application proceedings. Essentially, adoption of this option would leave total programming discretion to the individual licensee. Except for statutory requirements, this Commission no longer would make regulatory decisions based on programming. Parties are encouraged to comment on this approach to deregulation and to indicate whether such action appropriately might be taken on a national basis or only with respect to limited local markets exhibiting the greatest variety of competitive elements to the extent that competition is determined to be relevant to the action proposed herein. Finally, comment is solicited as to what effect this approach would have on other Commission processes, particularly the comparative renewal process.

OTHER OPTIONS

64. Certainly the Commission is not rigidly bound by any statement made in this *Notice* when fashioning final programming and commercialization policies. Indeed, we intend to consider fully any other deregulatory proposals submitted in response to the *Notice*. Of course, for all of the four subject areas under consideration, after a thorough review of the record, we may choose to take no action whatsoever and leave our existing policies, rules, and guidelines intact. We invite comment on the benefits of retaining

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[50] Programming requirements specifically imposed on broadcasters by the Communications Act of 1934, as amended, include: the reasonable access provision in Section 312(a)(7); the obligation to provide equal opportunities for political candidates in Section 315; and, the sponsorship announcement requirement in Section 317. Further, the Criminal Code (18 U.S.C.) prohibits the broadcast of lottery information, Section 1304; fraud schemes, Section 1343; and, obscene or indecent language, Section 1464. Additionally, electonic media subject to the Commission's jurisdiction, including broadcasting and cable television, may not be used to advertise cigarettes and small cigars. 15 U.S.C. § 1335. Finally, we note that some debate exists as to whether or not the Fairness Doctrine constitutes a statutory programming obligation under the terms of Section 315 of the Communications Act. *See Notice of Proposed Rule Making* in MM Docket No. 83–331, FCC 83–130 (adopted March 31, 1983).

these policies, rules and guidelines. Thus, the proposals we have presented represent the full range of options open to the Commission. Our final actions in this proceeding might fall anywhere along the regulatory policy continuum represented by these options.

VI. *PROCEDURAL MATTERS*

Regulatory Flexibility Act Initial Analysis.[51]

65. Due to the ever increasing number of video delivery systems with which commercial television stations must compete and changing regulatory and philosophical attitudes about government intervention in the operations of business, the Commission believes that a complete review of commercial broadcasters' programming and commercialization obligations is appropriate. The options proposed herein, to varying degrees, are designed to permit commercial television broadcasters to compete freely with alternative media by allowing licensees more discretion in their programming and commercial practices. The proposals are also designed to lighten the reporting and paperwork burdens currently imposed on commercial television broadcasters. Third, the proposed actions would decrease the Commission's oversight of the affected entities, thus allowing the Commission to utilize more effectively its limited resources. These actions are proposed pursuant to Section 303(g) of the Communications Act of 1934, as amended, which charges the Commission to ". . . generally encourage the larger and more effective use of radio in the public interest." Although new reporting or record keeping requirements may be created, these new requirements should be substantially less burdensome than existing requirements. To our knowledge, there are no other federal rules that overlap, duplicate or conflict with this action.

66. The precise extent to which deleting our programming and commercialization guidelines might reduce licensee expenses or increase revenues is unknown. According to our estimations, elimination of the guidelines will reduce the paperwork burden on the industry by approximately 1,153 hours. The proposed amendments to our ascertainment and program logging requirements should substantially reduce licensee expenses. As reported in the radio deregulation proceeding, the ascertainment obligation for commercial radio stations cost, on the average, over $3,000 per year, and in some cases costs are as much as $20,000 per year. Because commercial television stations, in the main, are licensed to larger communities than commercial radio stations, we may assume that ascertainment expenses for the average television station are larger than for the average radio station. Thus, the savings incurred from

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[51] This initial analysis is conducted pursuant to the requirements of Section 603(b) of the Regulatory Flexibility Act, 5 U.S.C. § 603(b).

our proposals may be greater than the above-listed figures for radio stations. We estimate that elimination of our ascertainment requirements would result in a 86,630 work hour reduction in the industry's present paperwork burden. Small businesses that provide consulting and research services in connection with the general public ascertainment surveys now conducted by commercial television stations may no longer be hired to provide these services. This could result in some loss of revenue to these small businesses. With respect to our program logging requirements, GAO reports that these rules constitute an enormous paperwork burden. A reduction in the program logging requirements could save the industry up to an estimated 2.46 million work hours. Although licensees may continue to maintain comprehensive program logs for their own purposes, minimizing our program logging requirements would substantially reduce government-imposed expenses for commercial television licensees. Some small entities that provide services and consultation to assist in station record keeping, and small entities that market necessary record keeping supplies and equipment may experience some loss of business.

67. Initially, we presume that any modifications to our existing rules and policies would apply to all commercial television licensees regardless of size. As to any options presented, however, commenters are expressly requested to specify whether, consistent with legal requirements in the Communications Act, appropriate exemptions or modifications might be made to minimize any significant economic impact on small entities.

Rule Making Procedures

68. Accordingly, the Commission adopts this *Notice of Proposed Rule Making* pursuant to the authority contained in Sections 4(i) and 303(g) and (r) of the Communications Act of 1934, as amended.

69. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before November 2, 1983, and reply comments on or before December 19, 1983. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

70. In accordance with the provisions of Section 1.419 of the Rules, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by

submitting 1 copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters, Room 239, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

71. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules.

72. For further information regarding this proceeding, contact Robert Ratcliffe, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

TABLE I

	Commercial TV Stations In Operation		
Year	*Total*	*VHF*	*UHF*
1945	6	6	–
1950	97	97	–
1955	439	294	117
1960	573	441	76
1965	586	487	99
1966	598	491	107
1967	620	497	123

TABLE I

Commercial TV Stations In Operation

Year	*Total*	*VHF*	*UHF*
1968	648	504	144
1969	675	506	169
1970	690	508	182
1971	696	511	185
1972	699	510	189
1973	700	511	189
1974	705	513	192
1975	711	513	198
1976	710	513	197
1977	728	517	211
1978	727	516	211
1979	732	516	216
1980	746	517	229
1981	756	519	237

Source: Television Factbook, Services Volume, 1981–82 Edition.

TABLE II

Noncommercial TV's In Operation

Year	*Total*	*VHF*	*UHF*
1955	9	–	–
1960	44	–	–
1965	88	54	34
1966	105	61	44
1967	118	67	51
1968	146	71	75
1969	172	76	96
1970	182	77	105
1971	196	85	111
1972	206	89	117
1973	229	91	138
1974	233	91	142
1975	241	95	146
1976	252	97	155
1977	256	101	155
1978	259	101	158
1979	260	102	158
1980	267	105	162
1981	282	111	171

Source: Television Factbook, Services Volume, 1981–82 Edition

TABLE III

Estimated Growth Of The Cable Industry *
(as of January 1 of each year)

Year	*Operating Systems*	*Total Subscribers*
1952	70	14,000
1953	150	30,000
1954	300	65,000
1955	400	150,000

TABLE III

*Estimated Growth Of The Cable Industry**
(as of January 1 of each year)

Year	*Operating Systems*	*Total Subscribers*
1956	450	300,000
1957	500	350,000
1958	525	450,000
1959	560	550,000
1960	640	650,000
1961	700	725,000
1962	800	850,000
1963	1,000	950,000
1964	1,200	1,085,000
1965	1,325	1,275,000
1966	1,570	1,575,000
1967	1,770	2,100,000
1968	2,000	2,800,000
1969	2,260	3,600,000
1970	2,490	4,500,000
1971	2,639	5,300,000
1972	2,841	6,000,000
1973	2,991	7,300,000
1974	3,158	8,700,000
1975	3,506	9,800,000
1976	3,681	10,800,000
1977	3,832	11,900,000
1978	3,875	13,000,000
1979	4,150	14,000,000
1980	4,225	16,000,000
1981	4,375	18,300,000
1982	4,825	21,000,000

APPENDIX B

The following tables illustrate various percentages of news and public affairs programming, local programming and total nonentertainment programming for VHF network affiliates, UHF affiliates, VHF independents and UHF independents. Satellite stations were not included since they duplicate the parent station's programming and do no local programming of their own. All the data for these tables were compiled from FCC Form 303-A. Only the broadcast hours of 6 a.m. to midnight were used in this analysis. The years 1973–1979 are all inclusive as 1973 was the first year of collecting the data and 1980 data has yet to be processed.

TABLE 1

Seven-Year Average for Each Group

	Number of Stations	*% News and Public Affairs*	*% Local*	*% Total Non-Ent.*
VHF Net.	424	14.9	10.3	24.4

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*The change in the number of systems operating each year is determined by three factors: (1) New systems which began operation during the year. (2) Older systems coming to the attention of Television Factbook for the first time and therefore included in the total for the first time. (3) The splitting or combining of systems by operators. Source: Television Factbook, p. 83A, 1981-82 Edition.

TABLE 1
Seven-Year Average for Each Group

	Number of Stations	*% News and Public Affairs*	*% Local*	*% Total Non-Ent.*
VHF Ind.	30	9.9	15.8	19.1
UHF Net.	115	12.5	7.0	22.6
UHF Ind.	69	8.2	14.0	28.9
All Stations	638	13.7	10.3	24.3

Table 2
Seven-Year Trend for VHF Affiliates

	Number of Stations	*%News and Public Affairs*	*% Local*	*%total Non Ent.*
1973	420	14.4	10.5	23.6
1974	428	14.2	10.6	22.8
1975	423	15.7	10.5	25.6
1976	424	14.8	10.0	24.5
1977	424	15.1	10.0	24.5
1978	426	14.8	10.0	24.6
1979	425	15.5	10.2	25.3

Table 3
Seven-Year Trend for VHF Independents

1973	29	9.6	17.9	20.6
1974	29	9.8	18.0	17.8
1975	30	10.4	16.2	18.7
1976	28	10.4	15.3	19.0
1977	31	10.2	14.6	20.0
1978	30	9.8	14.5	19.4
1979	30	9.1	14.6	18.3

Table 4
Seven-Year Trend for UHF Affiliates

1973	109	12.1	7.6	20.5
1974	114	11.3	7.2	19.0
1975	112	13.2	7.0	22.8
1976	116	12.5	6.9	22.7
1977	117	12.7	6.7	23.6
1978	118	12.3	6.9	23.9
1979	118	13.2	7.1	25.0

Table 5
Seven-Year Trend for UHF Independents

1973	53	7.0	13.4	18.2
1974	61	7.8	15.1	22.1
1975	64	9.0	15.0	25.8
1976	69	9.0	15.0	29.3
1977	73	9.8	14.6	31.5
1978	74	7.5	12.9	32.8
1979	90	7.4	12.9	34.6

Table 6
National Average for Each Year

	Number of Stations	% News Public Affairs	% Local	% Total Non-Ent.
1973	611	13.3	10.5	22.6
1974	632	13.0	10.6	21.8
1975	629	14.5	10.5	24.8
1976	637	13.7	10.1	24.4
1977	645	13.9	10.1	24.8
1978	648	13.4	9.9	25.0
1979	663	13.9	10.1	26.1

Table 7

Frequency Distribution by Type of Station for Three Program Categories—A Seven-Year Average (1973-1979)

% Of Broadcasting Hours	News and Public Affairs				Local Programming				Total Non-Entertainment			
	VHF Net.	UHF Net.	VHF Ind.	UHF Ind.	VHF Net.	UHF Net.	VHF Ind.	UHF Ind.	VHF Net.	UHF Net.	VHF Ind.	UHF Ind.
0–4.9	0.2	0.7	1.9	39.5	4.2	22.5	5.3	27.9	0.0	0.0	0.0	1.0
5–9.9	5.3	18.7	55.1	36.0	49.2	64.6	20.8	28.9	0.3	0.9	1.4	7.0
10–14.9	46.7	62.2	35.7	11.2	34.4	11.3	33.8	12.4	2.2	5.2	19.8	20.5
15–19.9	42.2	18.0	6.8	5.0	10.0	1.2	14.5	7.2	12.2	24.5	44.0	17.8
20–24.9	5.4	0.4	0.5	2.1	1.9	0.4	5.3	6.4	41.3	39.6	20.8	9.9
25–29.9	0.3	-	-	1.0	0.2	-	10.6	3.7	34.5	24.0	11.1	8.7
30–34.9	-	-	-	1.0	-	-	5.3	2.5	8.4	4.1	1.4	4.3
35–39.9	-	-	-	1.0	-	-	1.9	1.7	1.0	1.4	0.5	4.8
40+	-	-	-	2.5	-	-	1.5	9.3	0.1	0.4	1.0	26.0

below guidelines

Appendix C

Analysis of Commercial Time

An analysis was conducted of the number of commercial minutes aired on all commercial television stations in Florida, Georgia, and Alabama. These states were chosen because they were in the most recent license renewal periods and their program logs were thus readily available.

A number of other stations were in the two renewal groups under consideration but were not included in the sample because of their particular circumstances. Puerto Rico and the Virgin Islands fell into the same renewal period as Florida, but were not included in the analysis because we did not consider their stations to be representative of mainland stations.

Of the 60 stations which were included in the three-state sample, 55 were network affiliates and five were independents. In addition, there were several additional stations that were operating with construction permits but had not been fully licensed and, therefore, did not submit renewal forms with program logs. Finally, there was one religious station that had no commercials. As a consequence of these various situations, these stations were not included in our analysis.

For analytical purposes, one day of the composite week, Thursday, was randomly chosen. In addition to this basic analysis, a small sample of weekend commercial time was separately analyzed. Results from that analysis also are discussed.

Commercial Time of Network Affiliates

An analysis of the entire broadcast day (sign-on to sign-off) showed that the 55 network affiliates in the sample averaged just under 5 minutes of local commercials per braodcast hour.[1] When the network average of about 8 minutes, 30 seconds of commercials per hour of network programming is added to this local commercial figure, a combined average of 13 minutes 30 seconds of total commercial time during network programming is reached.[2] Of course, this is an overstatement of the true average for the entire broadcast day because the amount of commercial time varies throughout the day and is less on average during non-network hours.[3] For example, during prime time the NAB code suggests a 9 minute, 30 second limit on commercial matter.[4] It is during prime time that the networks average about 6 minutes of commercials and the affiliate typically adds about one minute, 30 seconds of their own commercials, thereby not exceeding the guidelines set by NAB. When affiliates are clearing network programming, there is an inverse relationship between the amount of time devoted to network originated commercials and local commercials so that neither the NAB nor FCC guidelines will be exceeded. In other words, as more time is accounted for by network commercials, less time can be apportioned to local commercials since the station must not exceed an upper constraint of either 9 minutes, 30 seconds for NAB's prime time limit nor the FCC guideline of 16 minutes.

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[1] In total, stations averaged 100 minutes, 20 seconds of local commercials for the broadcast day. This sum divided by an average of 20 hours, 15 minutes of air time per station yields an average of 4 minutes, 57 seconds per hour.

[2] There was an average of about 14 hours of network programming by each network for the randomly selected Thursday. The average amount of commercial time on a network for that day was 119 minutes, 50 seconds. Therefore, the average per hour was 8 minutes, 30 seconds.

[3] Station program logs have two purposes - engineering and billing. They inform engineering personnel when to air broadcast material and act as transcripts of commercial record keeping for billing. As such, there is no need to log or be aware of commercials that are within blocks of pre-recorded syndicated programming or programming sent down to affiliates from the networks. Consequently, logged commercial time during any broadcast hour that included syndicated programming may not reflect total commercial time. However, commercials that are network originated but not logged by stations have been determined from documents which the networks supplied to their affiliated stations and are accounted for in this study.

[4] We realize the NAB commercial code has been suspended. However, it was in effect during the studied stations' most recent license terms.

Another approach to deriving the amount of commercial time aired by the affiliates in our sample and one which may give a more accurate estimate is to consider the typical network affiliate commercial make-up. As discussed earlier this type of station airs an average of 100 minutes, 20 seconds of local commercials per day; clears an average of 119 minutes, 50 seconds of network commercial minutes, and broadcasts an average of 20 hours, 15 minutes per day. By adding the average number of local commercial minutes aired by an affiliate per day to the average number of network commercial minutes per day and then dividing by the average number of broadcast hours by an affiliate per day, the resulting figure of about 10 minutes, 52 seconds of commercials per hour is reached.[5]

By actually adding the number of network commercial minutes to logged local commercials from each station's Thursday log, it was found that two CBS affiliates were 1 minute, 10 seconds over 16 minutes in the same hour. This occured when both had a half hour of local news and then aired the first half hour of the CBS late night movie. Another affiliate was 40 seconds over the limit during the 6–7 pm slot when broadcasting local news and an episode of MASH.

Commercial Time of Independents

In examining logs of the five independent stations in the sample, there was only one hour where the amount of commercial time exceeded 16 minutes. WLTV, a specialty station in Miami, logged 16 minutes, 20 seconds for one hour of the sampled Thursday. There was no other single hour of an independent's time that approached 16 minutes per hour. In fact, the next highest count was 13 minutes, 30 seconds for one hour. The average for the five independents for the entire broadcast day was 8 minutes, 36 seconds per hour.[6] This is significantly less than the 10 minutes, 52 seconds per hour average found for affiliates.

The four hours where the 16 minute limit was exceeded (3 on affiliates and one on an independent) represent 0.33% of the total broadcast hours for all 60 stations. In other words, 99.67% of all broadcast hours were within the guidelines. This result is comparable with recent NAB data that showed that of over 71,000 broadcast hours monitored, 99.84% were within NAB guidelines.[7] The sample used by NAB was almost 60 times larger than the one used in our analysis yet the percentages are quite close. Both figures are higher than the data compiled for the radio deregulation effort which showed that 98.71% of the hours observed contained a quantity of commercials less than the 18 minute commercial guideline for radio.[8]

Weekend Commercial Time

The commercial time aired by a seven station sample of network affiliates was

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[5] Mathematically: $$\frac{(100 \text{ min., } 20 \text{ sec. } + 119 \text{ min. } 50 \text{ sec.}) = 10.87 \text{ min./hr.}}{20 \text{ hours, } 15 \text{ minutes}}$$

[6] One independent in the sample operated in an STV mode for a portion of the day. Those pay broadcast hours were not included in determining the average.

[7] Source: NAB Code Authority.

[8] FCC Public Notice, January 11, 1980, Report No. 15448, Table 24.

compiled and revealed an average of only 62 minutes, 48 seconds of local commercial minutes per day. This figure is substantially lower than the average of 100 minutes of local commercials per affiliate for the Thursday used in the weekday sample. Similary, the networks averaged only 77 minutes, 25 seconds of commercials on either Saturday or Sunday. This is also substantially lower than the Thursday average of 119 minutes, 50 seconds. Given that both the network and local commercial minute totals are lower on the weekends, the likelihood of any commercial overages occurring is minimal. In fact, the average number of commercial minutes per hour for the weekend sample is about 7 minutes, 9 seconds as compared to about 11 minutes per hour for Thursday.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

This rulemaking[1] gives the Commission a tremendous opportunity to take significant steps towards the elimination of Commission-generated policies.

In particular, I view the comments in three areas as critical:

(1) *Description of the Video Market.* If the Commission is to rely in whole or in part on "competition" in the video market as a rationale for significant television deregulation, then it is important to have a clear idea as to what that market is. Thus, it is significant that the Commission asks for comments on the scope of both the product and geographic markets for television and whether the relevant geographic market should be viewed primarily as a local or a national market. *NPRM* at para. 23. This information will be especially important since it will potentially impact the Commission's approach to ownership issues as well.

(2) *Alternative Rationales.* It is also critical that this rulemaking essentially asks whether the Commission must find a "competitive" market, as it did in the radio deregulation decision,[2] in order to take the deregulatory steps which the NPRM proposes. I am not convinced that "competition" must be the exclusive basis for deregulation,[3] and in this regard, the NPRM proposes several alternative theories which may form the basis for a decision deregulating television.[4] The most promising of these alternative

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[1] Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 94 F.C.C. 2d ___ (FCC 83-313, adopted June 29, 1983) [hereinafter *NPRM*].

[2] Deregulation of Radio, 84 F.C.C.2d 968 [hereinafter *Radio Deregulation*] *reconsideration granted in part,* 87 F.C.C.2d 797 (1981), *aff'd in part and remanded in part sub nom.* Office of Communication of the United Church of Christ v. Federal Communications Comm'n, ___ F.2d ___ (D.C. Cir., May 10, 1983) [hereinafter *Radio Deregulation Appeal*].

[3] For example, the Commission did not rely on "competition" in its decision exempting small-market radio and television licensees from formalized ascertainment procedures. Ascertainment of Community Problems by Broadcast Applicants, 78 F.C.C.2d 444 (1980), *modified* 86 F.C.C.2d 798 (1981), *aff'd sub nom.* National Black Media Coalition v. Federal Communications Comm'n, 706 F.2d (D.C. Cir. 1983).

[4] Among the alternative rationales are: (1) the burden of conventional television

rationales seems to be a straightforward cost-benefit analysis. *NPRM* at para. 38. Quite simply, if the subject rules and policies do little or nothing to advance their various goals, then they would be likely candidates for elimination, especially where the costs to broadcasters are substantial. *Id.* It will undoubtedly be important for commenting parties to consider not only the paperwork burdens imposed by the subject rules and policies but also such burdens as reduced editorial discretion and licensee flexibility. *Id.*

(3) *Option of Reliance on Statutory Requirements Alone.* Most important, this NPRM asks whether and to what extent the Commission may rely on the relevant statutory requirements of the Communications Act rather than on Commission-imposed obligations.[5] In essence, the NPRM asks whether the time may have come for a return to the regulatory basics of the Act and for the repudiation of the regulatory baggage that the Commission—not the Communications Act—has imposed on television broadcasters.

Such an approach, in my reading of the Act, would mean that: (1) there would be no requirement to ascertain communities of license; (2) there would be no commercialization standards; (3) there would be no requirement for certain kinds of programming, except for those required by the Act, particularly Sections 312(a)(7) and 315 of the Act, 47 U.S.C. §§ 312(a)(7), 315 (1976);[6] and (4) there would be no

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regulation vis-a-vis other video delivery technologies, *NPRM* at para. 35; a Congressional policy against "over-regulation," *NPRM* at para. 36; and the impact of regulation on First Amendment values, *NPRM* at para. 37.

[5] The subject rules and policies present a remarkable history of regulatory accretion. For example, neither the Radio Act of 1927 nor the Communications Act of 1934 contained explicit requirements that broadcast stations present particular kinds of programs or that they ascertain their local communities. In fact, except for the gradual development of the Fairness Doctrine, *see* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247–48 (1948), both the Radio Commission and the Communications Commission avoided the erection of "a rigid schedule specifying the hours or minutes that may be devoted to one kind of programming or another," *Federal Radio Comm'n, Annual Rep't* 32 (1929). However, in 1960 the Commission imposed an affirmative obligation on broadcasters to provide programming to their communities in response to the ascertained needs and interests of the community and, in fact, listed 14 program types "usually necessary to meet the public interest, needs and desires of the community." En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960). In 1973, despite its previous statements, the Commission added a 10 per cent informational programming "guideline" for the staff in acting on applications. Amendment of Part O of the Commission's Rules, 43 F.C.C.2d 638 (1973). And in 1975, the Commission decided that all applications proposing less than five per cent "local" and less than five per cent "informational" programming should be referred to the Commission for action. Amendment to Section 0.281 of the Commission's Rules, 59 F.C.C.2d 491 (1976). Thus, in less than 40 years, the Commission has gone from the generalized requirement of the Fairness Doctrine that licensees cover various views on controversial issues of public importance to a system whereby the federal government prescribes the types—and in some cases the amounts—of programming for broadcast licensees.

[6] If the Commission ultimately chooses to rely in whole or in part on statutory

program log requirement, except for those logs necessary to assure compliance with statutory programming obligations.[7] Obviously, this approach would go further than the FCC was willing to go in the radio deregulation decision, where the Commission replaced formal programming and ascertainment requirements with more general standards.[8] However, it should be noted that a similar approach was proposed in the radio deregulation NPRM although it was not finally adopted.[9]

My initial reaction is that the statutory approach has much to commend itself to the Commission, the television industry and, most important, the American public. First, such an approach would avoid the largely ritualistic regulatory burdens imposed by the Commission for no particular statutory reason. Moreover, it has become painfully clear in recent years that concepts such as ascertainment and generalized programming requirements have grown to encumber other Commission processes, particularly the Commission's comparative process. In addition, they clearly impinge on broadcasters' First Amendment choices. Finally, a statutory approach would avoid what I view as a critical failing of the radio deregulation decision: the replacement of specific ascertainment and programming guidelines with amorphous ones.[10]

I do not accept the view that the current FCC may do no more

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compliance, it will be necessary to know exactly what is required by the Communications Act and what is not. *See* NPRM at n.50. To the extent that the Fairness Doctrine is found to be statutory, see *id.*, the obligation to present differing views of controversial issues of public importance would, of course, survive should the Commission opt for the statutory approach.

[7] *See Radio Deregulation Appeal*, sl. op. at 48–56. *See also Radio Deregulation*, 48 Fed. Reg. 33499 (1983), (FCC 83–311).

[8] The radio deregulation decision is perhaps more accurately denominated radio "reregulation" since its primary effect seems to have been the reformulation of Commission-imposed standards rather than the elimination of such standards. In fact, Commissioner Fogarty concurred in the decision "not because it 'deregulates' radio—it does not—but because it rationally refines the public interest obligations of radio station licensees in light of the contemporary reality of the radio marketplace." *Radio Deregulation* at 1119 (concurring opinion).

[9] Deregulation of Radio, 73 F.C.C.2d 457, 529–32 (1979).

[10] The transmutation of vague ascertainment guidelines into specific ascertainment requirements should be instructive to the Commission as it approaches deregulation. In 1960 the Commission found that broadcast licensees were obligated "to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community" En Banc Programming Inquiry, 44 F.C.C. at 2314. After several years of case law development, the Federal Communications Bar Association asked for some "clarification" of the Commission's standard, and the Commission obliged with numerous, specific rules regarding ascertainment. Ascertainment of Community Problems, 27 F.C.C.2d 650 (1971). It was the ritual of that clarification that the Commission largely repudiated in the radio deregulation decision as it returned to a standard of allowing radio licensees to ascertain "by any reasonable means." *Radio Deregulation* at 993. It takes no great analytical skill to discern a disturbing pattern here, and I hope that our decision in this proceeding will do something more than start a similar metamorphosis.

with regard to television deregulation than retrace the steps of a prior Commission with regard to radio deregulation. Courts have consistently recognized that the Commission, as an expert regulatory agency, is entitled to great deference in its policy decisions[11] and that its statutory construction should be followed unless clearly incorrect.[12]

In this regard the *WNCN* case[13] is particularly instructive. There, the Court reversed an appeals court decision that the Commission was statutorily obligated to review certain entertainment format changes of broadcast stations. The Court found that the Commission had made a "reasonable explanation" of its preference not to inquire into entertainment format changes, 450 U.S. at 603, and stated:

> As we read the legislative history of the Act, Congress did not unequivocably express its disfavor of entertainment format reviewed by the Commission, but neither is there substantial indication that Congress expected the public-interest standard to *require* format regulation by the Commission. The legislative history of the Act does not support the Court of Appeals and provides insufficient basis for invalidating the agency's construction of the Act.

450 U.S. at 597–98 (emphasis in original). Similarly, in the instant situation, nothing in the Act appears to *require* the Commission to impose ascertainment and informational programming obligations on broadcasters. Accordingly, assuming the Commission could provide a reasonable explanation of its action, nothing appears to keep the Commission from relying exclusively on the strictures of the Act in this area.

Similarly, I find nothing in a statutory approach which is necessarily inconsistent with the court's decision in the radio deregulation appeal. Indeed, the court specifically noted that the Commission's original "preferred approach" had been "to rely totally on the market and the decisions of individual licensees to set the amounts and types of nonentertainment programming." *Radio Deregulation Appeal*, sl. op. at 23. However, since the FCC did not ultimately adopt this approach, the court stated no opinion on it, finding that it "need not consider whether the Act would permit the Commission to rely solely on market forces in the area of nonentertainment programming." *Id.* at 23, n. 34.

In short, I see no reason why the Commission may not view the radio deregulation decision as a point of departure rather as an absolute limit. And my initial reaction is that reliance on statutory requirements rather than Commission-generated standards is the best hope of bringing significant deregulatory relief to television licensees and more diverse program choice to the American people.

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[11] *E.g.*, Federal Communications Comm'n v. National Citizens Committee for Broadcasting, 436 U.S. 775, 810 (1978).

[12] *E.g.*, Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 381 (1969).

[13] Federal Communications Comm'n v. WNCN Listeners Guild, 450 U.S. 582 (1981)

CONCURRING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Notice of Proposed Rulemaking to Revise Commercial Television Licensing Policies.

My concurrence in this Notice of Proposed Rulemaking is premised on the belief that the Commission should periodically reexamine its policies and procedures to see whether they can be improved. Most of the guidelines, policies and rules under study here have not been comprehensively revisited—as they apply to commercial television—for a decade or more.[1] Therefore, although I emphatically disagree with the Notice's suggestion that the television industry is ripe for substantial deregulation, I do not object to its issuance because the options outlined specifically include proposals that would improve, rather than eliminate, the existing regulatory structure.

Despite this acquiescence, I differ fundamentally with the reasons given for launching this broadly-gauged review. My objections are detailed at greater length below. Initially, however, it bears emphasizing that regardless of how this proceeding may be publicly characterized, it does not, and could not, propose complete television deregulation. *That* is possible only by legislation. Recent judicial decisions confirm that licensees remain, by law, public trustees, whose fiduciary status carries with it binding public service obligations.[2] As the court of appeals has once again confirmed:

> The regulatory scheme that Congress envisioned for the broadcast industry was a unique hybrid of private sector ownership of the broadcast licenses tempered by public service responsibilities; in return for "free and exclusive use of a limited and valuable part of the public domain," broadcasters were to be "burdened by enforceable public obligations."[3]

These public obligations may not be nullified by the philosphical predilections of this or any other Commission. Thus, any revision of the existing regulatory scheme must retain rational procedures to measure a licensee's service to the public. It must also preserve the public's opportunity to contribute meaningfully to our licensing decisions. The right of citizens to participate in our statutory public interest determinations is a "crucial" safeguard, one which the Commission may not indirectly undermine.[4]

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[1] Although some regulations function so effectively that their review by notice and comment would be wasteful, I cannot unequivocally vouch for the efficacy of regulations under study in this Notice.

[2] *See Office of Communication of United Church of Christ* v. *FCC*, No. 81–1032 (D.C. Cir. May 10, 1983) ("*UCC* v. *FCC*"); *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982).

[3] *UCC* v. *FCC*, *supra*, slip op. at 24–25 (citation omitted).

Some of my fellow commissioners are apparently inclined to defer oversight of the television industry "to the marketplace" except where the Communications Act expressly requires otherwise.[5] In my judgment, pursuing that course before recently planted seeds of new competition fully mature, even if it could be legally justified, would work a profound disservice on the television viewers of this country, and could only be perceived as reflecting gross indifference to our mandate to regulate "for the benefit of the public, not for incumbent broadcasters."[6] Common sense and experience confirm that the two sets of interests are *not* always synonymous, and that the broader public interest will not be fully satisfied in the existing television marketplace absent continued selective regulatory involvement.[7] Any action ceding substantial new discretion to television licensees must be scrutinized closely to ensure that it does not undermine the public's interest *sub silentio*.

With these principles firmly in mind, I turn to my specific problems with the Notice. The Commission sets forth three primary arguments for reducing television regulation. The first two are wholly unpersuasive. The Notice suggests that: (1) growing competition in the television marketplace may offer an effective substitute for attaining the goals underlying FCC regulations; (2) regardless of the competitive condition of the television industry, our policies disadvantage licensees in competing with other, less regulated video services; and (3) in any event, existing federal policy disfavors burdensome and costly regulations.

As for the first contention, it is undeniable that television is a competitive industry; that has long been the case. However, in premising any fundamental policy shift on the degree of competition in television broadcasting, the Commission must have evidence that there has been a substantial increase in the number of outlets competing for the local television viewer. Only then can we plausibly assert that spectrum scarcity—the longstanding rationale for content-related regulation—has been reduced to such an extent that the FCC can largely rely on competitive market incentives to ensure that all major programming needs are satisfied and that all significant issues are aired.

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[4] *Id.* slip op. at pp. 52–53.

[5] It is difficult to respond fully to the proposal that the Commission forswear all behavioral regulation except where required by statute, *see* para. 63, since the Notice advances neither policy nor legal support for this dramatic regulatory shift. However, it is worth observing that the FCC has already rejected such an approach for radio as administratively unworkable and of dubious legality. *See Deregulation of Radio*, 84 FCC 2d 968, 1022, 1069–71 (1981). The likely success of implementing in television what was just rejected for radio—after extensive study and public comment—is dim indeed. Consequently, I see no constructive public purpose to be served by inviting comment on the issue.

[6] *Central Florida Enterprises, Inc.* v. *FCC*, *supra*, 683 F.2d at 507.

[7] *See generally Notice of Proposed Rulemaking In the Matter of Children's Television Programming and Advertising Practices*, 75 FCC 2d 138 (1980) (inviting comment on task force findings that industry's self-regulatory efforts have failed and that public demand for additional children's programs is unlikely to be met in the present marketplace absent direct regulatory intervention).

Judged by that standard, it cannot be demonstrated that today's video market is fundamentally different, *nationwide*, than it was ten or twenty years ago.[8] Nevertheless, the Notice is somewhat schizophrenic about the present level of competition in television. On the one hand, it frankly acknowledges that recent FCC efforts to expand television viewing alternatives nationwide have not yet advanced much beyond regulatory fantasy; on the other, it suggests that a "burgeoning multitude" of video sources is spurring television licensees to render the most desirable program service. Whatever position the Notice means to espouse, it does not, nor could it, rebut the fact that conventional over-the-air television continues as the dominant video medium for a majority of the public. In other words, while the prospects for greater diversity seem bright, the choice of video service available to most Americans today is scarcely wider than it was before most of these rules and procedures were adopted.[9] One need only witness the recent astronomical sales prices of major market television stations—both VHF and UHF—to confirm that scarcity of television signals is still very much with us today.

The Commission's appraisal of the competitiveness of the existing video marketplace would have been considerably aided, and the necessity for comment on the issue substantially foreshortened, by meaningful consideration of the detailed report published just 18 months ago by the House of Representatives' Subcommittee on Telecommunications, Consumer Protection and Finance. That study is the most comprehensive assessment of competition in television performed outside the FCC. The Notice's failure to address these findings lends credence to the view that the Commission's bottom line in this proceeding is predetermined. After exhaustive factual, economic and policy analysis, the Subcommittee concluded that despite the advent of increased choices in some markets, "[i]f the argument for deregulation of television broadcasting is that the competitive infusion of the new technologies has overcome a preexisting scarcity, thus reducing or eliminating the former's position of market dominance, the argument must fail."[10] The Subcommittee's conclusions are amply supported by an extensive record and I fully concur in its judgment that "the burden falls on those who urge deregulation in the absence of sufficient competition to demonstrate how the public interest will be protected."[11] The analysis set forth by the Commission in this Notice falls woefully short on this score.

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[8] It is true that some markets boast a multitude of video services, including VHF and UHF television, cable and STV. However, those markets are the exception rather than the rule. Where there is robust competition among numerous competing firms and types of service, more significant deregulatory measures may well be called for. *See* U.S. House of Representatives Committee on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong. 1st Sess. 374–76 (1981). On the other hand, the Commission cannot take broadly based deregulatory steps today premised on the hope or expectation that a multiplicity of video outlets will develop tomorrow.

[9] At this time, cable systems provide the only significant alternative to over-the-air television. And although cable penetration has deepened impressively in the last decade, cable television is still available in only about one-third of this nation's homes.

Unlike commercial radio, where since 1965 the number of outlets has swelled by several thousand to a current total of nearly 9,000 stations, the ranks of commercial television licensees have increased by roughly two hundred (to approximately 800 stations) during the same period. Although 90 percent of the public receives at least four television signals, that is hardly the abundance witnessed in radio, where the number of outlets exceed outstanding television authorizations by a factor of ten.

The Commission's radio deregulation rulemaking noted fundamental structural differences between television and radio. Those distinctions still exist. For example, the FCC recognized that while both radio and television were part of a larger information market, the television industry's growth has been far more limited due to considerable technical constraints.[12] The Commission also found that in contrast to the pronounced trend toward specialization in radio, the economics of television encourage licensees to offer broad, common denominator programming, thus diminishing their capacity to respond to specialized needs.[13] Finally, the Commission observed that in sharp contrast to radio, television has achieved a prominent, if not paramount, role in informing and educating our society.[14]

In view of the significant differences between television and radio, any attempt to pattern "television deregulation" after our radio deregulation order could be achieved after only the most searching analysis. However, this Notice scarcely acknowledges the existence of distinctions between the two media, tersely observing that "[i]nterested parties may wish to comment on whether these [unspecified] differences should affect our thinking with respect to amending our commercial television rules and policies." *See* Notice at para. 34.

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[10] U.S. House of Representatives Committee on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong. 1st Sess. 375–76 (1981).

[11] *Id.* at 376.

[12] *See In the Matter of Deregulation of Radio*, 73 FCC 2d 457, 484–86 (1979).

[13] *Id.*, 73 FCC 2d at 486–87.

[14] Television may well be the primary source of news and information for most Americans, who rely on it for exposure to issues of local and national importance. *See* 73 FCC 2d at 486. Any action reducing Commission oversight of television must be especially sensitive to this fact and must be calculated to preserve undiminished the public's access to "diverse social, political, aesthetic, moral and other ideas. *See Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 390 (1969). This Notice unfortunately reflects no such insight or sensitivity.

The Notice's second premise — that these policies and rules are ripe for review because they hinder licensees' ability to compete with less regulated media forms — is little more than a paper tiger. As the Notice concedes, neither DBS nor LPTV is now a reality, nor is there any prospect for their becoming widely available in the immediate future.[15] The same is true of STV and MDS, neither of which presently reaches more than one million viewers. Accordingly, there can be no material competitive disadvantage as far as these services are concerned. Cable television, the only service that has made competitive inroads into the broadcast television market, is not subject to the identical panoply of rules applicable to broadcasters, but is often more extensively regulated by local franchise authorities. Thus, to the extent there are disparities between cable and broadcast regulation, they are not likely to dampen television licensees' incentive to compete and to innovate; in any event, the Notice has made no case to the contrary.

The final argument for revisiting these rules — the growing federal policy against overregulation — is the only persuasive basis supplied for going forward.[16] Over time, our administrative interven-

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[15] The Notice's apparent concern over the competitive injustice resulting from the fact that DBS and LPTV are mimimally regulated is seriously misguided. In each case, the Commission's rationale for refraining from detailed regulation was carefully tailored to the unique attributes of the service being authorized. With respect to DBS, we concluded that it would be inappropriate to subject a service of unknown viability to extensive regulation during the initial "experimental" period; however, the Commission committed to revisit the matter before adopting permanent regulatory policies. *See Direct Broadcast Satellites*, 90 FCC 2d 676 (1982). The viability of LPTV is similarly undetermined, and the sharply limited range and preemptible status of those stations render them, at best, supplements to conventional television service. *See Low Power Television Service*, 51 RR 2d 476 (1982). Having couched its regulatory judgments in these limited terms, it would be disingenuous in the extreme for this agency suddenly to bootstrap significant commercial television deregulation on the fact that its DBS and LPTV decisions prejudice conventional broadcasters.

[16] It is argued that a "straightforward cost/benefit analysis" may supply another rationale for reducing these regulations. This approach is substantially a restatement of the third justification advanced, since many recent federal initiatives against burdensome regulation are essentially based on this calculus. In any event, at the risk of stating the obvious, a regulation should not be rescinded merely because it imposes costs. Furthermore, even if a regulation's costs outweigh its public benefits, the Commission is obliged to consider less burdensome alternatives before reflexively repealing it. *See UCC* v. *FCC*, *supra* note 2, slip op. at 48–52.

The Notice also maintains that licensees will remain responsive to the public absent present requirements because: (1) most licensees exceed the programming tion into broadcasters' daily activities may have become more intrusive than reasonably necessary to protect the public interest.[17] With the advantage of hindsight, it appears that the cost of complying with certain requirements — the ascertainment primers, for example — may indeed outweigh their public interest benefits, and that our programming guidelines, *as now structured*, may not optimally serve the public interest. Therefore, while I do not propose at this time to abandon ascertainment, non-entertainment programming, commercialization and logging requirements altogether, I am receptive to schemes that would permit television licensees to meet their public interest requirements in a less burdensome manner. In other words, my initial view is that it may be possible to achieve the public interest objectives at the heart of these procedures through more finely tuned administrative tools. All constructive ideas along these lines will receive my most careful attention.

In conclusion, I have considerable reservations about this Notice. Therefore, I hope these proposals will attract robust comment and debate by affected licensees, the general public they serve, and all other interested parties. The Commission cannot properly discharge

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guidelines and generally air less commercial matter than specified by the commercialization guideline; and (2) if a broadcaster is unresponsive, it will invite "the ultimate sanction: viewers will stop viewing." *See* Notice at para. 43. The persuasiveness of these arguments is extremely limited. The fact that most licensees comply with FCC programming guidelines is unremarkable — after all, those guidelines were intended to reflect industry norms so the Commission's oversight resources could be reserved for exceptional license renewal applications. As for the latter claim, given that the economics of television foster mass appeal programming, the contention that dissatisfied viewers can substantially affect television choices is fundamentally flawed. It is altogether irrelevant as to demographically undesirable groups (*i.e.* those with limited purchasing power), whose "sanction" is unheard in this marketplace, and for residents of communities with limited video alternatives.

[17] I must confess some bewilderment, however, over the industry's apparent enthusiasm for this rulemaking. At least part of the scheme under review here was prompted by licensees in the interest of certainty and security. That certainty has been undermined to some extent by the FCC's failure to promulgate understandable comparative renewal standards. If the most deregulatory options proposed herein are adopted, a licensee's certainty about what service is necessary to obtain a "renewal expectancy" would be further reduced (as would the FCC's ability to fashion manageable and meaningful comparative renewal standards) because evaluation of licensee performance would inescapably require more subjective administrative judgments. *See also Deregulation of Radio*, 84 FCC 2d 968–989 (1981) (licensee not entitled to comparative renewal expectancy for "minimal service," which consists of "performance of all statutory obligations (i.e., Fairness Doctrine, access by candidates for federal elective office, etc.) and minimal although adequate, attention to the issues confronting the licensee's community primarily, and service area outside its community secondarily"). In such an environment, a substantial number of licensees would probably adhere to existing requirements in an effort to insure against a petition to deny or competing application, thereby negating the claimed benefits of reduced regulation. *See also Simon Geller*, 90 FCC 2d 250 (1982), *appeal docketed sub nom. Committee for Community Access* v. *FCC*, no. 82–2314 (D.C. Cir. Nov. 2, 1982).

its public interest mandate in an information vacuum. If our policies are misguided or unduly burdensome, it is incumbent upon the public to identify these failings, and if possible, to propose alternatives also calculated to safeguard the public interest. In the final analysis, of course, this Commission bears the responsibility for protecting the paramount interests of this nation's viewers and listeners. Absent legislative change, our statutory stewardship may not be delegated to licensees in the name of deregulation or any other popular ideology.

Application for Review
Fairness Doctrine
Fairness Doctrine, Complaint Sufficiency in Overall Programming
Fairness Doctrine, Controversial Issue of Public Importance

Application for review denied. Complainant must identify a particular well-defined controversial issue of public importance. In addressing overall programming, complainant must consider programming aired prior to a subject broadcast.
–*Conservative Caucus, Inc.*

FCC 83-314

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
THE CONSERVATIVE CAUCUS, INC.
against
CBS, INC.
New York, New York

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983; Released: July 11, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Broadcast Bureau's December 10, 1981 ruling, filed January 12, 1982, by The Conservative Caucus, Inc.[1]

2. The Bureau's ruling addressed the September 24, 1981 complaint, filed by The Conservative Caucus against the CBS television network, asserting that CBS had violated the Fairness

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[1] On February 1, 1982, The Conservative Caucus filed a supplement to its Application for Review, composed entirely of "The Phyllis Schlafly Report," which includes her views on "national defense" and CBS' presentation of the subject programming. On May 12, 1982, The Conservative Caucus further supplemented its Application, requesting the Commission to consider that "The Defense of the United States" was shown during prime time and was broadcast on five successive days. On September 16, 1982, The Conservative Caucus requested and was granted additional time to further supplement its Application. Thereafter, on a periodic basis it submitted information purporting to demonstrate inaccuracy and unequal treatment in CBS' reporting of the subject series. On May 2, 1983, The Conservative Caucus informed the Commission it did not intend to submit further information.

Doctrine as a result of its airing of a five-part series entitled "The Defense of the United States."[2] The Conservative Caucus identified the controversial issue of public importance discussed as generally "national defense," and stated that its "monitoring" of CBS' nonentertainment programming "since" the series was presented demonstrated that CBS had failed to present contrasting views to those presented during the series. The complainant also stated that CBS refused its request that both sides of the issue be presented as required by the Fairness Doctrine. In addition, the complainant alleged that much of the information presented was "untrue and one-sided" and "misrepresented issues of great national importance."[3]

3. The Broadcast Bureau advised the complainant that its complaint was deficient in two respects: (1) it failed to identify a particular, well-defined controversial issue of public importance;[4] and it failed to address CBS' overall programming with respect to any broadcasts which aired *prior* to the subject series and which may have contained contrasting viewpoints.[5] Moreover, in the absence of a contrary *prima facie* showing, the Bureau indicated that the

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[2] The Conservative Caucus' initial complaint and Application for Review stated that the series was broadcast August 3–7, 1981, during prime time. It is our understanding that the programs were initially broadcast June 14–18, 1981, during prime time and rebroadcast August 3–7, 1981, at 11:30 p.m., EDT, which is after prime time viewing hours.

[3] In response to this aspect of the complaint, the Bureau stated that:

> [T]he Commission is not the national arbiter of the "truth" of the news programming or the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air.

The Bureau did indicate, however, that the Commission may appropriately act if it is furnished extrinsic evidence of an attempt by a broadcaster to "engage in intentional and deliberate falsification ('slanting or rigging') of the news."

[4] The Bureau stated:

> [W]ithin the issue of national defense you have brought together numerous individual issues that you have determined are relevant to the broader national defense discussion. For instance, under the umbrella of national defense you have identified a multiplicity of issues including the necessity for a United States military buildup, the relative military strengths of the United States and Russia, the nuclear strategy of Russia, Salt Treaty issues and Soviet influence in various countries throughout the world.

Furthermore, the Bureau, citing *American Security Council Educational Foundation (ASCEF) v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), stated in pertinent part that:

> Consideration of the issues together, rather than individually, would not provide a basis for determining whether the broadcaster presented a reasonable balance of conflicting views because views on any one issue do not support or contradict views on the others. [Id. at 449.]

[5] In this regard, The Conservative Caucus stated that it had "consistently monitored news, public affairs and other nonentertainment programming *since* the airing of 'The Defense of the United States.'" (Emphasis added.) The complainant failed to address any programming prior to the subject series.

reasonableness or good faith of CBS' assertion to the complainant that it has "given extensive coverage to a wide array of opposing viewpoints bearing on these issues," is unrefuted.

4. In its Application for Review, The Conservative Caucus argues that the Bureau misapplied Commission precedent to its identification of "national defense" as a controversial issue of public importance. The Conservative Caucus contends that the issue of national defense, as presented by its complaint, sufficiently identified "an issue of exceptional public importance" and is clearly distinguishable from the facts in *ASCEF, supra*. In this regard, The Conservative Caucus argues that:

> All ASCEF requires is that when an issue, such as national defense, contains separate subissues, those subissues must be related in such a manner that "average viewers or listeners can be expected to believe that expression of a view on one supports or refutes a view on another. . . ." [*ASCEF* at 450.]

Accordingly, The Conservative Caucus contends that *ASCEF* is inapplicable because the subissues "outlined in [its] complaint are obviously well enough related that reference to the *ASCEF* case is erroneous." We disagree. The Conservative Caucus makes a bare assertion that the subissues in its complaint are "obviously well enough related" to "national defense." It provides no basis for the contention that the views on any one subissue directly support or contradict views on the others. Moreover, the claim that the subissues are "well enough related" ignores the Court's statement in *ASCEF*, cited by the Broadcast Bureau that:

> The issues that ASCEF joined together may have reference in varying degrees, to the umbrella concept of "national security." However, their relationships to one another are tangential. [Id. at 449].

The Bureau did not dispute the relevance of the subissues to "national defense." It concluded, correctly we believe, that The Conservative Caucus had not made a requisite showing demonstrating that the various subissues it identified were in effect interrelated to the extent that views on any one support or contradict views on any of the others. For example, views on Soviet influence in various countries throughout the world do not necessarily support or contradict views on Salt Treaty issues or Soviet nuclear strategy. This goes to the heart of the *ASCEF* decision. *ASCEF* stands for the proposition that a broadcaster when faced with a Fairness Doctrine complaint should be able to tell with a reasonable degree of certainty whether it has presented contrasting points of view in compliance with the Fairness Doctrine. As the Court in *ASCEF* stated:

> Unless a broadcaster can recognize the issue "with precision and accuracy" [cite omitted], proof of compliance with the Fairness Doctrine would require the production of "recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time." [Id. at 451; cite ommitted.]

Thus, The Conservative Caucus' identification of the issue is not distinguishable from the circumstances in *ASCEF*, and clearly the rationale for the determination in that case is directly applicable to this complaint. The Court recognized the potential burden on a broadcaster when an identification of a controversial issue of public importance involves a myriad of subissues so extensive and diverse that to demonstrate compliance with the Fairness Doctrine, the broadcaster would be obligated to embark on an exhaustive, unnecessarily burdensome search of its programming. In this context, the Bureau cited the Court's statement in *ASCEF* that:

> The Commission has wisely determined that imposition of such onerous burdens on broadcasters would, in practice, defeat the policy of "encouraging robust, wide-open debate." [*Id.* at 451.][6]

It is important to note in light of the above discussion that our interpretation of *ASCEF* does not foreclose the success of every fairness complaint concerning broad, complex issues. The Court in *ASCEF* recognized that absent sufficient particularity some issues like "national defense" are inherently subject to numerous possible interpretations of what the issue means.[7] Unless the issue is adequately defined, it may, as illustrated in this case, contain subissues which, although related to the umbrella issue, do not necessarily contrast each other. Thus, in addressing an issue as broad as national defense it is incumbent upon a complainant to identify precisely what controversy concerning that issue is being focused upon, and if subissues are identified, to demonstrate how they are related to each other. If a complainant can neither define the umbrella issue with sufficient detail, nor explain how views on each subissue contrast with the others, the complainant should consider addressing individual subissues as separate controversial issues of public importance. Without such particularity, it is impossible from a practical standpoint for the broadcaster or the Commission to know how compliance with the Fairness Doctrine can be demonstrated.

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[6] In this context, the following statement by the Court in *ASCEF* is pertinent:

> An editor preparing an evening newscast would be required to decide whether any of the day's newsworthy events is tied, even tangentially, to events covered in the past, and whether a report on today's lead story, in some remote way, balances yesterday's, last week's or last year's. Because this requirement would not promote the public interest, the limitations on the exercise of news judgment would be unjustified. [*Id.* at 455].

[7] In this connection, Chief Judge Wright's concurring opinion in *ASCEF* stated:

> That "national security" means different things to different people is incontestable and, in this fairness doctrine context, fatal to petitioner's complaint. To some, national security means devoting the bulk of our national resources to creating the ideal society. . . . To others, this is nonsense: national security translates literally into military superiority. Still others take a more discriminating view and seek to arrive at a secure compromise between domestic improvements and military might. And within each of those conceptions of National Security there is a sufficient number of allocational configurations to correspond to the multiplicity of individual visions of a "secure" nation. [Id. at 454.]

5. Assuming the issues listed in footnote 4, *supra*, were related as advocated by complainant, it has still not shown that CBS failed to afford a reasonable opportunity for contrasting views in its overall programming. In this regard, the Bureau noted The Conservative Caucus' assertion that, in "monitoring" CBS' programming "*since* the airing of 'The Defense of the United States,'" it found a lack of contrasting views to those presented during the series. The Bureau stated:

> Clearly, the burden upon the complainant to demonstrate an imbalance in the discussion of a controversial issue of public importance in a broadcaster's *overall* programming cannot exclude consideration of programming *prior* to subject presentations.

Rather than furnishing the necessary information regarding CBS' programming "prior" to "The Defense of the United States," the complainant now merely states that "The Conservative Caucus has not, however, contended that the programming *prior* to that series or that overall programming of CBS should not be taken into consideration in deciding whether or not Fairness Doctrine violations have been established." Clearly, The Conservative Caucus has still not made any showing regarding its viewing prior to the series, nor has it indicated any effort to ascertain the extent, if any, of CBS' presentation of contrasting views during this period. Absent such information, the Commission remains without a necessary element of a *prima facie* Fairness Doctrine complaint. Furthermore, we believe that The Conservative Caucus' complaint is deficient in an additional respect. The complaint states that officers of The Conservative Caucus have "consistently monitored news, public affairs and other nonentertainment programming by CBS since the airing of 'The Defense of the United States.'" There is no description of what "monitored" means. The *Fairness Report*, 48 FCC 2d 1, 19 (1974), states that "complainants should specify the nature and extent of their viewing or listening habits." In this regard, the Commission has stated that:

> [It] did not intend that the mechanical repetition of the words "regular viewer" or the assertion that the complainant "routinely listens to [or views] the news, public affairs and other nonentertainment programs" broadcast by the station, without the additional specific information setting forth the "nature and extent" of the complainant's viewing habits [cite omitted] would be considered an adequate basis for a Fairness Doctrine complaint. [*John Howard*, 55 FCC 2d 777, 780–81 (1975).]

Clearly, this is equally applicable to the complainant's bare monitoring assertion.

6. The Conservative Caucus supplemented its Application with documents contaning the views of various military personnel and

other interested parties who question the accuracy and balance of CBS' reporting. However, although the Bureau's ruling clearly advised the complainant that the Commission will not take action in this area unless provided with extrinsic evidence of *deliberate* distortion, no such evidence was furnished. Thus, because the Commission appropriately avoids arbitrating the truth or falsity of news programming, or judging the handling of particular news events in the absence of extrinsic evidence of bad faith, this aspect of the Application also fails to warrant alteration of the Bureau's ruling.

7. We recognize the high burden placed upon Fairness Doctrine complainants. However, the public interest is best served by avoiding government involvement in programming judgments as much as possible. By placing high procedural burdens on complainants, station and network inquiries initiated by the Commission are made only when we receive thorough, well-documented complaints. As the Bureau noted, we would place a heavy burden on broadcasters if we asked them to demonstrate compliance with the Fairness Doctrine on every complaint. If this were the case, broadcasters might tend to avoid controversies and present only bland programming rather than subject themselves to that burden. Such a result would certainly be contrary to the public interest, particularly because we seek to encourage vigorous coverage of the controversial issues of public importance that face us every day.

8. Having carefully examined the pleadings before us, it appears that The Conservative Caucus has presented no new or additional information or arguments which would warrant reversal or alteration of the Broadcast Bureau's ruling in this matter. Accordingly, in view of the above considerations, the Application for Review filed by The Conservative Caucus IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application for Review
Fairness Doctrine
Fairness Doctrine, Controversial Issue of Public Importance

> Application for Review of Bureau ruling denying a complaint against the ABC television network denied. Complainant failed to establish that the treatment of allergy sufferers is a controversial issue of public importance.
> *–Council of Allergy/Immunology*

FCC 83–294

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
JOINT COUNCIL OF ALLERGY AND IMMUNOLOGY
against
AMERICAN BROADCASTING COMPANIES, INC.

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: June 28, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The Commission has before it an Application for Review of the Broadcast (now Mass Media) Bureau's September 10, 1982 ruling[1] filed October 12, 1982, by Stephen Paul Mahinka on behalf of the Joint Council of Allergy and Immunology (JCAI).

2. The ABC television network, on its July 6, 1981 news program, "ABC World News Tonight," presented a news story that focused on a method of treatment for allergy sufferers called "clinical ecology." In response to this program, JCAI filed a complaint on June 25, 1982, requesting "that the Commission direct the American Broadcasting Companies, Inc. to provide the Joint Council of Allergy and Immunology with a 'reasonable opportunity for the presentation of conflicting views' on a controversial issue of public importance regarding safety and health, as required under the Fairness Doctrine. . . ." JCAI identified the issue as "what doctors should do for this nation's nearly 35 million allergy sufferers."

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[1] A copy of the ruling is attached (Appendix).

3. On September 10, 1982, the Bureau ruled that ABC was not unreasonable in determining that the issue in question "did not involve a controversial issue of public importance subject to the Fairness Doctrine." In addition, the Bureau noted that the complainant had failed to establish "the nature and extent of the viewing habits" of its members.

4. In its Application for Review, JACI asserts that in addition to the broadcast in question, "recent attention from both the media and government officials, which the [s]taff determination failed to take into account, supports JACI's contention that the issue addressed in its complaint is both important and controversial." JCAI also reiterates its allegations that ABC's overall programming fails to present contrasting viewpoints and that the broadcast in question was a "one-sided" presentation. In addition, JCAI asserts that it adequately established the nature and extent of its members' viewing habits in accordance with the *Fairness Report*, 48 FCC 2d 1, 19 (1974).[2]

5. In support of its contention that the subject issue has received significant media attention, JCAI refers to the August 23, 1982 edition of Newsweek magazine which contained "a cover story on the subject of 'Allergies: New Discoveries, New Relief.'" JCAI states that this cover story "included a lengthy discussion of the growing controversy surrounding the methods of the 'clinical ecologist.'" In addition JCAI notes that, in August 1982, the Chicago Tribune carried a three-part series entitled "War on Allergies" which discussed methods of allergy research and treatment. Regarding its contention that this issue has received attention by government officials, JCAI explains that in June 1982 the Environmental Protection Agency circulated within the Agency a draft of a study entitled "Mini-Assessment of Selected Future Environmental Problems: Environmental Allergy." JCAI states that this "study directly addresses the growing controversy concerning alternative treatments for allergy sufferers."

6. JCAI asserts that the Bureau "failed to take into account" recent attention by the media and government officials pertaining to the subject issue. This material is brought to the Commission's attention for the first time in JCAI's Application for Review. Section 1.115(c) of the Commission's rules and regulations (47 C.F.R. § 1.115(c)) states that "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." The complainant did not submit copies or even identify the existence of the

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[2] In this regard, JCAI in its June 23, 1982 complaint stated "JCAI's member organizations have several individuals who are and have been for some time regular viewers of the network's news and public affairs programming, including Abe L. Aaronson, M.D., and Robert J. Becker, M.D."

Newsweek and Chicago Tribune articles or the EPA draft while its complaint was pending before the Bureau.[3] Therefore, under Section 1.115(c) these matters are not properly before the Commission. Under the Fairness Doctrine it is incumbent on the complainant, and not the Commission, to establish a *prima facie* case. In assessing a Fairness complaint, the Commission examines only material submitted by the complainant in accordance with our rules.

7. In any event, even if the above-mentioned writings were properly before the Bureau and contemporaneous with the broadcast, we do not believe that they show the treatment of allergy sufferers to be a "controversial issue of public importance" so as to make ABC's judgment unreasonable. As the Bureau previously quoted in its ruling, to establish the controversiality of an issue, a complainant must show that an issue "is the subject of vigorous debate with substantial elements of the community in opposition to one another." *Fairness Report*, 48 FCC 2d at 12. The existence of two articles in the media, an unpublished report by a government agency, and the July 6, 1981 program in question, do not, in themselves, demonstrate that the treatment of allergy sufferers is controversial. The Bureau correctly concluded that media attention does not necessarily make an issue controversial. *See Healey v. FCC*, 460 F.2d 917, 922 (D.C. Cir. 1972).

8. Having carefully examined the pleadings before us, it appears that JCAI has presented no new or additional information or arguments which would warrant reversal of the Bureau's ruling on this matter. Therefore, we agree with the Bureau's finding that ABC was not unreasonable in its determination that the treatment of allergies, although newsworthy, is not an issue which should be subject to the Fairness Doctrine.

9. In regard to establishing the nature and extent of the viewing habits of the JCAI members, the JCAI complaint presents nothing more than a "mechanical assertion" of viewing habits (see Appendix), which we have found to be an insufficient showing for establishing a *prima facie* fairness complaint. Therefore, the Bureau was correct in finding that "[a] mechanical assertion that one is a 'regular viewer' will not serve to establish that the licensee, in its overall programming, has failed to present contrasting points of view." *John Howard*, 55 FCC 2d 777, 780–81 (1975); *Environmental Defense Fund*, 90 FCC 2d 658 (1982).

10. In view of the foregoing, it is unnecessary for us to address whether ABC's overall programming, or the program in question, presented contrasting viewpoints on the issue in question.

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[3] The Newsweek and Chicago Tribune articles were published after the complaint was filed, but before the Bureau's ruling, and more than one year after the broadcast in question.

11. Accordingly, in view of the above considerations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

September 10, 1982

IN REPLY REFER TO:

8330-D
C6-677

Joint Council of Allergy and Immunology
c/o Stephen Paul Mahinka, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Mahinka:

This is in response to your Fairness Doctrine complaint, filed June 25, 1982, on behalf of The Joint Council of Allergy and Immunology (JCAI) which alleges that the ABC television network, on its July 6, 1981 news program, "ABC World News Tonight," violated the Fairness Doctrine.

You assert that ABC only presented one side of the issue you identify as, "what doctors should do for this nation's nearly 35 million allergy sufferers." You allege that "the broadcast appeared to endorse . . . 'clinical ecology'" as a treatment for allergy sufferers, but failed to indicate that "traditional methods of medical treatment [for allergies] . . . have been shown to be safe and effective. . . ." You further assert that several members of JCAI, including Drs. Abe L. Aaronson and Robert J. Becker, are "regular viewers of the network's news and public affairs programming" and "have never encountered" programming on the traditional treatment of allergies. You assert the above stated issue is controversial and its controversiality was recognized by the "ABC World News Tonight" commentator when he stated there is "a growing controversy over what doctors should do for this nation's . . . allergy sufferers." Furthermore, you assert this issue is of public importance because a major portion of the United States' population, at least 35 million people, suffer from allergies, and that Fairness Doctrine obligations require "considered attention" to issues directly "affecting public safety and health." In addition, you allege that ABC's response to your Fairness Doctrine complaint was "incorrect and misleading" because, contrary to ABC's contention, the program "clearly appeared to advocate the methods of clinical ecologists." Finally, you assert that ABC did not clearly specify the subject of discussion in those programs it identified as representing contrasting viewpoints on the issue. As a result, you request that the Commission investigate ABC's response to your complaint and order ABC to provide you with a reasonable amount of time to present a contrasting viewpoint.

In reviewing complaints under the Fairness Doctrine, the Commission does not substitute its judgment for that of the broadcaster. Rather, the Commission considers whether the station or network has acted reasonably and in good faith. As the Commission stated in the *Fairness Report*, 48 FCC 2d 1, 9 (1974):

> We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. [Citation omitted.]

In its December 9, 1981 response to your letter of November 3, 1981, ABC indicated that its program was newsworthy, but it did not involve a controversial issue of public importance under the Fairness Doctrine. Furthermore, ABC did not feel that its broadcast could be characterized as "an endorsement of clinical ecology" since it had presented criticisms of clinical ecologists within the same program.[1] Finally, ABC indicated that on four different occasions allergists have appeared on the "Good Morning America" program and, as a result, it was of the opinion that it had presented a representative sampling of allergy treatments in its programming.

To establish a *prima facie* case under the Fairness Doctrine, a complainant should demonstrate that an issue is *both* controversial and of public importance.[2] In determining the "controversiality" of an issue, a licensee should consider "the degree of attention paid to an issue by government officials, community leaders, and the media . . . and whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another." *Fairness Report, supra,* at 12. You have not made any showing that this issue, the appropriate treatment of allergy sufferers, has received attention from government officials, community leaders or the media (except for the broadcast in question). Moreover, you have not established that this issue has been subject to vigorous debate with substantial elements of the community in opposition to one another. An issue which may be debated within the medical field will not, by itself, be considered controversial. *See Thomas W. Lippitt,* 53 FCC 2d 1195 (B/c Bur. 1975). There must be a cognizable public controversy for the Fairness Doctrine to apply. *See American Vegetarian Union,* 38 FCC 2d 1024, 1026 (B/c Bur. 1972), *review denied,* 45 FCC 2d 1038 (1973); *Nellie Shriver,* 46 FCC 2d 1121 (B/c Bur. 1974). Furthermore, an issue is not necessarily controversial or of public importance because it has received media attention. In this regard, the Court of Appeals in *Healey v. FCC,* 460 F.2d 917, 922 (D.C. Cir. 1972) stated:

> Merely because a story is newsworthy does not mean that it contains a

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[1] ABC indicated in its letter of December 9, 1981, that "[i]n addition to the critical comments of Dr. Garry Ross," its correspondent, James Walker, "pointed out that the views of clinical ecologists were 'controversial' and that they 'have drawn sharp criticism from the medical establishment.'"

[2] In addition to the foregoing, the *Fairness Report, supra,* states that the complainant should include the following information to establish a *prima facie* complaint:

> (1) the broadcaster (station or network) involved;
>
> (2) the specific issue of a controversial nature broadcast (complainant should include an accurate summary of the views broadcast);
>
> (3) the date and time when the issue was broadcast;
>
> (4) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming;
>
> (5) copies of correspondence between the complainant and the broadcaster; and
>
> (6) whether the broadcaster has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

> controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues.

Thus, the existence of media coverage, by itself, is insufficient to demonstrate an issue is subject to the Fairness Doctrine.

In view of the foregoing, we cannot find that ABC was unreasonable in determining that its July 6, 1981 program, "ABC World News Tonight," did not involve a controversial issue of public importance subject to the Fairness Doctrine.[3]

Moreover, you have asserted that several members of JCAI, including Drs. Aaronson and Becker, are "regular viewers of the network's news and public affairs programming." Although the Commission does not require complainants to be "around the clock" viewers of a station or network in order to establish unbalanced programming, they are, however, required to "specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience." *Fairness Report, supra,* at 19. A mechanical assertion that one is a "regular viewer" will not serve to establish that the licensee, in its overall programming, has failed to present contrasting points of view. *John Howard,* 55 FCC 2d 777, 780–81 (1975); *Environmental Defense Fund,* 90 FCC 2d 648 (FCC 82-268, July 9, 1982). You have made no showing as to the nature and extent of the viewing habits of Dr. Aaronson, Dr. Becker or any other members of JCAI.

Accordingly, no further action is warranted on your complaint. We recognize the high burden placed upon Fairness Doctrine complainants. However, the public interest is best served by avoiding government involvement in programming judgments as much as possible. By placing high procedural burdens on complainants, station and network inquiries initiated by the Commission are made only when we receive thorough, well-documented complaints. We would place a heavy burden on broadcasters if we asked them to demonstrate compliance with the Fairness Doctrine on every complaint. If this were the case, broadcasters might tend to avoid controversies and present only bland programming rather than subject themselves to that burden. Such a result would certainly be contrary to the public interest, particularly because we seek to encourage vigorous coverage of the controversial issues of public importance that face us every day.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. §1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. §1.115).

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[3] In your complaint you have requested that the Commission order ABC to provide JCAI with a reasonable amount of time to present a contrasting point of view. Under the Fairness Doctrine no individual or group has the right to respond to a controversial issue of public importance. Instead, the licensee exercises wide journalistic discretion in determining who may present contrasting viewpoints. Therefore, even if the Fairness Doctrine were applicable in this case, JCAI would not necessarily be afforded any broadcast time to present its viewpoint.

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

Frequency Allocation
Satellite Direct Broadcast

Reallocation of spectrum to enable establishment of new Direct Broadcast Satellite service affirmed on reconsideration, given policies and procedures adopted to protect legitimate interests of existing users of the frequency band.
-Direct B/c Satellite Service
GEN. Docket No. 80-603

FCC 83-241

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Regulatory Policy Regarding the Direct Broadcast Satellite Service	General Docket No. 80-603

MEMORANDUM OPINION ORDER

(Adopted: May 17, 1983; Released: May 19, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

I. Introduction

1. This *Order* considers and denies a petition for reconsideration of the Commission's June 23, 1982, *Report and Order* in General Docket 80-603 ("*DBS Report and Order* "), 90 F.C.C. 2d 676 (1982), that established initial rules and policies for the direct broadcast satellite ("DBS") service. The petition, filed on August 3, 1982, for the County of Los Angeles ("LA County") by George Y. Tice, Director of Communications, is limited to issues raised by the Commission's action confirming the allocation of the 12.2-12.7 GHz (12 GHz) band for satellite to earth transmissions in the DBS service, and outlining plans for accomodation of terrestrial microwave fixed service (fixed service) licensees currently using that spectrum. Oppositions were timely filed by Direct Broadcast Satellite Corporation ("DBSC"), Satellite Television Corporation ("STC"), Western Union Telegraph Company ("WU"), and United States Satellite Broadcasting Company ("USSB"). LA County is a licensee in the fixed service in the 12 GHz band. All parties participated in earlier stages of this proceeding.

2. The petition for reconsideration makes three substantive allegations:

(1) The Commission allocated the 12.2-12.7 GHz band for DBS use without giving adequate consideration to the needs of fixed service users of the band.

(2) The proceeding to accommodate the needs of existing 12 GHz fixed service licensees,[1] first announced and outlined by the Commission in the *DBS Report and Order*, will not protect adequately the needs of these licensees.

(3) The Commission did not establish a procedure in the *DBS Report and Order* to compensate adequately fixed service licensees that must move from the 12.2-12.7 GHz band.

LA County implicitly requests that the 12 GHz spectrum allocation be suspended pending full Commission consideration of the needs of fixed service users, and explicitly requests that it be suspended pending the conclusion of the 1983 Region 2 Administrative Radio Conference ("RARC-83"). At that conference, the United States and other regional administrations will adopt procedures for the sharing of the 12 GHz spectrum for direct satellite broadcasting services within Region 2. LA County also requests that the terrestrial proceeding be structured to allow public comment on the spectrum allocation issue after RARC-83. Opposition comments generally assert that the petition is technically flawed, that the allocation of the 12.2-12.7 GHz band to DBS was proper, that the needs of present and future fixed service users are protected adequately under the present procedures and plans, and that granting the petition would unnecessarily delay the introduction of DBS service to the detriment of the public interest. Consideration of these issues requires a somewhat detailed exposition of the relevant details of the DBS rule making and associated proceedings.

II. Background

3. The potential conflict of fixed service and DBS use of the 12.2-12.7 GHz band was considered by this Commission upon initiating this proceeding in 1980 with the *Notice of Inquiry*, 45 Fed. Reg. 72719 (published November 3, 1980). Therein the Commission noted that shared use of the band by fixed and DBS services might be impossible and thus requested comment on how to accommodate existing 12 GHz users, if required. Subsequently, after extensive comment and full consideration of these difficult issues, the Commission adopted the *Notice of Proposed Policy Statement and Rulemaking*("*Notice* ") in this proceeding, 86 F.C.C. 2d 719 (1981), designating the 12.2-12.7 GHz spectrum for DBS use. The *Notice* proposed that when DBS satellites began operating, "terrestrial licensees in the 12 GHz band will be required to make whatever adjustments in technical parameters or assigned frequencies necessary to prevent harmful interference to operating DBS systems." *Id.* at para. 36. To facilitate the needed adjustments, the *Notice* indicated that existing fixed service

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[1] This proceeding, General Docket 82–334 (see paragraph 9, *infra*), is referred to herein as the "terrestrial rule making" or "terrestrial proceeding."

users would be subject to reassignment within or outside the 12 GHz band. The Commission announced these intentions at that time to give existing fixed service licensees enough time to prepare for a possible transition to other bands. *Id.* at para. 37. In addition, the *Notice* established a procedure to give specific notice to all new fixed service licensees of the probable need to alter frequencies at some future date to prevent harmful interference to operating DBS systems.[2]

4. The *Notice* reflected extensive study of the issues posed by the fact that the 12 GHz band was then being used by fixed service licensees. Recognizing the costs associated with a move to other bands by fixed service licensees, it invited comment on the best way to allocate these costs. The Commission proposed that existing fixed service licensees bear all costs of relocation, but the accompanying discussion considered the option of establishing a transition period when DBS and fixed services would share the band. The transition period was suggested to give fixed service users time to move to other bands as equipment reached the end of its useful life. In discussing this option, the *Notice* stated that reception of DBS signals during this period would be impossible and that the financial impact on the DBS systems might be severe. In contrast, spectrum sharing during this period was expected to have no negative impact on fixed service systems. Given the comparative disadvantage of such sharing to DBS operators, the Commission suggested that arrangements might be sanctioned wherein DBS operators could pay some costs of relocation by fixed service operators in return for earlier non-restricted use of the band. Additionally, the *Notice* announced the Commission's intention to initiate a proceeding looking to expansion of the alternative bands available for fixed services. Specifically, this new proceeding was to consider rules to initiate use of higher, undeveloped fixed service bands and to re-examine the rules governing the use of the fixed service at the lower bands.

5. Six months after publication of the *Notice*, the Aerospace and Flight Test Radio Coordinating Council ("AFTRCC") submitted a "Petition for Expedited Relief" seeking substantially the same relief as requested here by LA County. More specifically, the AFTRCC petition requested that the Commission (1) initiate a study of the 12 GHz and other bands for fixed service use, and (2) defer authorizing DBS in the 12 GHz band until the study was complete. The

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[2] *Id.* at para. 36. Between the date of issuance of the *Notice* and the *DBS Report and Order*, the Private Radio Bureau specifically advised all new applicants for fixed service licenses in the 12 GHz band of the proposed DBS allocation decision, and of the probable need to change frequencies in the future. Similarly, all such licenses issued during this period were expressly conditioned on the outcome of the DBS proceeding. Since adoption of the *DBS Report and Order*, all fixed service license authorizations have been accompanied by a copy of the June 1982 News Release announcing Commission adoption of the *DBS Report and Order*.

Commission incorporated that pleading and the accompanying record into the DBS rule making.

6. The *DBS Report and Order* gave extensive treatment to the spectrum allocation and sharing issues raised in the *Notice*, in the AFTRCC petition, and in the combined record. In considering these issues in the *DBS Report and Order*, the Commission proceeded from two policy premises: first, the concerns of the fixed service users deserved serious attention; second, the potential public interest benefits of DBS justified both expedited action by the Commission and some adjustments by other services. Concluding that these premises posed difficult but not incompatible policy choices, the Commission chose a course of action designed both to avoid unnecessary delays in the DBS proceedings and to minimize the impact of its DBS allocation decision on existing 12 GHz fixed service licensees. The threshold question was whether to confirm the action of the *Notice* allocating the 12 GHz spectrum to DBS. In confirming the allocation, the Commission reviewed the spectrum needs for DBS and determined that no viable alternative to the 12 GHz spectrum existed.[3] This finding was based, in large part, on two interrelated considerations. First, the Commission concluded that sufficient spectrum for initial DBS service and its expected growth through the year 2000 must be made available quickly if its public interest goals in authorizing broadcast satellite services were to be realized fully. Second, the 12 GHz band offered the only means of accomplishing this end since it is the only spectrum suitable for satellite communications for which the necessary equipment would be readily available and in which DBS service was already authorized in the International Table of Allocations. The Commission's decision to utilize the 12 GHz spectrum for DBS was also based on various technical, legal and economic factors. One of the most important policy considerations was the need to provide sufficient spectrum to allow an "open skies" policy for DBS service that would afford the greatest possible flexibility and adaptability to those that would provide the service. The Commission noted that this policy was extremely successful in the domestic satellite area, and that it had facilitated the early implementation of many new satellite services.

7. At this point, the Commission considered extensively the issues raised by its DBS allocation action with respect to current

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[3] It should be noted that the Commission decision to allocate the 12 GHz spectrum for DBS is not mandated by international agreement, but was made to further the domestic policy interest in providing for DBS service. The International Table of Allocations adopted at the 1979 World Administrative Radio Conference allows Region 2 administrations to implement several services in this band, including the Fixed, Fixed-Satellite, Mobile, Broadcasting, and Broadcasting Satellite services. The details of this sharing will be formulated at RARC-83, and have been the subject of General Docket 80–739. *See Report and Order Concerning Commission Proposals for RARC-83*, (adopted March 9, 1983), FCC 83–102, 4-28-83, 48 FR 19212.

users of the 12 GHz band. Although it continued to recognize the significance of these issues, it was then satisfied that the record contained sufficient evidence to assume that these issues could be reasonably resolved without further delay of the DBS rule making. The Commission recognized that rule makings were already in progress to establish rules and procedures governing the use of two higher bands and that these bands would be available for use by existing 12 GHz fixed service users.[4] It recognized also that these higher bands would not be entirely satisfactory to fixed service users and thus conducted an extensive review of the record and other available data to determine if more suitable spectrum could be found for many of the fixed service users. This review included a thorough exposition of the number of these licensees, the type of service they provide, the equipment and relay system arrangements employed, and the most important reasons why these users chose 12 GHz over alternative bands. On this latter point the record revealed that many fixed service users apparently chose the 12 GHz band for reasons not related to the technical characteristics of the band, including their being precluded because of status limitations on some bands and because of heavy use of some bands in specific geographical areas. The cost of equipment was also noted as a reason for selecting some bands over others. In this situation, the Commission determined that if it were to adopt changes in certain Commission procedures and policies, significant substitute spectrum might well be available in existing bands for these licensees. The Commission then tentatively identified other bands that might support existing 12 GHz users, and various means for accommodating these users through the development of rules and policies to encourage spectrum sharing and other spectrum use efficiencies. The Commission instructed the staff of the Office of Science and Technology to prepare a *Notice of Proposed Rule Making* that would look toward the adoption of these measures. The Commission stated its firm intention to take final action to accommodate these users no later than September 4, 1983. This date was chosen because of its proximity to the completion of the RARC-83 conference that will adopt final international rules for the use of the 12 GHz band by DBS in Region 2, and because it will precede post-RARC-83 authorizations of DBS systems.

8. The most important remaining matter involved the cost and timing of relocation. Given the alternatives proposed and considered in the record, the Commission adhered to its proposal in the *Notice* to require the fixed service users to bear the cost of their relocation, but included several very important provisions to mitigate these costs. First, those fixed service users that cause no interference to DBS

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[4] The Commission noted two specific proceedings, Dockets 79–188 and 79–337, in which it had already identified frequencies that might be suitable for some existing 12 GHz users. *See DBS Report and Order*, n. 57.

users would be allowed to remain on the 12 GHz band indefinitely, although on a strict secondary basis. Second, all fixed service users licensed before the conclusion of the above mentioned terrestrial rule making would be allowed to remain on the band for a period of five years from the date of the conclusion of that rule making. Thus, existing fixed service licensees would be allowed to operate unimpeded until as late as September 4, 1988. This provision gave considerable notice to the affected fixed service users. Although the deadline will not be known precisely until the conclusion of the terrestrial rule making, it is apparent that current fixed service users will have about seven years to make the appropriate frequency adjustments from the time the Commission gave official notice of that probability when adopting the *Notice*, and six years from the time of the adoption of the *DBS Report and Order*. Third, the Commission sanctioned agreements by DBS and fixed service operators wherein DBS operators could agree to bear some of the relocation costs of an interfering fixed service operator in return for evacuation of the 12 GHz band before the deadline. These provisions, together with the expectation that certain fixed service operators would be able to relocate to adjacent or lower bands requiring relatively inexpensive modifications, appeared to forge the best possible compromise between the private interest of both DBS and fixed service operators, and the public interest in promoting the widest practicable availability of both services. In addition, the Commission noted that the higher frequencies appeared to offer sufficient capacity to meet the short distance radio link needs of these services in the future.

9. On January 13, 1983, the Commission adopted and released the *Notice of Proposed Rulemaking* in General Docket 82-334, FCC 83-2 ("Terrestrial Notice "), that, *inter alia*, was designed to make additional spectrum available for fixed service users displaced from the 12 GHz band. Following instructions in the *DBS Report and Order*, the *Terrestrial Notice* proposed changes and solicited comment from all interested parties on the following issues: (1) the feasibility of pooling or sharing microwave spectrum among the broadcast auxiliary, cable television relay (CARS) and private operational fixed services, (2) the need for minimum path link criteria in each of the available bands, (3) bandwidth and channeling requirements for each of the bands, (4) the feasibility of continued fixed service use of the 12 GHz band on a secondary basis, and (5) coordination and loading practices to ensure efficient use of the bands. In particular, the notice addressed the use of the frequency bands at 6 GHz, 13 GHz and 18 GHz that are expected to be most appropriate for existing 12 GHz users. The 6 GHz and 13 GHz bands were considered the most desirable because of the low cost of conversion to those bands. Although the Commission noted that some additional issues raised in the *Terrestrial Notice* might require more protracted deliberation, it declared its continued intention to

resolve those issues relating to 12 GHz conversion by the scheduled September 1983 deadline.

III. Discussion

10. Given the foregoing background, the Commission now considers the procedural and substantive issues raised and the relief requested in the petition for reconsideration. The threshold consideration for any petition concerns whether it is properly before the Commission. If it fails in this regard, the Commission must reject it, unless in its independent judgment the substance of the matter is sufficiently compelling to warrant prompt action to protect the public interest. In this regard, we find that the petition fails to meet the basic requirements of a petition for reconsideration, and on this ground alone should be rejected. The failure is two fold: (1) the substantive allegations of error on the part of the Commission in adopting the *DBS Report and Order* are not supported by facts meeting the basic pleading and procedural standards for a petition for reconsideration, and (2) the petition includes a request for relief not properly filed in a petition for reconsideration.

11. The Commission's standards and requirements for petitions for reconsideration are well established by rule and case law. Most relevant here, petitions for reconsideration are not granted for the purpose of debating matters which have already been fully considered and substantively settled.[5] Similarly, parties that wish to reopen debate based on new facts can do so only under limited circumstances. Reconsideration based on new facts is appropriate only when these facts relate to events subsequent to the last opportunity for submission, were unknown and could not have been known by the petitioner at the time of the last opportunity, or the Commission determines that subsequent consideration is required to protect the public interest.[6] The subject petition does not meet these criteria.

12. In essence, the petition for reconsideration simply restates the objections to the DBS rule making that have been stated previously by this petitioner and others representing the interests of fixed service users in this proceeding.[7] Section II of this *Order* clearly

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[5] *See, e.g., WWIZ, Inc.*, 37 F.C.C. 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert.* denied, 383 U.S. 967 (1966); *Florida Gulfcoast Broadcasters, Inc.*, 37 F.C.C. 833 (1964); *Employment Practices of Stations - Charlotte, N.C. Market*, 77 F.C.C. 2d 1 (1980); *WEOK Broadcasting*, 4 Rad. Reg. 2d 503 (1965).

[6] *See Southeast Arkansas Radio, Inc.*, 61 F.C.C. 2d 72, 73 (1976).

[7] *See, e.g.*, Aerospace and Flight Test Radio Coordinating Council, Petition for Expedited Relief, General Docket No. 80-603 (Aug. 12, 1981); Comments of the Association of Maximum Service Telecasters (July 2, 1981), Harris Corporation [Farinon Electric Operations] (July 1, 1981), Manufacturers Radio Frequency Advisory Committee (July 1, 1981), and Utilities Telecommunications Council (July 1, 1981), all filed in General Docket 80-603. Indeed, LA County has been an

demonstrates that the resolution of these issues has been a central feature of this rule making from the outset, that full opportunity for all affected parties to comment has been amply afforded, that all relevant matters have been fully considered, and that the Commission made its policy choices and fashioned its procedural rule making processes to assure that the needs of the public and all interested parties were taken into account fully. That petitioner disagrees with some of these policy choices and various other procedural devices chosen by the Commission to pursue them is quite clear. However, bare disagreement, absent new facts and argument properly placed before the Commission, is insufficient grounds for reconsideration.

13. The petition suffers from one additional flaw. The primary specific relief requested is to defer the effective date of the *DBS Report and Order*, a form of relief only properly before the Commission in a separate motion for stay. Section 1.44(e) of the Commission's rules clearly sets out this requirement:

> Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

Moreover, even if the Commission were to put aside this rule and construe this petition as a properly filed motion for stay, the motion would fail on its merits. This is because the petitioner fails to even plead, much less demonstrate, that the basic criteria for granting such a stay are met.[8] For all of the foregoing reasons, we conclude that the subject petition for reconsideration must be denied.

14. On April 27, 1983, the Commission received from the

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active participant in this rule making and has previously requested similar relief. *See* Comments of the County of Los Angeles (July 1, 1981), and Reply Comments of the County of Los Angeles (July 28, 1981) in General Docket 80-603. *See also* County of Los Angeles, Statement in Support of National Association of Broadcasters' Motion to Establish Reasonable and Fair Procedural Dates (July 17, 1981); County of Los Angeles, Petition to Deny (December 11, 1981); and, County of Los Angeles, Comments (Feb. 6, 1981), all filed in General Docket 80-603.

[8] The accepted criteria for granting a stay require petitioner to demonstrate the following:

(1) a strong likelihood that it will prevail on the merits of its appeal;

(2) without such relief, it will suffer irreparable injury;

(3) the issuance of the stay will not substantially harm other parties interested in this proceeding; and

(4) it is in the public interest to grant the stay.

These standards are set forth in *Virginia Petroleum Jobbers Ass'n* v. *EPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). For a discussion of these standards in the context of the instant proceeding, *see Stay Request re: STC Interim Grant*, FCC 82-572, released December 22, 1982. *See also National Association of Broadcasters* v. *Federal* petitioner an extensive filing entitled "Supplemental Pleading and Exhibits in Support of Petition for Reconsideration." Section 1.429 of the Commission's Rules and Regulations which details the filing requirements for petitions for reconsideration in notice and comment rule makings states in relevant part:

> (d) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action. . . . No supplement to a petition for reconsideration filed after the expiration of the 30 day period will be considered, except on leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement.

The *DBS Report and Order* was published in the Federal Register on July 21, 1982, making the filing deadline for petitions and supplements August 22, 1982. *See also* Section 1.4(b) of the Commission's Rules and Regulations. Petitioner's supplemental filing is not accompanied by a separate pleading stating specific grounds for acceptance of the supplement after expiration of the filing deadlines. Further, we note that petitioner's submission cannot be deemed a timely reply to the oppositions filed in this proceeding since the filing period for any such reply expired on September 30, 1982. Accordingly, we find that petitioner's proposed supplemental filing is not timely filed and need not be considered.

15. However, because of the gravity of the issues presented herein, we have asked the staff to conduct a preliminary review of the scope and content of the supplemental filing. Pursuant to this review, we find that petitioner's supplemental filing raises no substantive questions related to generic rule making issues which have not been addressed and resolved generally in this docket. Instead, this supplemental filing is devoted largely to submission of detailed information on how the 12 GHz allocation decision is expected to impact Los Angeles County as a multiple licensee in the fixed service. The proposed supplemental filing does not allege or suggest that the situation in Los Angeles County is representative of the situation faced by other 12 GHz licensees in the fixed service, and therefore should be a basis for general reconsideration of the 12 GHz allocation decision. The allocation issue here is of national dimensions, involving public interest questions related to DBS as well as to the fixed service, and therefore is not wholly dependent upon the situation faced by any one licensee. Thus, we find that it would be inappropriate to re-open this docket at this time to accept this supplemental filing.

16. This does not mean, of course, that we are insensitive to particularized consequences of our actions, nor that we are unwilling to consider requests for special relief where appropriate. *See* paragraph 19, *infra*. Assuming for present purposes that Los Angeles

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Communications Commission, Number 82-1926 (D.C. Cir. February 10, 1983) (order denying stay).

County can successfully demonstrate its contention in the proposed supplement that the integrity of its safety and emergency services is wholly dependent on its continued use of the 12 GHz band, then the Commission would certainly fashion appropriate relief to ensure the continuation of those services. In that regard, we suggest that the substance of this proposed supplement be revised and resubmitted to not only detail the situation and the alternatives, but also to specify the types of particularized relief that would most appropriately address the situation with the minimum impact on other interested parties. Upon receipt of such request, the Commission would give it all due consideration, taking into account the full impact of the situation as demonstrated, the effect on other parties of all forms of relief suggested, and the need for timely action on the petition.

IV. Restatement

17. Although we are persuaded that the inadequacies of form and substance of this petition dictate its denial here, we nonetheless believe that the petition provides a useful opportunity for the Commission to restate the relevant facts and policy considerations relied upon in our DBS decisions. This restatement should ensure that no interested party misperceives these facts nor misunderstands the procedural avenues by which the Commission seeks to resolve the related policy questions. The substantive objections raised in the petition for reconsideration provide the framework for this discussion.

18. *Allocation of the 12 GHz Band to DBS.* The Commission's allocation of the 12 GHz band for DBS use was made against the background of international and domestic spectrum allocation and planning, and reflects not only careful consideration of all the facts and arguments put before it, but also a commitment to mitigate as much as possible any dislocation the decision might engender. In the *DBS Report and Order* the Commission concluded that the allocation of 12 GHz to DBS would further fundamental communications policies, and determined that expedited action was necessary to facilitate introduction of the service to the public. It concluded that DBS offered substantial potential benefits to the American public. *See DBS Report and Order* at paragraphs 12–20.

19. Further, the Commission found that the 12 GHz band was the only frequency band available both internationally and domestically that would allow initiation of the service in the foreseeable future, and, unfortunately, that DBS and most existing terrestrial uses of the band were incompatible. After serious and searching investigation of the status, number and needs of the 12 GHz users that potentially would be displaced, the Commission announced its intention to protect those users in several ways. The first of these was to create a transition period that delayed for more than five years the need for fixed service users to change frequencies, and to

"grandfather" indefinitely those fixed service users that cause no interference to operating DBS systems. Knowing that adequate alternative spectrum was available for fixed service users at the higher frequency bands, including 18 GHz, the Commission also resolved to find as much additional frequency space as possible in the more desirable bands adjacent to or lower than 12 GHz. Thus, it announced its intention to minimize any dislocation and expense by directing the staff of the Commission to facilitate the use of these more desirable bands through the development of an associated rule making. The Commission also understood that if it is faced with specific cases involving severe hardship or potential risk to the public safety, it has both the duty and the means to address and rectify them as they arise. For example, the Commission could, upon receiving a properly supported request, extend the transition date for a limited period for fixed service licensees in a given area if loss of vital emergency or safety services was unavoidably threatened by compliance with the existing spectrum relocation requirements.[9] It is particularly important to note in this regard that even if DBS service is actually implemented, it poses no danger to fixed services since any interference resulting from simultaneous use of the same frequencies by these two services is singularly detrimental to the DBS service. This fact is especially relevant to our conclusion that delay of the DBS proceeding in order to protect critical fixed service uses of 12 GHz is neither necessary nor advisable.

20. It should also be noted, however, that our duty to ensure that safety or emergency services are not impaired runs to the benefit of the public and not a particular licensee. Thus, while we might be persuaded to extend the transition period or to provide some alternative relief in order to preserve such services, assuming a clear and well documented showing of need, we must emphasize that all licensees are expected to exert diligent and good faith efforts to prepare for and comply with our DBS allocation decision in a timely manner.

21. *Delay of the DBS and Terrestrial Proceedings*. Petitioner has requested that the DBS proceeding be held in abeyance pending Commission action subsequent to RARC-83 and completion of the terrestrial rule making. The persuasive force of this request depends upon a showing that our established approach of proceeding concurrently to implement our DBS policies and to resolve the problems of displaced fixed service users disserves the public interest. This, in turn, would require petitioner to demonstrate that this approach

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[9] We do not imply, of course, that simple extension of the transition period is the only relief we might fashion. Various alternatives exist, including acceptance of interference to DBS services in specified locations or forced relocation of fixed services upon appropriate compensation by DBS operators. The nature of the remedy chosen in any given situation would depend upon the particular facts of the case and the showings made by the interested parties

results in some specific harm that outweighs the public interest in the timely initiation of DBS service. Yet, petitioner has offered no showing of harm, either to itself or to the public interest. Indeed, our decision to proceed concurrently is reinforced by our study of these matters here.

22. The Commission has proceeded from the outset of the DBS rule making on the assumption that it should act as rapidly as possible in order to expedite the offering of DBS to the public.[10] Consistent with this assumption, the Commission reviewed the spectrum requirements of the DBS service, and determined to reallocate the 12 GHz band to broadcast satellite services. Petitioner's objections to that decision have been reviewed both here and in earlier Commission documents and need not be repeated. Petitioner now suggests that our allocation decision should be suspended until the results of RARC-83 are known. The basis for this suggestion, however, is unclear since our allocation of 12 GHz to DBS is a domestic policy matter largely unrelated to any expected outcome of RARC-83. While some details of the international allocation of 12 GHz to DBS will be worked out at the conference, the underlying international allocation decision was made at the 1979 World Administrative Radio Conference (WARC-79) and cannot be altered at RARC-83. As a result, the only possible outcome of RARC-83 relevant to the domestic allocation decision is that the full 500 MHz of spectrum would not be made available for DBS in Region 2. The only pertinent domestic consequence of this would be to *decrease* the number of existing fixed service users that would have to move from the 12 GHz band. Clearly, this result cannot be deemed detrimental to petitioner's interests. Similarly, we think it unnecessary to delay the allocation of the 12 GHz band to DBS pending the outcome of the terrestrial rule making. As previously noted, the Commission was fully satisfied that adequate spectrum existed at the higher bands to accommodate existing fixed service licensees before proceeding on the 12 GHz allocation matter. The relevant purpose of the terrestrial rule making is to find additional space at the most desirable frequencies for fixed service licensees.[11] Thus, although the addition-

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[10] *See, e.g., Notice* at paras. 25–27; *DBS Report and Order* at paras. 7–27.

[11] Although sufficient frequency space exists at the higher bands for existing 12 GHz users, many licensees may be required to relocate or add transmitter/relay stations (links) to utilize these bands. Thus, a frequency shift to the adjacent or lower bands as contemplated in the terrestrial rule making would be more desirable because these bands require no additional links. When adopting the *DBS Report and Order*, the Commission estimated that under the worst possible circumstance, *i.e.*, all existing 12 GHz users moving to 18 GHz or higher, 50 to 85 percent of the links then in use would be sufficient for use at the higher bands. Assuming the use of one intermediate relay station, the Commission estimated that 75 to 90 percent of these links would be usable. *See DBS Report and Order* at para. 63.

al frequency space at these frequencies would facilitate the transition process, it is not a prerequisite. This is especially true considering the provisions adopted in the DBS docket to ensure that the services fixed services licensees provide to the public will not be interrupted. Accordingly, we believe petitioner's request that we delay the DBS proceeding is not adequately supported, particularly since granting such a request could substantially frustrate our public interest objective of implementing DBS service at the earliest practicable date.

23. The basis for petitioner's associated request that the Commission delay the terrestrial proceeding until after RARC-83 is similarly unclear. The primary purposes of the terrestrial rule making are to find additional spectrum for fixed service users, and to create rules and procedures that will facilitate more efficient spectrum use. Although related to the need to find additional spectrum for existing 12 GHz users, the resolution of these issues is not contingent on international allocation decisions made at RARC-83, nor on subsequent domestic policy decisions in the DBS rule making. If, as the petition suggests, the international spectrum allocation situation changes as a consequence of actions taken at RARC-83, or other subsequent factors arise that prompt the Commission to re-open the 12 GHz allocation decision, the spectrum issue can then be re-opened in the DBS rule making with all due concern for the equities of existing fixed service users.[12] Meanwhile, assuming as we must for present purposes that the U.S. goals will not be frustrated at the RARC-83 conference and that the international spectrum decisions there will be fully consistent with the 12 GHz allocation decision made in the *DBS Report and Order*, any unnecessary delay in the course of the terrestrial rule making could well impede the orderly transition of fixed service users to other bands. Delaying the terrestrial rule making at this time would serve no relevant purpose, but could have a negative influence on the interest of existing 12 GHz users. At the same time, the protections granted existing fixed service users in the DBS proceeding could well give these licensees more protection than that which would be afforded them by the requested delays. As noted earlier, existing terrestrial users will be "grandfathered" indefinitely so long as they cause no interference to operating DBS systems. Furthermore, no terrestrial 12 GHz users will be required to move until five years after the conclusion of the terrestrial rule making. Although not precisely what petitioners requested, these safeguards are designed to protect the public interest in DBS service while also protecting the legitimate interests of the existing fixed service users.

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[12] For example, the Commission noted in the *DBS Report and Order* that the fixed service plan may be revisited if the U.S. is not allocated the entire 12.2–12.7 GHz band for DBS at RARC-83. *DBS Report and Order*, n.59.

24. *Compensation of Fixed Service Users*. The Commission has considered fully the compensation issue and is presented with no new facts to alter its previous determinations in this area. The Commission's extensive consideration of the issue is apparent from the face of the *Notice* and subsequent actions in the *DBS Report and Order*. Relying on the record before it and its administrative experience and expertise, the Commission resolved the compensation issue in two basic ways: (1) it adopted several measures to mitigate the costs of relocation, and (2) it sanctioned voluntary compensation arrangements to facilitate relocation and interference-free operation. The Commission concluded, however, that it would not be in the public interest to require DBS licensees to pay the costs of relocating fixed licensees to other bands.

25. The most important of the cost reduction provisions was the establishment of the transition period which will give terrestrial users at least five years in their present operating modes without providing interference protection to DBS users. Thus, those terrestrial users that must relocate will have considerable time to plan for the transition and substantial latitude in timing their move to other bands. This latitude should permit existing 12 GHz users to mitigate to some degree the costs of relocating by coordinating their spectrum shift with such factors as existing equipment lifetimes and other time-dependent considerations. To further reduce transition costs, the Commission ordered the initiation of the terrestrial fixed service rule making that would propose the use of adajacent and lower frequency bands. No additional transmission relay sites would be required at these frequencies, and, at least in the case of moves to adjacent frequencies, much existing 12 GHz equipment can be used with relatively inexpensive modification. Finally, some fixed service users may escape all relocation costs because of the provision to "grandfather" indefinitely all existing fixed service systems that do not cause interference to operating DBS systems.

26. Given these measures, the Commission concluded that in most cases the remaining costs could be be borne reasonably by the terrestrial users. At the same time, it determined that it would not serve the public interest to adopt a system whereby the Commission required DBS users to directly compensate displaced fixed service users, although it did sanction voluntary agreements providing such compensation. It is useful to note in this regard that no licensee of this Commission has a property interest in the use of that spectrum assigned to it, and that in situations such as this neither the Communications Act nor judicial precedent require the Commission

or individual parties benefitted by our actions to reimburse those parties that are adversely affected.[13] However, we believe that private agreements that accommodate the mutual interests of the parties and serve to further our own public interest goals are clearly desirable, and we fully expect that many of the parties will enter such agreements. Proposals that the Commission mandate and supervise such compensation agreements were rejected in part because of their potential for delay, and in part because of the increased administrative burden they would place on the parties and on the Commission. Against this background, the Commission found that it would be better for both the Commission and the affected licensees to simply sanction unsupervised financial agreements. Of course, if extraordinary circumstances arise where Commission intervention is warranted, such cases can be considered as they arise. Because its resources will be called upon only in these special cases, the Commission should be able to address and resolve them in an expeditious manner.

IV. Conclusion

27. In summary, our review of the petition for reconsideration requires that it be denied. To the extent that it requests a stay of Commission action in the *DBS Report and Order*, we find it improperly filed. Alternatively, we find that it does not meet the burden of proof required for us to grant a stay of our actions. To the extent that it lies as a petition for reconsideration, we find that no new facts or arguments are properly raised that would require modification of the Commission decisions addressed. We also note at this point that the petitioner raised no allegation of Commission error in fact or law in the relevant areas that would prompt us to change the outcome of this proceeding on our own motion.

28. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by George Y. Tice on behalf of the County of Los Angeles hereby IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[13] 47 U.S.C. §301 provides in part: "It is the purpose of this Act . . . to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time." *See also Aeronautical Mobile Services*, 42 F.C.C. 425 (1955).

Discovery
Interlocutory Ruling, Appeal from
Intervention, Request for, Denied
Renewal, of License, Dismissed
Review by Review Board

> Review Board denied appeal of dismissal of television renewal application because licensee failed to comply with valid discovery requests and orders. Asserted grounds for non-compliance were previously rejected by Board, Commission, and courts. Also, appeal from dismissal of late-filed petition to intervene is denied because Rule Sec. 1.223 requirements not met.
> *–Faith Center, Inc.*
> BC Docket No. 82–339

FCC 83R–47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FAITH CENTER, INC.	BC Docket No. 82–339 File Nos. BRCT-711 and BRCT-801015KE
For Renewal of License for Station KVOF-TV San Francisco, California	
WEST COAST UNITED BROADCASTING CO. San Francisco, California	BC Docket No. 82–340 File No. BPCT-810113KI
TOGETHER MEDIA MINISTRIES San Francisco, California	BC Docket No. 82–341 File No. BPCT-810115KE
LDA COMMUNICATIONS, INC. San Francisco, California	BC Docket No. 82–342 File No. BPCT-810115KF
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983; Released: July 7, 1983)

BY THE REVIEW BOARD: BOARD CHAIRMAN MARINO ISSUING SEPARATE STATEMENT.

1. By *Memorandum Opinion and Order* (hereinafter *"Dismissal Order"*), FCC 83M-970, released March 24, 1983, presiding Administrative Law Judge (ALJ) Edward J. Kuhlmann dismissed the application of Faith Center, Inc. for renewal of license of television Station KVOF-TV, San Francisco, California. And, by *Memorandum Opinion and Order* (hereinafter *"Intervention Order"*), FCC 83M-1384, released April 27, 1983, the ALJ dismissed a petition to intervene filed by Lucille E. Johnston. Now before the Review Board for consideration are: (a) an appeal from *Dismissal Order* filed May 23, 1983 by Faith Center; (b) an appeal from *Intervention Order* filed May 27, 1983 by Lucille E. Johnston; (c) opposition to (a) filed June 10, 1983 and an erratum thereto filed June 13, 1983 by Together Media Ministries; (d) opposition to (a) filed June 10, 1983 by LDA Communications, Inc.; (e) opposition to (a) filed June 10, 1983 by West Coast United Broadcasting Co.; (f) opposition to (a) filed June 10, 1983 by the Mass Media Bureau; (g) opposition to (b) filed June 9, 1983 by West Coast United Broadcasting Co.; (h) opposition to (b) filed June 9, 1983 by the Mass Media Bureau; (i) opposition to (b) filed June 10, 1983 by LDA Communications, Inc.; and (j) motion to strike (c) filed June 27, 1983 by Faith Center. For reasons that follow, the Board will deny both of the appeals.

2. *Faith Center's Appeal.* Faith Center's application was dismissed by the ALJ because of its refusal to comply with numerous discovery orders. It has, *inter alia*: (1) never answered interrogatories filed on December 14, 1982 by Together Media Ministries, a competing applicant; (2) failed to produce documents as required by *Order*, FCC 83M-87, released January 7, 1983; (3) not complied with *Memorandum Opinion and Order*, FCC 83M-390, released January 31, 1983, which directed it to answer interrogatories propounded by the Mass Media Bureau and LDA Communications; and (4) failed to produce its principals for scheduled depositions as required by *Memorandum Opinion and Order*, FCC 83M-390, *supra*.

3. Faith Center appeals the dismissal of its application and appears to argue that: (1) discovery orders issued by the ALJ during the pendency of its September 7, 1982 motion to disqualify the ALJ (subsequently denied by the Commission, *Faith Center, Inc.*, 90 FCC 2d 519, 52 RR 2d 1223 (1982) were void *ab initio* and, consequently, Faith Center was not required to comply with them; (2) because the ALJ did not certify to the Commission its second motion to disqualify the ALJ, filed December 14, 1982, and its exception to the ALJ's dismissal of that motion, all of the ALJ's subsequent actions were void *ab initio*; (3) illness of its counsel during December 15–21, 1982 accounts, in part, for some of the procedural delays in this case; (4) it

was not required to answer the December 14, 1982 motion for production of documents and interrogatories propounded by Together Media Ministries because Faith Center's counsel was not directly served with a copy of them on the date they were filed and that, instead, a copy of the interrogatories was sent to Faith Center's co-counsel in another proceeding; and (5) it objected to the Bureau's discovery requests on constitutional and technical procedural grounds.

4. We reject these complaints. With regard to Faith Center's first argument, after the Commission denied its disqualification request on December 10, 1982, the ALJ extended additional time to Faith Center to comply with discovery. *Dismissal Order, supra*, at para. 4. Nevertheless, Faith Center has continued to refuse to comply with the ALJ's discovery orders. As to its second argument, we find that the ALJ properly rejected its second attempt to disqualify him because it was frivolously and speciously repetitious of the earlier attempt at disqualification which was denied by the Commission. *See Faith Center, Inc., supra*. Thus, continued refusal to comply with discovery on these grounds is equally impermissible. Its third argument is simply not germane; as pointed out above, Faith Center had been given additional time to comply with discovery but failed to do so, and has not even now indicated a willingness to so comply. *Dismissal Order, supra*, at para. 4. Fourth, Faith Center's defective service-of-process argument is rejected as frivolous. It has conceded that "it appears . . . counsel received [the interrogatories] from another attorney, co-counsel in another proceeding, though not this one," Faith Center Appeal, at 6, and that both the interrogatories and the motion for production of documents were "reserved" in mid-January. *Id.*, at 7. Finally, with regard to Faith Center's refusal to fully comply with the Bureau's discovery requests, its resistance to valid discovery requests on constitutional and non-constitutional grounds have already been rejected by the Board, the Commission and the courts. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *aff'd without opinion*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1188 (1982); *Faith Center, Inc.*, 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983). *Cf. Scott* v. *Rosenberg*, 702 F.2d 1263 (9th Cir. 1983).[*]

5. *Lucille Johnston's Appeal*. The petition to intervene filed on April 20, 1983 by Lucille E. Johnston was dismissed by the ALJ because it was late filed, no explanation for the tardiness in filing was provided, and because Ms. Johnston had failed to support her claims with specific allegations of fact. *Intervention Order, supra*. Ms. Johnston appeals her dismissal and asserts, in essence, that as an innocent creditor of Faith Center, she has standing to intervene. We

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[*] Faith Center's June 27, 1983 motion to strike the opposition pleading of Together Media Ministries will be denied because the latter pleading was timely filed on June 10, 1983, and because Faith Center has not specifically alleged sufficient facts to support its motion.

shall deny her appeal for the reasons stated by the ALJ and because she has not stated any new grounds not considered by the ALJ that would warrant intervention. Specifically, she has failed to meet the requirements for late intervention set forth in Section 1.223 of the Rules, 47 CFR § 1.223. In particular, she has not explained why she did not seek intervention within 30 days after publication of the hearing designation order and has not shown that her participation would assist in determining the issues in question in this proceeding. *See Golden State Broadcasting Corp.*, 52 RR 2d 1253 (Rev. Bd. 1982); *Washington's Christian Television Outreach, Inc.*, ___ FCC 2d ___ , FCC 83R-23, released March 28, 1983. And, her status as a creditor, standing alone, is insufficient to confer standing as a party in interest. *Arizona Mobile Telephone Co.*, 80 FCC 2d 87 (Rev. Bd. 1980); *Hertz Broadcasting of Birmingham, Inc.*, 46 FCC 2d 350, 352 (Rev. Bd. 1974); *cf. American Telephone and Telegraph Co.*, 7 RR 2d 520 (1966) (shareholder status insufficient to confer standing to intervene).

6. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed June 27, 1983 by Faith Center, Inc. IS DENIED; and

7. IT IS FURTHER ORDERED, That the appeal filed May 23, 1983 by Faith Center, Inc. IS DENIED: and

8. IT IS FURTHER ORDERED, That the appeal filed May 27, 1983 by Lucille E. Johnston IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

Our action in this case is compelled by the legal authority cited in the Board's order. But this is an occasion to think anew and deeper about such cases. Faith Center is now a step closer to losing its third, and possibly fourth, station for what on the record before us are sound procedural reasons. Perhaps this raging controversy which began with the licensee's good faith assertion of its constitutional rights, *Faith Center, Inc.* , 69 FCC 2d 1123, 1124 (1978), might have been contained if a procedural device had been used which permitted the licensee to obtain a final Court adjudication of its constitutional claims without putting all of its licenses in jeopardy. See authorities cited in my separate statement, *David Hildebrand*, 52 RR 2d 1671 (1983). Past experience teaches that renewal hearings are not the best vehicles for the adjudication of potential constitutional issues. *See, e.g.* , Lamb, *No Lamb for Slaughter* (1963); *Brandywine-Main Line* v. *FCC*, 473 F.2d 16, 27–28 n. 39 (D.C. Cir. 1972); and *Kaye Broadcasters*, 46 FCC 2d 600 (1974). On the other hand, Faith Center decided to litigate and is legally responsible for its bizarre, counterproductive and flawed litigation strategy in this and the companion Los Angeles case. *See Faith Center, Inc.* , 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983).

Recently, after a preliminary inquiry, the Commission referred a case containing similar 18 U.S.C. 1343 allegations to the Department of Justice for appropriate action. A criminal investigation, followed by possible Grand Jury action and trial in a U.S. District Court, would seem a more appropriate process than a less formal administrative hearing, especially when a licensee pleads its freedom of speech and religion, or Fourth and Fifth Amendment rights. The Commission's recent approach of deferring to other authorities makes much common sense whether the licensee is a controversial preacher accused of soliciting in violation of 18 U.S.C. 1343, an amateur operator alleged to have uttered non-obscene but indecent language, 18 U.S.C. 1464, or a commercial broadcaster who has allegedly conspired to fix prices in violation of the Sherman Act, 15 U.S.C. 1. Similarly, the NLRB is in a better position to resolve unfair labor practice charges against broadcasters. *Community Television of Southern California* v. *Gottfried,* 103 S.Ct. 885, 892–93, and notes 16–17 (1983). But see *Country Broadcasting Co.* , 93 FCC 2d 83, 53 RR 2d 293, 294–5 n.3 (Rev. Bd. 1983), Deferring to other authorities is even more appropriate today because the Commission's limited hearing resources are strained to the limits by matters which are closer to the core of the agency's primary mission set forth in 47 U.S.C. 151.

Comparative Hearing
Equipment, Inspection of
Financial Qualifications, Estimated Costs
Review By Review Board
Settlement
Television Station, Authorization

Review Board affirms Initial Decision, financially disqualifies one commercial VHF television applicant, and grants competing application. Disqualified applicant relied heavily on equipment "on hand," which was in poor condition and was not shown to be functional in quality and adequate in amount, and substantially underestimated its programming costs.
–GACO Communications Corp.
BC Docket No. 80–484

FCC 83R–44

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GACO COMMUNICATIONS CORPORATION Houma, Louisiana	BC Docket No. 80–484 File No. BPCT-5047
THE WAY OF LIFE TELEVISION NETWORK, INC. Houma, Louisiana	BC Docket No. 80–487 File No. BPCT-790622KE
For Construction Permit for a New Commercial VHF Television Station	

Appearances

Vincent A. Pepper, Peter Gutmann, and *Julian Freret,* on behalf of GACO Communications Corporation; *J. Geoffrey Bentley* and *Joseph P. Benkert,* on behalf of The Way of Life Television Network, Inc.; and *Dennis J. Kelly* and *Alfred C. Cordon,* on behalf of Houma Broadcasters, Inc.

DECISION

(Adopted: June 10, 1983; Released: June 21, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding currently involves the mutually exclusive applications of GACO Communications Corporation (GACO) and The Way of Life Television Network, Inc. (TWL) for authority to construct a new commercial television station to operate on Channel 11 at Houma, Louisiana. By *Memorandum Opinion and Order,* 45 Fed. Reg. 66866, published October 8, 1980 (hereinafter "*Designation Order* "), the Commission designated these applications for consolidated hearing on a "fair break" religious programming issue against TWL to determine whether that applicant will provide reasonable opportunities for the expression of diverse religious views and on an issue to determine whether operation from TWL's proposed main studio located outside of the Houma city limits would be consistent with the public interest, as well as the standard comparative issue to determine which applicant would better serve the public interest. In the *Initial Decision (I.D.)* , FCC 82D-74, released November 23, 1982, presiding Administrative Law Judge (ALJ), John H. Conlin, provided a short history of this proceeding in which he pointed out that three of the original applications that had been consolidated for hearing by the *Designation Order* had been dismissed, to wit: Houma Broadcasters, Inc. (File No. BPCT-4992), Guaranty Broadcasting Corporation (File No. BPCT-5045), and Greater New Orleans Educational Television Foundation (File No. BPCT-5043). *I.D.* , para. 1. A sixth applicant, Communications Corporation of the South, Inc. (File No. BPCT-5006), was merged into GACO, and Houma Broadcasters was granted party-intervenor status. *Id.* After adding a financial and related issues against TWL, the ALJ found TWL to be financially unqualified and granted the GACO application. *See infra* para. 2 *et seq.* Now before the Review Board for consideration are: (a) exceptions filed January 14, 1983 by TWL (hereinafter "TWL Br."); (b) limited exceptions filed January 14, 1983 by Houma Broadcasters, Inc. (hereinafter "HBI Br."); (c) reply to (a) filed January 27, 1983 by GACO (hereinafter "GACO Br."); (d) reply to (b) filed January 27, 1983 by TWL (hereinafter "TWL Reply"); (e) contingent motion to reopen the record and to enlarge issues filed May 23, 1983 by GACO (hereinafter "GACO Motion"); and (f) motion for extension of time to reply to (e) filed June 6, 1983 by TWL (hereinafter "TWL Motion"). The Board reviewed the *I.D.* in light of these pleadings, the oral argument held March 18, 1983, and the record. We adopt the findings of fact in the *I.D.* , except as modified herein, affirm the ALJ's conclusion that TWL is financially unqualified, and, without reaching the comparative issue, affirm the ALJ's ultimate conclusion that a grant of the GACO application will serve the public interest, convenience and necessity.

TWL: Financial Qualifications

2. By *Memorandum Opinion and Order*, FCC 81M-538, released February 25, 1981, the ALJ added a financial issue against TWL;[1] he later added two other issues related to the basic financial qualifications of TWL. *Memorandum Opinion and Order*, FCC 81M-3432, released October 30, 1981.[2] In 9 pages of factual findings, *I.D.* , paras. 11–32, and in several pages of conclusions, *I.D.* , Conclusions, paras. 4–12, the ALJ reviewed the evidence, assessed the testimony and opinions of the witnesses, and thoroughly explicated the record. Based thereon, he found that TWL was not financially qualified. We easily affirm the ALJ's findings and conclusions on this issue. Without reiterating all that is painstakingly laid bare in the *Initial Decision*, we will encapsulate a number of facts and circumstances which clearly corroborate the accuracy of the ALJ's ultimate conclusion on the financial issue.

3. *Construction and Equipment*. TWL proposed to build its new VHF television station with $105,360 and deferred credit in the amount of $49,200 from an equipment supplier, Quality Media Corporation. *I.D.*, para. 12. TWL also claimed that it had its RF generating equipment, its monitoring and test equipment, and some of its program origination equipment "on hand." *Id.* It allocated $2,000 to remodel a building it intends to use for studios,[3] *id.*; and,

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[1] This issue was:

> Whether the applicant is financially qualified to construct and operate its proposed station.

I.D. , para. 1.

[2] These issues were:

> To determine whether TWL has, in pleadings filed during the course of this proceeding, misstated the condition of equipment it has purported to rely on in the construction and operation of its proposed station.
>
> To determine whether TWL failed to comply with an order of the presiding officer to permit entry, inspection and photographing of its equipment.

I.D. , para. 1.

[3] Although the building TWL intends to use for studios, *etc.*, was originally built for the now-defunct KHMA-TV (1972–1974), *I.D.*, para. 9, the structure has been used for the past several years, and at the time of the hearing was being used, by the Louisiana Compressor Maintenance Company. *I.D.*, para. 26. A TWL consultant, Robert D. Blazier (*see infra* para. 5) averred that the studio building would not need much remodeling, TWL Exh. 8C at 1, and was "accoustically treated and air conditioned with a high volume, low velocity unit not presently in use." *Id.*

A rather different description of the condition of the building was contained in the testimony of GACO principal, Iddo K. Corkern, a former chief engineer at WBRZ-TV, Baton Rouge, Louisiana (*I.D.*, para. 50). Corkern stated that he had visited the studio building in June 1981, Tr. 915, that it was "very, very dirty, filthy over there," Tr. 916, that the air conditioning plant (obviously critical in a TV studio) had frozen in the past, *id.*, and that the company had given up on it after spending "$1,000 to although it originally indicated that its antenna system would cost no money, it revised its estimates to $35,000 after assertions by the other parties that the KHMA-TV antenna system was inoperable. *I.D.*, para. 13 & n.10. The very low equipment cost estimates of TWL (totalling, it appears, some $17,600 in certain expenses over and above its antenna system estimates, *see I.D.*, para. 12) were predicated squarely on the applicant's assertion that it already had "on hand" much of the equipment necessary to build and operate a new television station. This assemblage of used equipment, which later became the subject of an abuse of process and an inspection issue against TWL,[4] was acquired by TWL on a gradual basis with, at least, the partial assistance of William Kitchen, president of Quality Media Corporation. *I.D.*, para. 15. TWL's proposed transmitter (formerly belonging to WLCY-TV, Channel 10, Largo, Florida), a tube-type model, was first installed in Florida in 1965; it was dismantled and shipped to Houma in 1979. *I.D.*, para. 24; TWL Exh. 8D.

4. In view of its heavy reliance on its alleged equipment "on hand," the ALJ granted a motion "to permit inspection and photographing" of the material.[5] No TWL principal showed up at the ordered inspection, which was conducted primarily by William B. Carr, a registered engineer. *I.D.*, para. 38. Carr, who was accompa-

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$2,000 a month trying to keep it operating." *Id.*

What is more, GACO filed on May 23, 1983 a "contingent" motion to reopen the record and enlarge the issues on the basis of an affidavit of Ronald R. Cannon, president of Louisiana Compressor Maintenance Company, the owner of the building TWL intends to use as a studio. In the affidavit, Cannon asserts that its agreement with TWL expired on May 21, 1982, that an eviction order was issued on September 16, 1982 requiring TWL to remove its trailer, and that:

> If TWL represents that it can continue to rely upon the availability of its proposed studio site, such representation is incorrect. The property is for sale to any party.

GACO Motion, Affidavit at 2.

TWL responded on June 6, 1983 seeking more time to respond and noting that GACO's "motion recites alleged facts which supposedly have been public knowledge since August 30, 1982. . . ." TWL Motion, at 2. It does not contest GACO's allegations: it merely states that a further hearing would consume several months.

Because we have found TWL financially disqualified, and because GACO's motion is merely "contingent," neither motion need be ruled upon. However, had any serious question remained concerning TWL's financial disqualification, this matter would require further evidentiary exploration since TWL's proposal is inextricably tied to its ability to secure renovated television studios at a negligible initial cost and a monthly rental of $2,000.

[4] *See I.D.*, paras. 33–39; Conclusions, paras. 13–18. These subsidiary issues are addressed *infra*, paras. 21–24.

[5] FCC 81M-1342, released May 4, 1981. The subsequent issue designated to determine whether TWL actually complied with the inspection ordered by the ALJ is reprinted at note 2, *supra*.

nied by principals of the other applicants (*id.*), found the used equipment stacked haphazardly in a trailer and in a warehouse. *I.D.*, para. 39.[6] Although some portion of the used equipment was inaccessible, *id.*, Carr testified with respect to the equipment he could access: he described it as in "extremely poor condition," with "parts broken off, components damaged, tube sockets broken. . . ." *Id.* (*quoting* Tr. 823). Carr also observed "evidence of broken meters, broken pieces, this type of thing." *Id.* (*quoting* Tr. 824). On the basis of his entire inspection, Carr concluded that there was not enough equipment to operate a television station (even assuming that the used equipment worked), *id.*; of particular and critical importance was TWL's complete lack of a diplexer which is that vital piece of equipment necessary to combine the audio signal with the video signal and to feed the sound and pictures simultaneously to the antenna system. *I.D.*, para. 19; Tr. 864. A station without a diplexer could be either a sound station or a picture station, but not a television station as we have come to know television. Carr testified that a diplexer would add $30,000-$40,000 to TWL's costs.[7]

5. To support its equipment "on hand" claim, TWL offered the statement of Robert D. Blazier, coordinator of instructional television at Nicholls State University, who visually examined the equipment.[8] Blazier submitted written testimony in which he "found the [TWL] equipment usable for television broadcasting program origination." *I.D.*, para. 17 (*quoting* TWL Exh. 8). But, at hearing and upon cross-examination, Blazier's written endorsement of the equipment withered away: he conceded (1) that in describing the equipment as "usable," he meant only that it was the type of equipment he was familiar with at television stations, *I.D.*, para. 17; (2) that although he inventoried the equipment and advised TWL of additional equipment it would need, he made no qualitative analysis of

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[6] The photographs taken at the inspection are arrayed as GACO Exhs. 11A-Q. As did the ALJ, *see I.D.*, para. 18, we have examined those exhibits and the testimony related thereto (Tr. 829–63) and confirm the descriptions related by the ALJ and Carr.

[7] Tr. 864. Janis Graves, a TWL principal, says she was assured that a diplexer was part of the transmitter purchased in Florida. Tr. 995–96. But, the individual who shipped the transmitter and proposes to install it, Bruce E. Singleton, a former engineer at WLCY-TV, could not recall whether a diplexer was shipped with the transmitter and stated that the written inventory of parts supplied with the transmitter did not specify a diplexer. Tr. 662. Moreover, even if a diplexer had been shipped as part of the WLCY-TV transmitter, it would seem that any such diplexer would have to be converted from Channel 10 (WLCY-TV's frequency) to Channel 11 at a substantial cost. See related discussion of the necessity to convert the WLCY-TV transmitter itself at para. 9, *infra*.

[8] Blazier has no experience in commercial television and is not a registered engineer; neither does he have an electrical engineering degree nor an FCC First Class License. Tr. 289–90. He did, however, assist TWL in preparing its application, *I.D.*, para. 38, and was present at the inspection solely to unlock the doors to the trailer and warehouse. Tr. 294–95.

the equipment "on hand" nor did he test any of it for electronic performance, *id.*; and (3) that the equipment was 15–16 years old, had not been used in 10–11 years, and was tube-type—therefore needing more maintenance than solid-state and more susceptible to deterioration from lack of use. *Id.* Hence, Blazier testified that he did not know if the equipment would work. *Id.*[9] He did not know whether TWL had ordered other necessary equipment such as a studio-transmitter link. *See generally* Tr. 304–306. And, he noted that other program origination equipment would have to be ordered. *See* TWL Exh. 8C. GACO supplied the views of Horace W. Gross, president of Frazier, Gross & Kadlec, Inc., a Washington, D.C. broadcast consulting firm.[10] After reviewing TWL's equipment list (TWL Exh. 8), he found that TWL had neglected such basic items as "tools, fire extinguishers, lamps for the studio lights and camera equipment for the news department with facilities for editing tape or processing news film."[11]

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[9] Blazier's "expertise" on the TWL equipment can be gleaned, in part, from the following exchanges:

> Q. So, your knowledge of this equipment is based on representations made by others, you did not feel it necessary to personally check out the equipment.
>
> A. No.

Tr. 297.

> Q. You can't tell whether it will work through a visual inspection.
>
> A. No.
>
> Q. The answer is that you cannot tell.
>
> A. I cannot tell.

Tr. 300. Although Blazier conceded that his knowledge of the operability of the equipment was based on the representations of others, he answered:

> Q. Have you ever dealt with a company known as Quality Media Corporation before?
>
> A. Not personally, no.

Id.

[10] *I.D.*, para. 20.

[11] GACO Exh. 8, at 2. Gross further opined:

> TWL has proposed all used equipment. Spare parts will be needed to maintain the equipment. The only provision for this item is an old list of spare parts associated with the transmitter and a canabalized [sic] studio camera that can be canabalized [sic] further to maintain the studio cameras. It is not possible to ascertain from the list of transmitter spare parts whether there are adequate tubes and parts for normal maintenance. Nor is it possible to determine if there are sufficient spare parts remaining to maintain the studio cameras. No spare parts have been provided to maintain the film camera and projectors which will receive heavy use. Because all of the equipment to be installed by TWL is used equipment, a greater than average quantity of spare parts will be needed to place

6. The president of Quality Media Corporation, William Kitchen, asserted that the equipment "on hand" was in working order at the time of initial acquisition, based upon personal inspection or reports of his subordinates. *I.D.*, para. 16. However, the equipment collection, accumulated gradually since 1977, was never tested to see if these variously acquired components functioned as a system. *Id.* Indeed, Kitchen himself had not inspected the equipment since it was moved to Houma from Monroe, Louisiana and stored in a trailer; nor was he familiar with the conditions of the storage of the equipment. *Id.* And, although Kitchen made a representation that he would remedy "any problems that could be determined to have been caused by the condition of the equipment when I purchased it," Tr. 590, he would not vouchsafe that the equipment would work.[12]

7. TWL's antenna system and proposed tower were also the subject of focus.[13] Whereas TWL initially specified no funds for rehabilitating the former KHMA-TV antenna system and tower, *I.D.*, para. 13 & n.10, and, in fact, represented in a 1979 amendment to its application that its antenna system was "on hand," *I.D.*, para. 34, it submitted an exhibit nearly one-and-a-half years later (on June 1, 1981) which confessed that it could "no longer presume that the

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> the station in operation and maintain it for three months. A reasonable budget for these spares for the initial operation and the first three months would be $3,000.

Id., at 2–3.

[12] Kitchen testified:

> Q. What is your obligation in terms of making the Commission— the equipment operable?
>
> A. We did not make any statements as to warranty on the equipment. What I do is, when a large amount of equipment is installed, is we talk to the engineers. We find, if there was any misrepresentations on our part, whether actual or assumed by the customer, we try and make it right.

Tr. 589.

> Q. Is it your testimony now that all the equipment which was purchased or acquired through you would be made operable at your expense?
>
> A. No, I did not say that I would make it operable.
>
> Q. I didn't—I'm not—I'm asking you would you make all the equipment provided by you to date to TWL operable at your expense or operative at your expense?
>
> A. What you're asking me to do here is difficult because I'm stating in public record that I'm obligating myself to my customer for something which I didn't represent initially that I would do.

Tr. 590.

[13] The discussion here is limited to the costs related to bringing these equipment components up to operational level. The availability and costs associated with TWL's specification of the tower and transmitter site of the defunct KHMA-TV—now 50% owned by a GACO principal—is discussed more fully at paras. 10–14, *infra*.

transmission line and antenna mounted on the tower are in operable condition. . . ." *I.D.*, para. 35 (*quoting* TWL Exh. 8 at 1–2).[14] It amended its financial showing by specifying $35,000 to make the antenna system operable. *I.D.*, paras. 12–13. GACO challenged TWL's antenna syste financing as woefully understated: it offered the opinion of consulting engineer Richard L. Biby, who estimated a minimum of $100,000 to rehabilitate the tower and antenna plus $25,000 to replace the coaxial cable connecting the studio and the transmitter. *I.D.*, para. 14. Biby's estimate is based, in part, on the on-site inspections conducted in 1976 by R.C. Cornforth Associates, a firm specializing in structural analyses of towers, and by Dean W. Sargent Broadcast Service. *Id.*[15] Biby stated that the tower has had no maintenance since 1976 and has, therefore, probably deteriorated even further because of high winds and semi-salt water. *Id.*

8. TWL's assessment of the tower was offered by William Kitchen who claimed that he had visited the tower in 1977, found it in "very good condition," and opined that it should be serviceable for many years if "properly taken care of" by "routine painting and the things that go along with the tower."[16] However, Kitchen does not

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[14] This belated concession and TWL's amendment led to the designation of the abuse of process (*cum* misrepresentation) issue set forth in note 2, *supra*. The ALJ's discussion of the issue is found at *I.D.*, para. 34 *et seq.*; our review of that issue is found at paras. 21–23, *infra*.

[15] GACO Exh. 12 contains, *inter alia*, a letter of December 10, 1976 in which, after inspecting the tower, R.C. Cornforth stated that the tower "appeared to be in good shape" but that the guy cables and anchors were not. Also contained is a November 1976 report from Dean W. Sargent who said that the tower was rusting even then, but that the antenna condition was "good" at that time.

The exhibit incorporating the Cornforth and Sargent reports is prefaced by the notarized statement of Biby, executed on December 10, 1980, which contends that, based upon the Cornforth and Sargent reports and upon telephone conversations with them, "a reasonable approximation of the costs of performing only such rehabilitation work as normal prudence and insurance requirements [insurance policy reference deleted] dictate is in excess of $100,000.00." Although the Cornforth and Sargent discussions alleged by Biby are hearsay and neither person was presented at hearing for cross-examination on their reports, hearsay evidence is not necessarily precluded in administrative proceedings. *National Ass'n of Recycling Industries* v. *FMC*, 658 F.2d 816, 825 (D.C. Cir. 1980); *see generally* K. Davis, *Administrative Law of the Seventies*, §14.00, at 338 (*citing* FCC Rule §1.351 which allows for relaxation of the Federal Rules of Evidence); §14.11, at 340 (1976). *But see United Broadcasting Corp.*, 53 RR 2d 57, 80 n.114 (1983) (hearing exhibits relating to financial showing properly rejected by ALJ as hearsay). However, Biby did testify, *see* Tr. 935–53, was cross-examined, *id.*, and TWL has neither impeached Biby's testimony nor offered its own tower rehabilitation cost estimates. Finally, TWL did not seek to subpoena Cornforth or Sargent. *See Richardson* v. *Perales*, 402 U.S. 389, 402 (1971) (physician's report "may constitute substantial evidence supportive of a finding by the hearing examiner" where adverse party did not exercise right to subpoena physician for cross-examination).

[16] Tr. 546, 548. Kitchen is neither a structural engineer nor an electrical engineer. Tr. 546.

perform any of the work on rehabilitating transmission lines or tower antenna systems and he had not contacted any of his local subcontractors who do such work to obtain estimates of the potential cost of rehabilitation.[17] Moreover, although Kitchen had previously emphasized the importance of tower maintenance in assuring structural integrity, he testified as follows at the November 1981 hearing:[18]

> Q. Do you know what maintenance has been performed on the KHMA-TV tower since you visited that site in 1977?
>
> A. I believe there's been practically none.

Furthermore, in its arguments asserting that the hypothetical $2,000 per month it would pay as rental to the owner of the KHMA-TV tower and transmitter site is reasonable, TWL argues that the land value of the 10 acres on which the tower is situated is low and:

> . . . according to documents filed with the Federal Communications Commission by CCSI [the land owner], the tower is in poor condition. Therefore, to assign it [land, transmitter building and tower] a value of $122,000 for . . . determining the property's fair rental value is at least reasonable, if not generous.

TWL Exh. 8 at 4.

9. With regard to the transmitter and transmitter site, the following appears. As noted *supra*, TWL's proposed transmitter was formerly used by WLCY-TV, Largo, Florida where it was installed in 1965 to operate on that station's frequency, Channel 10. Because the frequency here at contest in Houma is Channel 11, the transmitter must be converted to operate on the higher frequency. GACO submitted an estimate of approximately $90,000 for the conversion, such estimate being provided by E. Noel Luddy, manager of consultant relations for RCA.[19] The ALJ adverts to RCA's estimate in his conclusions;[20] however, TWL retorts that a GACO witness, Horace W. Gross, stated "that the cost of converting the transmitter could be as little as $440."[21] Thus, although TWL implicitly recognizes that its transmitter must be converted (at a cost, apparently, of between $440 and $90,000), it has specifically earmarked no funds for the conversion in its budget, *see I.D.*, para. 12; it furnishes no reasonably firm estimate of its own for the conversion; and, it does not indicate where the funds will come from if the actual transmitter conversion costs are closer to RCA's $90,000 estimate. Moreover, while TWL has budgeted $13,260 for the physical installation of the transmitter, *see id.*, the individual installing the

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[17] Tr. 586.

[18] *Id.*

[19] GACO Br. at 3 (referencing GACO Exh. 14). The TWL transmitter model is an RCA TT35. Tr. 648.

[20] *I.D.*, Conclusions, para. 10.

[21] TWL Br. at 30 n.14 (referencing GACO Exh. 8).

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transmitter, Bruce E. Singleton, nowhere indicated that he would make the required conversion. *See* Tr. 646–674. Indeed, although Singleton expressed his belief that the transmitter was in generally good shape, *I.D.*, para. 24, he specifically noted that his obligation did not include completion of the final proof of performance, or the execution of the forms attendant thereto. *Id.* Moreover, Singleton's installation estimate and contract did not include the time or measurement equipment necessary for equipment performance measurements and he did not know if TWL had the requisite measurement equipment on hand.[22] Nor would Singleton take responsibility for replacing inoperative parts.[23][24]

10. A vigorous legal debate is presented over TWL's proposed tower and transmitter site and its allocation of a hypothetical $2,000 per month rental for that site. As indicated *supra*, TWL has specified the tower and site of the former KHMA-TV, which facilities are now "owned by The Vanderbilt Corporation, the corporate parent of CCSI, which in turn owns 50% of GACO."[25] The present owner paid $100,000 for the site in 1976,[26] has refused to rent the site, but says that it will sell it outright for $250,000.[27] TWL has never inquired of Vanderbilt as to the availability of the site;[28] and, its allocation of $2,000 per month for rental of the site is based exclusively upon its somewhat solipsistic view of a reasonable rate of return to the property owner.[29]

11. TWL contends that it may specify the site owned (50%) by its opponent by dint of the policy espoused in *George E. Cameron, Jr. Communications*, 71 FCC 2d 460 (1979) ("*Cameron*") and amplified in

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[22] Tr. 652–53.

[24] Additionally, although Singleton's cost estimate for the physical installation of the transmitter was apparently based upon a 36-day installation period, *see* Tr. 651, 670, he refused to guaranty his estimate because of the "variables" associated with installation such as the condition of the transmitter building. *Id.* But, the state of the TWL transmitter building (used by KHMA-TV until 1974) is doubtful. The *Initial Decision* relates that its condition was described as "extremely poor, the door was ripped open, snakes and cattle had been in and out of the building and everything was in a state of disarray including the electrical system." *I.D.*, para. 22. Another witness' description reflected that the building "was in a state of disrepair with doors open, wiring and circuit breakers cannabalized and no sign of a water supply for cooling purposes." *Id.* In its brief, TWL does not challenge these descriptions; and, Singleton has not been to Houma to inspect the transmitter, Tr. 654, or the transmitter building. Tr. 664. Finally, Singleton had not personally tested the WLCY-TV transmitter prior to its being dismantled in 1977 to determine if it was in operating condition even then. Tr. 668–69.

[25] TWL Br. at 6; *see also I.D.*, n.11.

[26] *Id.*, at 7 (referencing Tr. 960).

[27] *I.D.*, para. 27; Conclusions, para. 5.

[28] Tr. 966.

[29] TWL Exh. 8 at 4–5.

New Continental Broadcasting Co., 45 RR 2d 1632 (1979) ("*New Continental*").[30] It claims that those cases establish a "conclusive presumption that applicants may specify the tower facilities of deleted stations . . . with a reasonable assurance that those facilities will be available to the applicant who emerges successful at the conclusion of the hearing."[31] In *Cameron*, the Commission announced a novel policy, the effect of which was to allow a license renewal challenger to specify the site of its opponent, the incumbent licensee; this approach was intended to preclude the incumbent from contumaciously eliminating an otherwise (possibly) viable applicant by refusing the challenger the future use of its site.[32]

12. GACO counters that *Cameron* is a comparative renewal case and thus distingushable because there is present here no "incumbent" to unfairly obstruct a "challenger."[33] It claims that the "narrow exception"[34] carved by *Cameron* to the general rule that an applicant must show the availability of a transmitter site is inapposite where "the property owner is not an incumbent, the site is not presently [sic] used for broadcasting and four of the other original applicants in this proceeding specified other sites which they found to be both suitable and available."[35] However, while GACO cites to *New Continental* in its brief,[36] it conveniently overlooks—disingenuously, we believe—the fact that that later case expressly extended *Cameron* to a situation in which one of the new applicants had privately acquired the site of a deleted radio facility (the former WFAB, Miami, Florida). The Commission found in *New Continental* that an applicant's stated refusal to make the site available to current competitors was "highly premature,"[37] and it

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[30] TWL Br. at 22–25.

[31] *Id.* at 23. *But see Belo Broadcasting Corp.*, 88 FCC 2d 922, 926 n.19 (1981) where the Commission explained:

> Although the term 'conclusive presumption' was used, the intent of *Cameron* was to hold in abeyance all considerations relating to a challenger's transmitter site until a final determination can be made as to which applicant would best serve the public interest.

[32] *See Cameron, supra*, 71 FCC 2d at 466–67. However, *Cameron* may not be directly on point here because the site owner has *not* refused to make the site available. Rather, it has expressly represented that it would sell the site to TWL. But, TWL has refused to pay the initial asking price and has not even negotiated. Moreover, it has not been shown that TWL could pay even the $100,000 that the land sold for in 1976, let alone its current fair market value; and TWL does not say that it could or would. It merely pushes its right to rent the site at a hypothetical monthly amount. Nonetheless, nothing in the law would require GACO—if it lost this contest—to retain the land for TWL's benefit.

[33] *See* GACO Br. at 10.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] 45 RR 2d at 1633.

permitted the other applicants to also specify the former WFAB site "given the fact that towers, transmission facilities and other equipment are already located there, making broadcasting its logical use."[38] The situation in *New Continental* was, therefore, virtually identical to that at bar and is, to that extent, controlling.

13. Nonetheless, it is salient here to note that the issue before the ALJ and the Board is not, as it was in *Cameron* or *New Continental*, an ordinary "site availability" issue. Rather, the matter of TWL's specification of the KHMA-TV site and its hypothetical $2,000 per month rental arises within the context of a larger financial issue and, in that connection, the law is dictated by the later case of *Belo Broadcasting Corp., supra* note 31, where the Commission clarified the *Cameron* doctrine by deleting a "site availability" issue against a renewal challenger and "deferring all questions concerning site availability until completion of the hearing."[39] In that regard, the Commission held that the *Belo* challenger was expected to demonstrate "its contingency planning in case [its competitor's] sites remain unavailable."[40] Here, the hearing has expired, TWL has yet to even query the property owner as to the availability of the KHMA-TV site or the potential cost to it (purchase or rental), and it has indicated no "contingency planning" whatever.

14. In *Belo*, Commissioner Quello concurred as being bound by the *Cameron* doctrine, but remarked:

> I am now concerned, however, that full implementation of the *Cameron* policy, plus its extension into areas outside the renewal context, may cause procedural and substantive problems which were not immediately apparent.

88 FCC 2d at 930 (footnote citing to *New Continental* deleted). The Commissioner's apprehensions appear prescient in consideration of the facts of this case. Yet, applying *Belo* as we understand it—as apparently did the ALJ (*see I.D.*, Conclusions, para. 5)—the current state of the law is this: (1) TWL was permitted to specify the KHMA-TV transmitter site (*qua* site) which is 50% owned by GACO principals; but that (2) TWL was nevertheless required to satisfy the larger financial qualification issue by showing ample resources for the site specified or "contingency planning" in the event that the specified site eluded it. Our understanding of *Belo* is reinforced by

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[38] *Id.* Moreover, the Commission also held that if the applicant/site-owner continued to refuse to make the site available to the ultimately successful competitor, the winning applicant could later modify to specify an entirely new site. *Id.*, at n.2. TWL points to this ability to later modify a site proposal if an opponent's site remains unavailable. TWL Br. at 24–25 & n.13. However, as discussed more fully in the succeeding textual paragraph, while an applicant may specify a later site where there are *no* questions about its *basic* financial ability (as is true with most applicants), and the *only* remaining question is whether it will have *any* site at all, it is simply the deferral of any "site availability" issue that is permissible. There is, though, no "site availability" issue here; there is, rather, a basic financial issue.

[39] 88 FCC 2d at 926.

[40] *Id.*, at 927 n.27.

Kaye-Smith Enterprises, 90 FCC 2d 105, 108 (1982), where an applicant relying on *Cameron* specified the site leased by its incumbent opponent. But, in its financial showing, it estimated a hypothetical $1,000 per month lease cost without inquiring of the property owner. Accordingly, the Commission held that "this matter must be explored at hearing to determine the basis and actual cost of leasing the site" within the context of a general financial issue also specified against that applicant. Hence, while a competing applicant's site itself may be specified, the specifying applicant must nonetheless demonstrate the basic financial ability to acquire *some* site—its opponent's or a reasonable substitute.

15. *Programming*. TWL proposes to operate for the first 3 months by spending only $24,465 in salaries, *I.D.*, para. 25,[41] and $13,070 for programming. *Id.* Although the Commission had designated a so-called "fair break" programming issue against TWL to determine whether it would provide "reasonable opportunities [to] representatives of religious faiths which do not share the religious beliefs of the applicant . . .,"[42] TWL averred at hearing that although religious programming will be broadcast, it proposes, in fact, a general market format. *I.D.*, para. 4. But, while it proposes a general market format, its programming budget (over and above local) is only $115 per day. *I.D.*, para. 29. It proposes to acquire a substantial amount of "barter" programming to fill its schedule. *Id.*

16. TWL anticipates that, with the exception of its chief engineer and its news director, it will pay its other employees minimum wage for the first 3 months, *I.D.*, para. 28, and will rely on 3 student interns who will work 20 hours per week each, 1 in news and 2 in production. *See id.*, at paras. 25, 28. According to the TWL brief, "TWL's salary estimates were based on consultations with Charles Chatelain, general manager of Station KADN-TV, Lafayette, Louisana."[43] Although Chatelain did not appear as a witness, his estimates

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[41] Its salary projections are:

Salaries

General Manager	$ 0	Technical Operator (6 full time or equivalent)	11,600
Program Director	0	Interns (3 at 20 hours/week; 1 News and 2 production)	2,900
Sales Director	Commission only	News Director	3,000
Salesman	Commission only	Secretary (20 hours/week)	965
Chief Engineer	6,000	Subtotal	$24,465

TWL Exh. 8 at 3–4.

[42] *I.D.*, para. 1 (referencing *Designation Order*, FCC 80–534, released September 30, 1980).

[43] TWL Br. at 8 (referencing TWL Exh. 8 at 5). However, that part of the exhibit adverting to alleged consultations with Chatelain was apparently stricken by the ALJ when Chatelain did not appear for cross-examination. *See* Tr. 564–66. We

were generally supported by William Kitchen.[44] Kitchen was also TWL's witness on program cost estimates.[45] However, when asked whether, in preparing his "testimony on programming available to the proposed station in Houma," he had studied the market, Kitchen replied that he hadn't;[46] in fact, he did not even know what perish (county) Houma was in.[47]

17. TWL's $115 per day allocation for syndicated programming and films, *etc.*, is based on its belief that some programs are available at a cost of $25 per episode and $20 or less for motion pictures. *I.D.*, para. 29. These cost estimates rest, in turn, on the evident assumption by TWL that Houma is considered a separate, small program market by program suppliers who price their programs according to whether the station's television market is within a larger ADI or is outside an ADI. *See I.D.*, Conclusions, para. 6. ADI's are established on a county basis. Despite this assumption, the record is conclusive that Houma is part of the New Orleans ADI, *id.*, a fact admitted by TWL's witness, William Kitchen.[48] GACO's witness, Horace W. Gross, a TV management consultant, testified that, based upon applicable standards, Houma could not be established as a separate market, *I.D.*, para. 30; and, that even if TWL tried to have Houma established as a separate market outside the New Orleans ADI, the process for making the showing necessary to change Houma's ADI status would take at least a year because it involves intensive diary-keeping by the audience rating service that establishes ADI designations. *Id.*[49] TWL's witness, Kitchen, stated that he had no idea whether Houma could ever be established as a separate market for purposes of costing programming and that the cost of programming to TWL would be "prohibitive" if it could not.[50]

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believe that the striking of alleged reliance on Chatelain may have been inconsistent with the ALJ's failure to strike GACO's reliance on tower experts Cornforth and Sargent, neither of whom appeared at hearing for cross-examination. *See* Tr. 944–51; and also see our brief discussion of hearsay evidence in note 15, *supra*. In any event, the handling of the Chatelain estimates is harmless and the validity, *vel non*, of those estimates plays no part in our review of TWL's financial qualifications.

[44] TWL Br. at 8 n.7 (referencing Tr. 592–93).

[45] Tr. 566–71.

[46] Tr. 573.

[47] *Id.*, at 573–74. The question of which parish (county) Houma is in looms pivotal since TWL's $115 per day estimated programming cost is predicated on the erroneous assumption that Houma is a separate programming market and that its county is not one of those within the New Orleans ADI. See discussion *infra* at next textual paragraph.

[48] Tr. 573.

[49] Gross also testified that TWL had made no provision in its programming budget for such basic expenses as down payments and advance payments for film suppliers, materials to produce local programming such as film stock, slide materials, sets and "flats," news gathering costs, or for advertising and promotion, *etc. I.D.*, para. 31.

[50] Kitchen testified:

18. *Summary*. Although the Commission gives great latitude to an applicant in projecting its financial qualifications,[51] and currently requires that an applicant need initially only certify that it has sufficient resources to operate for the first 3 months without operational income, *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981) (*"Revision of Form 301"*), a financial issue may be designated for hearing where a *prima facie* case is made that significant and material questions of fact exist as to the validity of the applicant's financial qualifications. *See* 47 U.S.C. §309(e); *see also United Broadcasting Co.*, 53 RR 2d 57, 78 & n.101 (1983).[52] An issue is proper where serious questions arise as to whether an applicant's proposal is capable of effectuation. *Thunder Bay Broadcasting Corp.*, 49 FCC 2d 1023, 1028 (1974). And, although an applicant may now initially certify on the revised Form 301 that it has its construction and financial resources, the Commission stated when revising the form:

> At the outset, it should be emphasized that we are not, in any way, modifying the underlying substantive financial criteria.

Revision of Form 301, supra, 50 RR 2d at 382. *See also United Broadcasting, supra*, 53 RR 2d at 78 n.101; *Kaye-Smith Enterprises, supra*, 90 FCC 2d at 108–10 (1982).[53]

19. Relying on *Thunder Bay, supra*, TWL excepts to the ALJ's close analysis of its equipment and finances and asserts that it is the Commission's policy to show deference to an applicant's determination of the resources it intends to rely upon.[54] It also relies on the

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> Q. Do you have any personal knowledge of whether the Houma television market would be a separate market from the New Orleans television market of which it is now a part?
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> A. Because of the number of households and the distance from the city, if I were the station owner, I would certainly attempt to establish, and I believe, sir, that your people would too—otherwise you would find the cost of programming prohibitive.
>
> Q. Yes, sir, that's exactly right. And do you have any knowledge of whether they would be successful in establishing Houma as a separate television market?
>
> A. No, sir, I do not.

Tr. 606.

[51] The Commission's authority to inquire into financial qualifications germinates from Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §308(b).

[52] In *United Broadcasting*, the Commission affirmed the financial disqualification of an applicant, 53 RR 2d at 79, after the Review Board had added an issue because the applicant had originally indicated that it had sufficient used equipment "on hand," but later admitted that it did not. *See id.*, at 78.

[53] In *Kaye-Smith*, and despite the policy relaxation announced a year earlier in the *Revision of FCC Form 301* to allow for self-certification of financial resources, the Commission added a financial issue against an applicant who had alleged $489,123 to construct and operate a new FM station because the applicant's (undated) financial statement did not establish the liquidity of its stock or real estate interests nor did it contain a verification of alleged "cash due." *See* 90 FCC 2d at 109–10.

Revision of Form 301, supra, for the proposition that "a party taking issue with [an applicant's] determinations bears a particularly heavy burden."[55] Finally, TWL intimates that inasmuch as its proposals were "reasonable in their inception," the ALJ's findings were not supported by substantial evidence.[56]

20. TWL's approach to the financial issue is backwards. Even if we were to agree, *arguendo,* that its proposals seemed "reasonable in their inception,"[57] once a financial issue is designated against an applicant, the applicant bears the burden of proof on the issue. The burden of proof on the financial issue was expressly placed on TWL. *I.D.*, at n.7.[58] TWL's formulation of the operable dynamics would place that burden somewhere else —perhaps on the ALJ. Moreover, TWL's reliance on *Revision of Form 301* is fatally misplaced; both *Kaye-Smith* and *United Broadcasting, supra,* decided *after* the form

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[54] *See* TWL Br. at 26–27. TWL cites the Commission's language in *Thunder Bay* which stated that it would not:

> . . . publish with each finding of financial qualification a catalogue of prices for every fixture or item of inventory in a television station. Doing so would ignore the judgment of the applicant and infringe upon the applicant's prerogative to apply ingenuity and flexibility to devise the best practicable service for its community of license.

Id., at 26, *quoting* 49 FCC 2d at 1028 (footnote omitted).

[55] *Id.*, at 26–27.

[56] *In haec verba,* TWL contends:

> It is pertinent to observe here that findings in administrative hearings governed by the Administrative Procedure Act must be 'supported by and in accordance with reliable, probative and substantial evidence.' 5 U.S.C. § 556(d) (1976). *See Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1140–41 (Rev. Bd. 1982) and cases cited therein.
>
> TWL's proposals were reasonable in their inception. They were based on consultations with managers of other television stations, TWL's equipment supplier, its counsel and the contractors it was engaging to do the work. . . . The record demonstrates that GACO's evidence was not sufficiently reliable, probative or substantial to cast doubt on the ability of TWL to effectuate its proposals.

TWL Br. at 27.

[57] Agreeing with TWL on this point would take considerable effort and constrain us to ignore TWL's own admissions that its proposals were not "reasonable in their inception." To wit, not only was TWL compelled to amend its application by adding $35,000 for antenna system costs in response to allegations and data supplied by others, *I.D.*, para. 13 & n.10, and to concede that it could no longer rely on its original assumptions with respect to its equipment "on hand," *id.*, at para. 35, it states in response to the abuse of process issue that its actions regarding initial equipment representations were:

> . . . at the worst, carelessness, exaggeration, puffing, slipshoddiness, or other similar behavior which is not a basis for disqualification [for misrepresentation].

TWL Reply, at 4. We doubt that an applicant's initial representations can be thus characterized and yet be considered "reasonable."

[58] This situs of the burden on the applicant is consistent with 47 U.S.C. § 309(e) and Commission precedent. *See, e.g., United Broadcasting, supra,* 53 RR 2d at 81.

relaxation policy was announced, attest to the fact that an applicant questioned as to its financial qualifications cannot merely "certify" those questions away as TWL's brief necessarily implies.[59] In this case, not only did TWL not meet its burden of proof on this issue (and we affirm the ALJ on his finding and conclusions thereunder) the "reliable, probative and substantial evidence"[60] shows—if anything—that TWL is not financially qualified to be licensed.[61]

TWL: Abuse of Process

21. *Misstatements Re Equipment.* In its application filed on December 31, 1979, TWL represented that it had "on hand" all of its antenna system, its RF generating equipment, its monitoring and test equipment, and its program origination equipment, *I.D.*, para. 34. Again, in an affidavit filed on December 1, 1980 (opposing an enlargement of issues motion challenging TWL's financial and equipment representations), TWL asserted that it had "on hand the necessary equipment to begin operation of a television station." *Id.*, at para. 35 (*quoting* GACO Exh. 10, at 3). Nevertheless, in a *volte-face* not satisfactorily explained to this day, TWL—facing a financial issue and a personal inspection of its purported equipment[62]—reversed its unqualified position just one week prior to the commencement of the hearing and, on June 8, 1981, admitted that it could no longer presume the operability of its transmission system and that other equipment was also needed. *Id.*

22. The foregoing sequence of events creates the unavoidable suspicion that TWL lacked candor regarding its equipment and the ALJ's addition of the "misstatement" issue based on the allegations before him was more than justified. After taking testimony and other evidence under the issue, the ALJ concluded that it was "conceivable" that TWL "believed until the eve of the hearing" that its equipment was as it originally envisaged. *I.D.*, Conclusions, para. 17. While we will not go so far as the ALJ and say that the record contains "no evidence" of deliberate overstatement (*id.*) in view of the fact that the other parties, very early on, made creditable allegations regarding the insufficiency of TWL's equipment, some of

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[59] *See* TWL Br. at 27. *But see South Florida Broadcasting Co., Inc.*, FCC 83-265, released June 2, 1983 (applicant may not merely certify to financial qualifications where substantial and material questions of fact exist).

[60] TWL Br. at 27, *quoting* 5 U.S.C. § 556(d) (1976).

[61] Although it is said that all comparisons are invidious, it is ironic that in the case heavily relied upon by TWL, *Thunder Bay*, the television applicant there proposed to operate in the first year in reliance on a $400,000 bank loan and $600,000 worth of leased equipment. 49 FCC 2d at 1025. That proposal was made in 1972. *See id.*

[62] The financial issue had been added on February 25, 1981. *See* para. 2, *supra*. The ALJ's inspection order had been released on May 4, 1981. *See* para. 4 & note 5, *supra*.

which allegations TWL later admitted, we do agree that a potential finding of an intentional lack of candor is not supported by substantial record evidence.

23. TWL's shuffling regarding its extant equipment, although no more, perhaps, than the "exaggeration" or "puffing" that TWL asserts is the "worst" that might be said of its conduct,[63] does, however, reinforce the generic conclusion that TWL has not demonstrated its basic financial qualifications. Its shifting representations illustrate graphically that TWL did (and does) not know what of its used equipment is operable, what is missing, or what acquisitions were (are) necessary to create a fully functioning VHF television station out of untested, cast-off equipage and a derelict transmission system.[64] Thus, while no penalty is charged under the "misstatement issue," the ALJ's examination thereunder was collaterally useful in bringing to light facts which illuminate the underlying matter of TWL's basic qualifications. While TWL might have possessed a vain and unsupportable "belief" that it had the resources necessary for broadcasting, it has actually shown not much more than that mere belief.

24. *Equipment Inspection*. Because TWL's efforts to comply with the ALJ's "inspection order were grudging and so insufficient that the purpose of the inspection was to a considerable extent thwarted," *I.D.*, Conclusions, para. 15,[65] the ALJ assessed TWL a "serious comparative demerit." *Id.*, at para. 18.[66] Although wholly agreeing

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[63] TWL Reply at 4.

[64] *Houma Broadcasters, Inc.* ("HBI"), a party-intervenor who has settled out of this case, *I.D.*, para. 1 & n.2, has filed "limited exceptions" and urges, *inter alia*, that the ALJ erred in not adding a misrepresentation issue based on TWL's listing of the ownership of a "production van" on its application balance sheet; it contends that California records show that the van is registered to KQED, Inc., San Francisco. HBI Br. at 7–8. Without going into great detail, we affirm the ALJ. TWL's financial status and its misplaced reliance on dubious equipment is already sufficiently clear without pursuing the incidental question of the locus of seisin in a used truck. HBI's other exceptions are likewise rejected as duplicative or non-decisional.

[65] It will be recalled that the alleged equipment "on hand" was, in substantial part, stored haphazardly and inaccessibly in a trailer and that TWL's representative was instructed only to unlock the doors. *See* paras. 4–5, *supra*; *see also I.D.*, paras. 37–39.

[66] The comparative demerit was also apparently based, in undefined proportion, on the so-called "settlement agreement" aspect of the abuse of process issues. *See I.D.*, Conclusions, paras. 16–18. Because we hereinbelow reverse the ALJ's assessment of the demerit, we need not delve into the legal sufficiency of assessing a demerit without a more specific identification of the conduct elements warranting a particular penalty. *Cf. Leflore Broadcasting Co., Inc.* v. *FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980) ("Where several violations are found, the Commission should set forth the role each plays in the assessment of a penalty. Rarely should the agency be permitted to take a 'gestalt' approach, one based upon a reaction to the 'overall' situation rather than to each violation one at a time.")

with the ALJ's characterization of TWL's conduct, we believe that the levy of a penalty based, in any degree, on that conduct partakes too strongly of the application of a retroactive standard. The conduct expected of this first-time applicant at the inspection was not articulated beforehand; nor are we aware of any published code that sets out such expectations. Before a penalty is assessed for misconduct, adequate prior notice of the appropriate standard of conduct should be redacted. *See, e.g., Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976); *Pressley* v. *FCC*, 437 F.2d 716, 721 n.5 (D.C. Cir. 1970). Should an "inspection" order be issued in a future case, the party against whom the order is directed should be apprised in relatively definitive terms as to its role. At a minimum here, TWL could have been reordered to submit to a second inspection more conducive to eliciting the objective condition of the equipment. In any event, the situation is largely selfcorrecting in that a party under the onus of a reasonable inspection order that does no more than did TWL runs the ineluctable risk that it will default on its showing, fail its procedural burden, and face disqualification. That scenario is at least as sharp a deterrent to "grudging" inspection conduct as a comparative demerit under the mantle of abuse.

25. *Settlement Agreement*. For reasons relating, in part, to the retroactivity factor discussed *supra* under the "inspection" issue, we will likewise erase whatever proportion of the "serious comparative demerit" the ALJ found attributable to TWL's withdrawal from a general settlement agreement announced by (prior) counsel. *See I.D.*, paras. 40–43; Conclusions, paras. 16–18. In synopsis, TWL president John Graves testified that he had instructed counsel on June 16, 1981 to settle the case because his wife was ill and he had tired of pursuing the application. *I.D.*, para. 41. Counsel advised the ALJ that the case had been settled, and the parties as well as the ALJ believed the case to be over on that day. *Id.* The ALJ dismissed the witnesses (who had travelled considerable distances) and continued the proceeding solely for the receipt of the final settlement agreement. *See I.D.*, Conclusions, paras. 16, 18. Unbeknownst to the ALJ, Graves later refused to sign the agreement papers forwarded to him by counsel and commenced to haggle on his own for substantially more money. *I.D.*, para. 42. TWL failed to respond to the settlement agreement filing deadline established on August 27, 1981 and later advised the ALJ—for the first time—that it intended to pursue its application. *Id.*, para. 43. The hearing was then recommenced.

26. TWL explains its conduct by saying that after Graves had telephonically agreed to the settlement, he later felt that it actually differed from the one TWL counsel had described on the telephone. TWL states that Graves "prayed" about what to do because he felt that he was "gambling" that the GACO application would be

granted, without which grant TWL would receive no reimbursement under the agreement.[67] Despite TWL's curious juxtaposition of the sacred and profane, and despite the fact that the record seems clear that TWL had agreed on June 16, 1981 to the original settlement amount (*i.e.*, $20,000, *see I.D.*, para. 41) and later reneged, thus greatly disrupting the adjudicatory process and causing wasted expenditures necessary to reassemble the hearing and the out-of-state witnesses, we find insufficient evidence that TWL's settlement conduct was intentionally aimed at abusing Commission processes.[68] Apart from the retroactivity considerations mentioned above, the Broadcast Bureau noted in its opposition to the addition of the "settlement" abuse issue that no written agreement had ever been filed.[69] And, while TWL's abandonment of its prior oral agreement was seriously disruptive, the Board has written that "[a]lthough the law does favor settlement, no Commission precedent prevents withdrawal of settlements. . . ." *Hanover Radio, Inc.*, 91 FCC 2d 849, 852 (Rev. Bd. 1982).

27. The Board is not insensitive to the fact that parties to an adjudicatory proceeding may attempt to use Commission processes as leverage in settlement negotiations. Nor are we immune to the fact that a request to an ALJ to cancel a scheduled hearing on the basis of a putative (or tentative) settlement involves the unpalatable risk of potential disruption if the settlement ultimately falls through. However, the law so favors settlements, *Country-Politan Broadcasting, Inc.*, 68 FCC 2d 640 (1978) (concurring statement of Chm'n Ferris), that we are reluctant to suggest a hearing procedure that goes so far towards reducing the risk of an abandoned settlement negotiation that we incur the equivalent risk that litigation might be pursued in lieu of careful and delicate settlement negotiations.[70] The best we can offer is that, when parties advise of a prospective settlement, the ALJ should seek a written confirmation of the basic settlement terms as early as possible and that the parties be monitored continually to determine the status of negotiations. Finally, should substantial extrinsic evidence surface to reveal that a party has disingenuously announced a settlement agreement for purposes of obstructing a hearing or for extracting better terms from a competing applicant who, necessarily, has been revealed as

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[67] TWL Br. at 18.

[68] For an example of a "serious misuse of Commission procedures," *see Jimmie H. Howell*, 46 FCC 2d 1150, 1151 (Rev. Bd. 1974) (enlargement of issues), 65 FCC 2d 516 (Rev. Bd. 1977) (applicant disqualified).

[69] Broadcast Bureau Opposition to Petition to Enlarge Issues, filed October 20, 1981, at 3.

[70] The Review Board is itself familiar with the frustration attending the delay of abandoned settlements. *See, e.g.*, *Absolutely Great Radio, Inc.*, 53 RR 2d 97, 100 n.6 (Rev. Bd. 1983) (proceeding held in abeyance for 49 days pending filing of announced settlement; settlement later abandoned).

amenable to settlement, that abusive party should be disqualified forthwith and absolutely.[71] No extrinsic evidence of such egregious conduct appearing in this case, TWL will not be penalized, notwithstanding its erratic conduct.

Conclusion

28. Over the past several years, the Commission has relaxed its financial qualification requirements to the point that applicants seeking to construct and operate a broadcasting facility may propose to do so on a veritable "shoestring."[72] Yet, the Commission has purposefully retained a substantive minimum to help ensure that those awarded a valuable broadcast construction permit first have the merest wherewithal to construct the station and to meet inaugural public interest obligations. *New Financial Qualifications Standards for Broadcast Television Applicants, supra* note 72; *Revision of Form 301, supra*. In the case at bar, TWL is not only bereft of the shoeleather necessary to ascend the relatively mild economic slope ahead, its "shoestring" is cleft through at virtually every eyelet. If anything, TWL's financial position is inferior to that of the applicant recently found unqualified in *United Broadcasting Co., supra*; and, TWL's actions and representations surrounding its alleged equipment "on hand" reflect a lack of seriousness and an irresponsibility towards the licensee qualification process. Viewed in a less charitable light then we have cast, its actions in that latter regard flirt with fraud. As we have said, though, we will generally accept the ALJ's conclusion that there is not sufficient evidence of "deliberate falsification." *See I.D.*, Conclusions, para. 17.

29. This case does reaffirm, however, the Commission's foresight in maintaining a bare minimum financial requirement for broadcast applicants. *See Revision of Form 301, supra*, 50 RR 2d at 382. The people of Houma and Southeastern Louisiana deserve far better on one of the nation's few remaining full power VHF frequencies than, at best, a garage-shop electronics experiment (assuming, doubtfully, that TWL could ever actually transmit under the circumstances proposed) and a programming budget of $115 per day, augmented by

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[71] In that connection, a party found to have abused processes in the described manner should not hope to escape with a mere "demerit." Abuse of process is a disqualifying offense. *Cf. Gulf Coast Communications, Inc.*, 81 FCC 2d 499, 513–515 (Rev. Bd. 1980), *application for review denied*, FCC 82–128 (released April 16, 1982) (mem.) *appeal docketed* No. 82–1760, D.C. Cir., 1982; *Home Service Broadcasting Corp.*, 24 FCC 2d 192 (Rev. Bd. 1970).

[72] *Compare Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965) (applicant must show ability to construct and operate for 1 year without advertising revenues) *with New Financial Qualifications Standards for Broadcast Television Applicants*, 72 FCC 2d 784 (1979) (reducing financial requirement for "start-up" period to 90 days' operating revenues plus construction costs) (PUBLIC NOTICE, released May 11, 1979). *Cf. Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978) (PUBLIC NOTICE, released August 2, 1978).

uncertain allusions to some "barter" programming. Although the Commission has pared its advance financial requirements to, perhaps, an irreducible minimum, that minimum must be met. *United Broadcasting Co., supra*. TWL has not come close. GACO, on the other hand, is fully qualified—a qualification TWL does not contest—and we affirm the ALJ's findings and conclusions with regard to GACO in every respect as well as the award of the permit.

30. ACCORDINGLY, IT IS ORDERED, That the Contingent Motion to Reopen the Record and to Enlarge Issues filed May 23, 1983 by GACO Communications Corp. and the Motion for Extension of Time filed June 6, 1983 by The Way of Life Television Network, Inc. ARE DISMISSED as moot; and

31. IT IS FURTHER ORDERED, That the application of GACO Communications Corporation (File No. BPCT-5047) IS GRANTED, and the application of The Way of Life Television Network, Inc. (File No. BPCT-790622KE) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 82D–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GACO COMMUNICATIONS CORPORATION Houma, Louisiana	BC Docket No. 80–484 File No. BPCT-5047
THE WAY OF LIFE TELEVISION NETWORK, INC. Houma, Louisiana	BC Docket No. 80–487 File No. BPCT-790622KE
For Construction Permit for a New Television Station.	

Appearances

Julian P. Freret, Christopher D. Imlay, James L. Oyster and *Vincent A. Pepper*, on behalf of GACO Communications Corporation, *John H. Midlen, Jr.* and *Matthew H. McCormick*, on behalf of The Way of Life Television Network, Inc.; *Alfred C. Cordon, Jr.* and *Dennis J. Kelly*, on behalf of Houma Broadcasters, Inc.; and *Norman Goldstein*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued November 15, 1982; Released: November 23, 1982)

Preliminary Statement

1. By Memorandum Opinion and Order, FCC 80–534, released September 30, 1980, the Commission designated six mutually exclusive applications for hearing. All had applied for Channel 11 in Houma, Louisiana following the demise of station KHMA-TV, which had operated on the channel for a brief period in the early 1970's. During the course of the proceeding, three applications were dismissed and two applicants, Communications Corporation of the South, Inc. (CCSI) and GACO Communications Corporation, were merged into a single entity.[1] Thus at the commencement of the hearing on November 10, 1981, there were two surviving applicants, The Way of Life Television Network, Inc. (TWL) and the newly

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[1] FCC 80M-2618, released December 12, 1980; FCC 81M-73, released January 12, 1981; and FCC 81M-2654, released August 27, 1981.

constituted GACO Communications Corporation (GACO). In addition a former applicant, Houma Broadcasters, Inc. (HBI), was granted intervenor status.[2] The issues in the case include the standard comparative issue and the following issues against TWL:

1. Whether the applicant will adopt and implement a policy of providing reasonable opportunities by representatives of religious faiths which do not share the religious beliefs of the applicant to express opposing or diverse religious views on the proposed Houma station;[3]
2. Whether operation of the proposed station from a main studio outside the city limits of Houma would be consistent with the public interest;[4]
3. Whether the applicant is financially qualified to construct and operate its proposed station;[5]
4. To determine whether TWL has, in pleadings filed during the course of this proceeding, misstated the condition of equipment it has purported to rely on in the construction and operation of its proposed station;[6]
5. To determine whether TWL failed to comply with an order of the presiding officer to permit entry, inspection and photographing of its equipment;[6]
6. To determine the facts and circumstances surrounding TWL's failure to comply with representations made to the presiding officer that its application would be dismissed in return for partial reimbursement of expenses;[6]
7. To determine, in light of the evidence adduced under the foregoing issues [4–6], whether TWL has abused the processes of the Commission and, if so, whether it possesses the requisite qualifications to be a Commission licensee.[7]

The designation order also specified a studio location issue against GACO. That issue was mooted by the GACO/CCSI merger, which provided that the merged applicant would utilize CCSI's proposed studio location.[8] The issue is therefore deleted.

2. Prehearing conferences were held on December 11, 1980 and February 10, 1981. An admissions session was held on June 15, 1981. On the following day, the parties represented that an agreement had been reached settling the case. The hearing was therefore continued

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[2] See FCC 81M-3414, released October 30, 1981.

[3] Specified in the Memorandum Opinion and Order (FCC 80–534, released September 30, 1980) designating the case for hearing.

[4] The studio location issue specified in the designation order was modified by the presiding officer in an order (FCC 81M-466, released February 19, 1981); see also Memorandum Opinion and Order (FCC 81M-445, released February 17, 1981).

[5] Added by Memorandum Opinion and Order (FCC 81M-538, released February 25, 1981); see also Memorandum Opinion and Order (FCC 81M-445, released February 17, 1981 at n. 2).

[6] Added by Memorandum Opinion and Order (FCC 81M-3432, released October 30, 1981).

[7] Added by Memorandum Opinion and Order (FCC 81M-3432, released October 30, 1981). The burden of proceeding with the introduction of evidence on issue 4 was placed on GACO; the burden of proceeding with the introduction of evidence under issue 5 was placed on HBI; and the burdens of proof under all issues were placed on TWL.

[8] See FCC 81M-2654, released August 27, 1981, p. 2.

without date. However, as will be discussed *infra*, the settlement agreement was not consummated, necessitating a further conference on September 25, 1981 and hearings on November 10, 12, 13, 16 and 17, 1981. Proposed findings of fact and conclusions of law were filed on March 1, 1982 and replies thereto were filed on April 5, 1982.

Findings of Fact

TWL's Religious Program Policy

3. In its designation order, the Commission stated that TWL proposed to provide "predominantly religious programming," but had not expressed an intention to provide a "fair break" to others who do not share the same religious precepts as the applicant (para. 16). Accordingly, an issue was specified to determine whether TWL would provide a reasonable opportunity for the expression of "opposing or diverse religious views."

4. At the hearing, Janis Graves, TWL's vice president, explained that TWL in fact proposes a general market format, not a religious format as the designation order had suggested. Some religious programming will be broadcast. She stated that TWL will make time available to persons or organizations for the broadcast of religious views, precepts and/or tenets regardless of whether TWL or its directors agree with them. Time will be given on a "first come, first serve" basis. The board of directors will determine if free time is available. Further, TWL will not discriminate as to which persons or organizations are offered free time; and as to those who purchase time all will be charged the same rate for the same time, but the rate may vary depending upon the amount of time purchased and the time of day broadcasts are aired.

5. According to Mrs. Graves, TWL will make at least one hour per week available free to houses of worship located within its Grade B service contour. The hour may be divided into half hour segments. In any event, its use will be allocated on a rotating basis among the entities participating. If several churches are of the same denomination, the frequency of the invitations extended would be determined by the number of churches comprising the group. However, the size of the congregation would not be a factor in determining how often a church or organization would be offered free time (TWL Ex. 7, pp. 1–2).

6. Mrs. Graves testified that this policy would be made known as widely as possible through on-air announcements occurring at least once a week. Additionally, letters reflecting the policy would be sent to the Roman Catholic Diocese of Houma-Thibodaux and to the Ministerial Association which represents most other organized churches. Their assistance in disseminating the policy would be requested, and fringe religious groups would also be contacted. All houses of worship whose addresses appear in the yellow pages

telephone books of the various communities within the Grade B contour would also be sent letters outlining the station's policy. TWL hopes that as a result a variety of religious views would be expressed over the station.

TWL's Main Studio Location

7. TWL proposes to locate its studio on a tract of land approximately 210' x 210' abutting Federal Highway 90, which is one of the two main thoroughfares going into Houma. The site is approximately 1.25 miles from the city limits, 4–5 miles from downtown Houma and no more than 7–8 miles to the NE boundary of Houma. The proposed studio building is within several hundred feet of the site proposed by TWL for its transmitter tower and building (TWL Ex. 5, pp. 1–2; TWL Ex. 6; Tr. 344–46).

8. Although there is no public transportation, TWL represents that the proposed studio site is readily accessible to the residents of Houma and that parking facilities exist for 12–15 cars, with more room becoming available when certain equipment is removed from the area. In this connection TWL notes that since Houma has no mass transportation system, it would be necessary to use a privately-owned vehicle or taxicab to get to the studio no matter where it is located unless one lived within walking distance. According to Mrs. Graves, the availability of suitable property inside the city limits of Houma is small, if not nonexistent. Moreover, due to the rapid growth of the city's population and the upsurge of commercial building, acquiring any property comparable to this site within the city limits is not a reasonable alternative.

9. The 5,500 square foot building located on the proposed site was originally designed and constructed specifically for a television studio and served as the studio for station KHMA-TV during its short existence. The building is designed to accommodate future additions and the site affords space for expansion.

10. The proposed studio location is within a 10-minute drive of the center of Houma. It is on the major highway in the region and therefore the site will be accessible to residents of other communities within TWL's proposed service area, including Morgan City and Thibodaux. There are no barriers between the studio building and the city limits of Houma, such as canals or bridges. Finally, the proximity of the proposed studio building and transmitter to each other will provide for a more economical operation of the proposed station.

TWL's Financial Qualifications

11. TWL estimated that the cost of constructing and operating its proposed station for the first quarter would be $177,174. Of this total $105,360 would be dedicated to equipment and construction costs and $71,814 to first quarter operating costs (TWL Ex. 8, pp. 1–

2). In specifying the general financial issue against TWL, the presiding judge noted that substantial doubt existed regarding the applicant's financial ability to obtain use of the site it is proposing and to place the equipment located thereon in operational condition. There was also uncertainty as to how much additional equipment TWL would have to acquire and the terms under which its studio building would be obtained. See FCC 81M-445, released February 17, 1981.

12. *Construction and Equipment.* The estimated cost of construction and equipment was itemized as follows:

Antenna System	$ 35,000
RF Generating Equipment	On hand
Monitoring and Test Equipment	On hand
Program Originating Equipment	14,200[9]
Remodeling of Buildings	2,000
Legal Costs	30,000
Engineering Costs	500
Installation	
(a) Studio Equipment	7,000
(b) Transmitter	13,260
Other Miscellaneous	3,400
TOTAL	$105,360

TWL's estimate is so low because, as indicated above, it already has equipment on hand. Additionally, the applicant proposes to rely on a deferred credit arrangement with Quality Media Corporation for $49,200 to cover the cost of any additional equipment it might be required to purchase (TWL Ex. 8, pp. 7–8, Attachment B). Many aspects of its proposal, however, were seriously challenged at the hearing.

13. Regarding the antenna system, TWL now estimates that it will cost $35,000 to make it operable.[10] This estimate includes the cost of replacing transmission line, refurbishing the antenna, and dismounting and remounting equipment on the existing tower. The price quotation was obtained from Quality Media, which would act as general contractor for the project and carry the entire $35,000 on a deferred payment basis (TWL Ex. 8, pp. 1–2, Attachment B, pp. 2–3; Tr. 537). Its president, William J. Kitchen, visited the tower site in 1977 and testified that absent any significant stress in the interim the tower should remain serviceable for many years (Tr. 547–51). He stated that his firm had experience in replacing transmission lines and would have no difficulty in acquiring the services of a subcon-

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[9] This is in addition to the equipment on hand.

[10] Previously, TWL indicated that its atenna system, initially used by station KHMA-TV, would require no outlay for renovation and that it had on hand all required equipment for program origination. The revised estimate was prompted by allegations and supporting data by other parties to the effect that the antenna system was not operable (TWL Ex. 8, pp. 1–2).

tractor to work on the antenna (Tr. 554). However, he admitted that he did not contract any local contractors regarding their costs to correct the transmission or antenna systems (Tr. 586).

14. GACO witness Richard L. Biby, a consulting engineer, expressed a contrary view, estimating that the cost at present prices (i.e., December 1980) of putting TWL's proposed tower and antenna site into acceptable condition would be in excess of $100,000. Biby's estimate was based upon his analysis of on-site investigations conducted in 1976 by R. C. Cornforth of Cornforth Associates, whose firm specializes in structural analysis of towers, and by Dean W. Sargent of D. W. Sargent Broadcast Service, who inspected the tower site from the standpoint of radiating capabilities. There has been no maintenance in the interim, a fact which in Biby's view would have resulted in further deterioration from high winds and the semi-salt water near the site (GACO Ex. 12). Biby also stated that in addition to the minimum rehabilitation costs of $100,000 for the tower and antenna, additional expenses in excess of $25,000 would probably be required to replace coaxial cable connecting the studio to the transmitter (GACO Ex. 12, p. 5).

15. Turning to equipment, TWL relies essentially on used equipment it has acquired over the years; it has also earmarked $14,200 for various additional items that might be needed and $3,400 for miscellaneous technical parts and supplies (TWL Ex. 8, pp. 1–2, Attachment A). The $14,200 estimate for required additional equipment was furnished by William Kitchen who testified that, based upon his personal experience, these items could be acquired on the used market for that amount. Kitchen had previously assisted TWL in the acquisition of its other used equipment which he represented was in working order at the time it was sold to TWL (TWL Ex. 8, Attachment B, pp. 1–2). To the extent that additional equipment was needed, he said his firm would carry it on deferred payments for six months (Tr. 544).

16. Kitchen's assertion that the equipment was in working order at time of sale was based either upon personal inspection or reports of his staff. However, his representations as to the workability of the equipment related to the individual components since he had never assembled the entire system to see if it actually would function together (Tr. 588). The equipment had been gradually acquired by TWL since 1977 and had been stored in Monroe, Louisiana until recently when it was moved to Houma and housed in a trailer. Although Kitchen had observed the manner in which the equipment was stored when it was in Monroe, he was not aware of storage conditions once it was brought to Houma. Furthermore, he was reluctant to commit himself to guaranteeing that the equipment would be operable. He stated, however, that he would remedy any problems or replace any equipment that was defective at the time he furnished it to TWL (Tr. 589–90).

17. Robert D. Blazier, coordinator of instructional television at Nicholls State University, testified that on May 20, 1981 he examined TWL's inventory of equipment. He indicated to TWL that certain additional equipment would be required and TWL provided funds in its budget to cover the cost of the items he had suggested. In his written testimony, Blazier stated that he "found the [TWL] equipment usable for television broadcasting program origination" (TWL Ex. 8, p. 1, Attachment B, pp. 1–2, Attachment C, p. 1). On cross-examination, he explained that by referring to the TWL equipment on hand as "usable," he meant that it was equipment of a type that he had experience with and that it "looked to be in good shape" (Tr. 308–09). He also admitted that he did not inspect the transmitter, other than to look at it. His inspection of the studio equipment consisted of trying to take down the serial numbers to make sure all the equipment purportedly available was in fact available. He made no qualitative analysis of the equipment. He relied upon representations that the equipment was operational when purchased and did not plug any of it in to test for electrical performance. He claimed it would be unrealistic to check out each piece of equipment, but acknowledged that each piece would have to be checked before being assembled and that he could not tell from visual inspection if the equipment would work. According to Blazier, the equipment was 15–16 years old, had not been used for 10–11 years and was of tube, not solid state, variety. He testified that tube type equipment requires more maintenance than solid state and is more likely to deteriorate from lack of use (Tr. 296–300, 307–09).

18. Pursuant to an order from the presiding officer (FCC 81M-1342, released May 4, 1981), representatives of GACO and two other applicants who were then parties to the case conducted an inspection of the equipment in Houma during June 1981. The equipment was contained in a tractor trailer, adjacent to the KHMA studio site, and at a warehouse (Tr. 328). Photographs of the equipment reveal that it was strewn about or stacked randomly in facilities that were not thermostatically controlled (Tr. 308, see GACO Exs. 11A-Q; Tr. 829–63).

19. William B. Carr, a registered professional engineer, was among those who conducted the inspection. Based on first-hand observation, which was as detailed as possible under the circumstances, he concluded that there is not enough equipment in TWL's possession to construct and operate its proposed station. He also stated that the equipment in the trailer was in extremely poor condition and was placed there in a haphazard manner. It was crammed into a small space and much of it appeared to be damaged. Based upon the conditions under which inspection took place and the appearance of the equipment, it was not possible to determine whether it was operational (GACO Ex. 11, pp. 1–3). He noted, in particular, that the transmitter appeared to be dirty, with meters

and other components apparently broken (Tr. 823–24). Prior to the inspection, Carr had been furnished with a copy of TWL's purported inventory of equipment, but could find no evidence of a diplexer, which was indispensable to the functioning of a station, and which cost in the neighborhood of $30,000 to $40,000. He also was unable to locate video monitoring equipment, projectors and other equipment (GACO Ex. 11, p. 3; Tr. 864).

20. Horace W. Gross, president of Frazier, Gross & Kadlec, Inc., radio and TV management consultants, reviewed TWL's proposed capital investment, and concluded that the equipment which TWL listed in its proposal is insufficient for the proposed operation. He specified certain items which were lacking and also noted an absence of spare parts which would be required for normal maintenance. He specifically noted the transmitter proposed by TWL would require modification to operate on Channel 11 (GACO Ex. 8, pp. 2–3). According to E. Noel Luddy, manager, consultant relations for RCA, the cost of new equipment necessary to convert the TWL proposed transmitter from Channel 10 to Channel 11 would exceed $90,000 (GACO Ex. 14).

21. With respect to studio and transmitter buildings, TWL, which proposes to use the facilities of the former licensee, budgeted $2,000 to cover any repairs or remodeling which might be required (TWL Ex. 8, p. 2). The studio facility is now owned by the Louisiana Compressor Maintenance Company and has been used since 1977 as a repair shop for compressors. According to Ronald Cannon, president of the company, a machine shop was installed in the building, but the basic structure has not been significantly altered. The company left everything in the studio portion of the building intact on the assumption that it would again be used as a TV studio. The walls, electrical system and lighting grid remain unchanged and, according to Cannon, the building still resembles a studio (Tr. 611–17, 644). From his perspective, the only thing needed to make the building functional as a studio is a general cleanup (Tr. 643). Cannon's testimony is essentially confirmed by Blazier, who stated that the studio facilities used previously by KHMA do not require significant remodeling since the physical plant was well designed and has not been altered significantly (TWL Ex. 8, Attachment C, pp. 1–2). To the extent that the air conditioning unit for the building is not working, Cannon testified that he can and will repair it at no cost to TWL (Tr. 636–40). Iddo Corkern, a principal of GACO who visited the proposed studio building in June 1981, testified that the building was filthy, and that a big six-eight foot high hole had been cut in the west wall of the building to put in a big exhaust fan (Tr. 916–17). William Carr testified that the studio building looked like a machine shop and required the addition of special circuit breakers which cost $2,000-$3,000 (Tr. 866–67).

22. Carr also testified that the condition of the transmitter

building was extremely poor, the door was ripped open, snakes and cattle had been in and out of the building and everything was in a state of disarray including the electrical system (Tr. 865). Corkern stated that as of June 1977, when he inspected the transmitter building, it was in a state of disrepair with doors open, wiring and circuit breakers cannibalized and no sign of a water supply for cooling purposes (Tr. 911–14).

23. TWL earmarked $7,000 for installation of studio equipment, based upon an estimate by Blazier, who said that the total cost to install and interconnect all master control and production control equipment should not exceed that amount (TWL Ex. 8, p. 2, Attachment C, p. 5). However, although Blazier described various pieces of equipment which he would use with respect to installation of the master control and production control equipment, he testified that he only verified the availability of the equipment specifically referred to in his affidavit. He admitted that he did not know whether some of the materials which he pre-supposed were "on hand" or being acquired were actually available (TWL Ex. 8, Attachment C, pp. 2–5; Tr. 301–07, 327–28).

24. TWL's estimate of $13,260 for transmitter installation was furnished by Bruce E. Singleton, who was formerly chief engineer of the station (WLCY-TV, Largo, Florida) where TWL's transmitter previously was used. Singleton installed the transmitter when it was new in 1965, and dismantled it for shipment to Houma in the spring of 1979 (TWL Ex. 8, p. 2, Attachment D). Singleton testified that the life expectancy of a transmitter is about 10–15 years before requiring an overhaul. The particular transmitter acquired by TWL had been completely overhauled about one year prior to its being taken out of service in 1977. Prior to dismantling the transmitter for shipment, Singleton had checked with the previous transmitter maintenance engineer, who said that it had operated satisfactorily (Tr. 660, 668–69). He was confident that he could install the transmitter in accordance with the provisions of his estimate which included time for partial proof of performance. His obligation did not include completion of the final proof of performance and final preparation of the required forms (Tr. 648–49, 651, 673–74). Singleton acknowledged that, as a tube type transmitter, the TWL transmitter would be subject to breakage if not properly handled. He also included some spare parts shipped with the transmitter (Tr. 657–58; TWL Ex. 8, Attachment A, pp. 8–9).

25. *Cost of Operation*. TWL's estimated costs of operating for a three-month period are broken down as follows (TWL Ex. 8, pp. 3–4):

Studio Rental (Five Months)		$10,000
Transmitter Site and Tower Rental (Five Months)		10,000
	Subtotal:	$20,000
Salaries		

General Manager		$ 0
Program Director		0
Sales Director		Commission only
Salesman		Commission only
Chief Engineer		6,000
Technical Operators (6 full time or equivalent)		11,600
Interns (3 at 20 hours/week; 1 News and 2 production)		2,900
News Director		3,000
Secretary (20 hours/week)		965
	Subtotal:	$24,465
Programming		
Film and Tape Programming		$10,500
Blank Tapes (initial stock and replacement)		1,000
News Service		1,320
Music License Fees		250
	Subtotal:	$13,070
Office Operations		
Supplies (initial stock and replacement)		$500
Telephone		750
Postage		300
Freight		3,000
Janitorial Service		450
Insurance		600
	Subtotal	$5,900
Utilities		
Studio Building		$1,950
Transmitter		6,429
	Subtotal:	$8,379
	Total:	$71,814

At the hearing a number of these estimates were disputed by the other parties, in particular the costs assigned to site rentals for the studio and transmitter, salaries and programming costs.

26. TWL estimated its studio rental at $2,000 per month based upon an agreement with Louisiana Compressor Maintenance Company (TWL Ex. 8, Attachment E). Ronald Cannon, its president, verified that the $2,000 was a correct and binding figure (Tr. 641). He indicated that this figure covers all costs of maintenance, his mortgage and insurance costs and still results in a profit of about $500 a month for his company (Tr. 625). Also, to the extent that TWL as the lessee of the property would have to absorb some of the costs of having the compressor company vacate the premises and relocate, he said no cash outlay would be required from TWL. Rather, the costs could be recouped through trades or advertising time (Tr. 642). TWL would be reasonable for the costs of utilities and estimated the cost at $1,950 (TWL Ex. 8, p. 4; Tr. 640).

27. TWL estimated its transmitter site and tower rental at $2,000 per month. TWL proposes the former KHMA site and tower now owned by The Vanderbilt Corporation. The basis for TWL's estimate is an analysis conducted on its behalf of the value of the land and the tower, the price paid for the land and tower and an evaluation of what would constitute a fair return to the property owner (TWL Ex. 8, p. 4). Seymour Smith, president and principal stockholder of The Vanderbilt Corporation,[11] testified that no one from TWL has made any inquiry as to the availability of the property. He further stated that The Vanderbilt Corporation would not lease the property to any of the other applicants but would be willing to sell it to TWL for $250,000 (CCSI Ex. 8; Tr. 965–66). The property was purchased about six years ago for $100,000 (Tr. 960).

28. The salary estimates were based on conversations with the general manager of KADN-TV in Lafayette, Louisiana. With the exception of the chief engineer and the news director, all employees will be paid minimum wage during the first three months of operation, and an additional twenty percent has been set aside to cover other payroll costs. John Graves and Janis Graves, general manager and program director, respectively, will receive no salary during the first three months (TWL Ex. 8, p. 5). John Graves testified that he has not received any salary over the past six months, and has been able to support his family from outside sources of funds. He stated that he will continue to be able to do so (Tr. 407, 744–45). TWL also proposes to rely upon student interns from Nicholls State University in Thibodaux, Louisiana. Robert Blazier, the coordinator of instructional television at the university, described the internship program at the university and testified that there would be no difficulty in finding student interns in the communications arts program who would be willing to work at the minimum wage level (TWL Ex. 8, p. 6, Attachment H, pp. 1–2).

29. For its program schedule TWL proposes to rely upon a substantial amount of so-called "barter" programming.[12] It also anticipates that the station will be paid to air religious programming provided by organizations such as the Christian Broadcasting Network and the PTL Television Network. In addition TWL has budgeted approximately $115 per day for other programming. TWL claims that a number of programs are available to small market stations at a cost of $25 per episode or less and many packages of

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[11] The Vanderbilt Corporation is the parent of CCSI which, as a result of the merger between itself and GACO, is a 50% stockholder in GACO. See FCC 81M-2654, released August 27, 1981.

[12] Under a "barter" arrangement, as described by TWL, the station is provided programming free of charge in exchange for running the commercials contained in the program. Commercial positions are also available in the program for the station to sell to local advertisers.

motion pictures are available at a cost of $20 or less per showing on small market stations (TWL Ex. 8, pp. 6–7).

30. Horace Gross, an expert witness and radio and TV management consultant, testified that Houma is not a separate ADI (Area of Dominant Influence) and is currently within the New Orleans ADI. Thus, the cost of programming would be substantially more than that proposed by TWL. Moreover, based upon applicable standards, Gross testified that TWL would not be able to establish Houma as a separate ADI. Moreover, any attempt to make the necessary showing would require at least a year's time.[13] Thus, for the first quarter of operation the station, in Gross' opinion, could not purchase programming at the budgeted figure (Tr. 800–05). According to Gross' analysis of TWL's programming proposal, the costs of acquiring the syndicated and feature film programming proposed by TWL would be at least three times as much as that proposed by TWL and probably more depending upon the actual mix (GACO Ex. 8, pp. 3–4).

31. Gross also pointed out that no provision was made for such basic and anticipated expenses as down payments and advance payments for film suppliers, materials and supplies to produce local programming such as film stock, slide materials, sets and flats, news gathering costs, advertising and promotion expenses, etc. Gross estimated that total operating costs for a station operating 117 hours a week without a network affiliation in a market such as Houma, with the type of operation proposed by TWL, would exceed TWL's estimate by at least $50,000 (GACO Ex. 8, pp. 4–6). William Kitchen, who was largely responsible for the preparation of TWL's estimates for programming and operating expenses, admitted that if TWL were not able to establish Houma as a separate market, its programming costs would be prohibitive. He also admitted that he had no idea whether TWL would be able to establish Houma as a separate market (Tr. 606).

32. Finally, in addition to challenging TWL's cost estimates GACO maintains that even the small sum set forth in TWL's financial showing would not be available to the applicant. In order to meet its estimated construction and first quarter operating costs of $177,174, TWL proposes to rely upon funds on deposit in the amount of $130,000 and deferred credit from its equipment supplier, Quality Media, in the amount of $49,200. The $130,000 is in the form of certificates of deposit at Progressive Bank and Trust Co. Quality Media has also agreed to provide deferred credit for additional equipment which TWL may purchase. No interest will be charged during the six-month period following delivery and payments will not be due until six months after delivery of the equipment (TWL Ex.

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[13] The determination is made by a rating service based upon the number of television households in the country, the number of diaries being kept there for rating purposes, and the audience market share achieved by the station.

8, pp. 7–8, Attachment B, p. 1; Tr. 543–44, 735). In a Hearing Designation Order, BC 000634, released April 30, 1981, a financial issue was specified against Quality Media, an applicant in that proceeding, since its balance sheet reflected net liquid assets of only $13,262. The issue was never resolved because Quality Media dismissed its application. William Kitchen, president of Quality Media, explained that the analysis in that designation order was based on an outdated balance sheet and that Quality Media's financial condition has improved appreciably, to the point where the company is now quite profitable. Kitchen also testified that his costs of acquiring the equipment which he furnishes to TWL are substantially less than he charges them, so that Quality Media is not bearing as much of a cost as it appears (Tr. 581–82, 595–98, 602).

Abuse of Process Issues Against TWL

33. The presiding officer specified three factual issues against TWL which raised the general question whether the applicant had abused the processes of the Commission (see FCC 81M-3432, released October 30, 1981). The issues were based on allegations that TWL had made misstatements regarding its equipment on hand (issue 4, *supra*); had failed to fully comply with an order issued during the discovery phase of the proceeding (issue 5, *supra*); and had failed to comply with representations made to the presiding officer relating to a settlement of the case (issue 6, *supra*).

34. *Equipment Misstatements*. In an amendment to its application filed December 31, 1979, TWL represented at page 2, Section III, FCC Form 301, that all of its antenna system, its RF generating equipment, its monitoring and test equipment and its program origination equipment were "on hand." It also indicated that the antenna and transmission lines are presently in place on the tower the applicant proposes to lease. Accordingly, no funds were provided for any of these items on the form (GACO Ex. 9, p. 3; Tr. 885).

35. Thereafter, in an affidavit filed December 1, 1980 (filed with TWL's opposition to a petition to enlarge issues), John A. Graves again averred that "[w]ith the exception of the transmission line and antenna, which are already mounted on the tower facility T.W.L. intends to lease, T.W.L. has on hand the necessary equipment to begin operation of a television station" (GACO Ex. 10, p. 3). It was not until TWL's exhibit exchange on June 8, 1981, which was accompanied by an amendment to its financial proposal, that TWL made the following acknowledgment (TWL Ex. 8, pp. 1–2):[14]

> Previously, TWL had been advised that with the exception of the transmission line and antenna already mounted on the tower TWL proposes to rent, all necessary equipment to build the proposed station was on hand. In preparing for

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[14] The amendment was accepted in an order (FCC 81M-3412, released October 30, 1981).

> this hearing, TWL has learned that some additional equipment should be obtained. Based on materials filed with pleadings of other parties to this proceeding, TWL has determined that it can no longer presume that the transmission line and antenna mounted on the tower are in operable condition. . .

Later, TWL identified additional equipment which it had not previously provided for (TWL Ex. 8, pp. 1–3, Attachment B).

36. Evidence as to the existence and state of TWL's equipment "on hand" has been described in the discussion of TWL's financial qualifications, *supra*, and will also be referred to in connection with the inspection issue, *infra*. This material is incorporated herein by reference.

37. *Inspection Issue*. In an order (FCC 81M-1342, released May 4, 1981), the presiding officer granted a motion to permit inspection and photographing of equipment which was allegedly "on hand" for use by TWL in the construction and operation of its proposed station. GACO and HBI contend that TWL, in violation of this order, prevented them from conducting any meaningful inspection of the equipment.

38. The inspection took place on June 8, 1981. It was conducted primarily by William B. Carr, a registered engineer, who was accompanied by principals of GACO, CCSI and HBI (all of whom were then applicants) and their counsel. No TWL principal was present; however, Robert Blazier, who had assisted in the preparation of TWL's application, met the group and explained that he had been instructed to unlock the doors to a trailer and a warehouse where the equipment was stored.

39. The trailer contained a transmitter, other RF generating equipment and certain studio equipment. The interior of the trailer was dark and the equipment was stacked in a haphazard manner. Access to it was difficult or in some instances impossible since there was only one entrance and little or no room to move about inside the trailer. Blazier's instructions were simply to unlock the trailer (Tr. 294–95), and no attempt was made to unload it so that individual pieces of equipment could be examined (GACO Ex. 11). Carr inspected the equipment as best he could under the circumstances. He testified that it was in "extremely poor" condition, with "parts broken off, components damaged, tube sockets broken . . ." (Tr. 823). He was unable to obtain the serial number of the transmitter, but observed "evidence of broken meters, broken pieces, this type of thing" (Tr. 824). He testified that on the whole the equipment could not be fully inspected or inventoried under the conditions that existed (GACO Ex. 11). The equipment in the warehouse was more accessible, but on the basis of the entire inspection Carr concluded that there was not enough equipment to construct and operate a television station and that he could not tell whether the equipment he did observe would actually work (*id.*).

40. *The Settlement Agreement*. The hearing in this case began on June 15, 1981. On the following day the parties announced that they had reached an agreement settling the case. TWL and HBI were to dismiss their applications with GACO and CCSI being merged into a single entity which would become the sole applicant for the channel. The hearing was therefore continued without date. In due course, HBI, CCSI and GACO filed a joint motion for approval of the settlement agreement. The motion was granted, the HBI and CCSI applications were dismissed and the GACO application was amended to reflect the GACO/CCSI merger (FCC 81M-2654, released August 27, 1981). During this period TWL remained silent. The presiding officer therefore scheduled a conference at which time (September 25, 1981) TWL stated that the case could be settled only if GACO accepted a counter offer calling for a substantially greater payment to TWL, something GACO refused to do. In view of the disruption and delay created by TWL's conduct, an inquiry into the entire matter was conducted.

41. TWL president John Graves testified that on the morning of June 16, 1981 (the day testimony in the case was to commence) he instructed his counsel to dismiss TWL's application without regard for any reimbursement. He explained that his wife was ill and that he had become tired of pursuing the application. Counsel advised him to seek a settlement, whereby TWL would dismiss its application in return for reimbursement of certain of its expenses (TWL Ex. 9, p. 2; Tr. 467). This conversation took place on the telephone since Graves was still in Houma. Later that morning counsel informed him that a settlement agreement had been reached. Graves understood that under the agreement he would receive $3,000 when the agreement was approved and $17,000 if and when the merged GACO/CCSI application was granted. He agreed to the terms and testified that at this point he believed the case "was over" (TWL Ex. 9, p. 3; Tr. 471). So, too, did the presiding officer when later that day announcement of the agreement was made on the record (Tr. 228–30).

42. In mid-July Graves received a final version of the agreement for his signature and found that the $3,000 and $17,000 had been consolidated, with payment of the entire sum to be made upon a grant to the merged applicant.[15] Graves testified that he feared he would receive nothing, since there was no assurance the merged applicant would be granted, there being an outstanding issue against one of the parties to the merger (TWL Ex. 9, p. 4).[16] For this reason,

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[15] This document had been approved by Graves' counsel, who requested that Graves sign it.

[16] A cross-interest issue had been designated against CCSI (FCC 81M-467, released February 19, 1981). This was later resolved by summary decision (FCC 81M-2653, released August 27, 1981).

according to his testimony, he refused to sign the agreement. However, in late July Graves contacted Seymour Smith, a CCSI principal, regarding the settlement terms (TWL Ex. 9, pp. 4–5). According to Smith, Graves advised him that he had received a bill for $25,000 from his attorneys which was $5,000 more than he would receive under the settlement agreement (Tr. 954). He also told Smith he could not understand why he was getting $20,000 while HBI was getting $75,000 (Tr. 954). Graves then told Smith he thought he was to get $20,000 in addition to his expenses (Tr. 955). The problem, as Graves related it to Smith, was not the terms of payment but rather that the total figure of $20,000 was inadequate (Tr. 955–56). Smith testified that CCSI has at all times been willing to pay the agreed upon $20,000; but this was apparently no longer agreeable to Graves, even though his stated fear that the merged applicant would not be granted was largely obviated in August, when the issue which he said had concerned him was favorably resolved through summary decision (see n. 16, *supra*).

43. During this period TWL never advised the presiding officer that it did not intend to live up to the settlement agreement announced on June 16, and that the representations regarding the voluntary dismissal of its application would be ignored. In an order released August 27, 1981 (FCC 81M-2654, n. 2), a deadline for the filing of settlement papers was set, and when no response was made by TWL a conference was held at which TWL finally indicated its intention to pursue the application.

Comparative Issue

44. *GACO*. The applicant has the following corporate structure:

Communications Corporation of the South, Inc. (CCSI)	1,000 shares (50%)
Seymour Smith	Director, voting the shares of CCSI
Douglas W. Black	Director
Iddo K. Corkern	President, Director, 490 shares (24.5%)
James A. Gatewood	Vice President, Director, 500 shares (25%)
Marion W. Corkern	Secretary, Treasurer, 10 shares (0.5%)

45. CCSI has the following corporate structure:

The Vanderbilt corporation	10,000 shares (100%)
Seymour Smith	President, Director, votes the shares of The Vanderbilt Corporation
Florence Anne Smith	Director
David J. Smith	Vice President, Assistant Secretary, Director
Barbara (Smith) Hirst	Director

Douglas W. Black	Executive Vice President, Secretary, Treasurer

46. The Vanderbilt Corporation has the following corporate structure:

Seymour Smith	President, Director, 22,700 shares (74.4%)
Seymour Smith, Trustee of the David Smith Trust	3,000 shares (9.8%)
Seymour Smith, Trustee of the Barbara Smith Trust	3,000 shares (9.8%)
Florence Anne Smith	Director, 1,800 shares (5.9%)
David J. Smith	Vice President, Assistant Secretary, Director
Barbara (Smith) Hirst	Director
Douglas W. Black	Executive Vice President, Secretary, Treasurer

47. Seymour Smith and Florence Anne Smith are husband and wife. David Smith and Barbara (Smith) Hirst are their children. Smith distributed the ownership to his family as shown for estate purposes. Iddo K. Corkern and Marion W. Corkern are husband and wife. James A. Gatewood is the nephew of Iddo K. Corkern.

48. CCSI owns 80% of the stock of Radio Vanderbilt, Inc., licensee of WWIW, a 1 kW-D, 250 W-N station in New Orleans, Louisiana. James A. Gatewood owns 98% of the stock of GACO Broadcasting Corporation, licensee of WFCG, Franklinton, Louisiana, a 1 kW-D station.[17] GACO and its principals have no other ownership interests in media of mass communication.

49. Iddo K. Corkern will serve as technical director of the proposed station on a full-time basis devoting at least 40 hours per week to station operations. James A. Gatewood will serve as sales manager of the proposed station on a full-time basis devoting at least 40 hours per week to station operations. Seymour Smith will serve as general manager of the proposed station on a full-time basis devoting at least 40 hours per week to station operations. As indicated in the above tables, Corkern is a 24.5% shareholder in GACO; Gatewood owns 25%; and Smith, who controls The Vanderbilt Corporation, will vote the 50% interest in GACO which is held by Vanderbilt's subsidiary, CCSI.

50. None of these individuals is a resident of the Houma area. However, they have extensive broadcast experience. Seymour Smith served as principal owner, president and full-time general manager of WGNO-TV, Channel 26, New Orleans, Louisiana, from 1972 to August 21, 1978. Since then he has been president of the licensee of

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[17] New Orleans is about 50 miles from Houma, Franklinton about 97.

WWIW. Iddo K. Corkern served for 25 years as assistant chief engineer and later as chief engineer at WBRZ-TV, Baton Rouge, Louisiana. From 1967–1980 he was also an officer, director and principal of standard broadcast station WFCG, Franklinton, Louisiana. He was involved in part-time sales, on-air work and news reporting at the station. James A. Gatewood became program director of WHXY (now WBOX) in Bogalusa, Louisiana in 1953. In 1955 he joined the engineering department of WBRZ-TV in Baton Rouge where he worked until 1966 in engineering and sales. In 1966 he and Corkern formed GACO Broadcasting Corporation and constructed standard broadcast station WFCG, Franklinton. He is president, general manager and principal owner of the station. He also serves as sales manager and chief engineer.

51. *TWL*. Formed in 1977, TWL is a nonprofit, nonstock corporation organized under the laws of Louisiana. From the time its application was filed in June 1979, TWL's board of directors has consisted of John Arthur Graves, Janis Armstrong Graves and Purvis Glen Nash. Graves is president, Mrs. Graves is vice president and Nash is secretary-treasurer of the corporation. All three propose to work at TWL's station on a full-time basis, Graves as general manager, Mrs. Graves as program director and Nash as sales and news director.

52. Nash's commitment to the station is somewhat conditional. He presently operates a pharmacy in Jonesboro, Louisiana. If TWL is awarded the construction permit, he intends either to sell the pharmacy or hire a pharmacist-manager to replace him. If neither of these can be accomplished, a situation he does not anticipate, Nash will reduce his full-time commitment to the station, but in no event would he work there less than 20 hours per week (TWL Ex. 4, p. 2; Tr. 682).

53. In 1973 Graves and his wife formed and began operation of an independent nondenominational worship center and evangelistic outreach association in Monroe, Louisiana. The association grew to include a state-licensed day care center and a youth rehabilitation house. In 1976 the association was incorporated as Evangel Temple of Monroe, Inc. Graves served as president, a position he still occupies although the corporation is presently inactive. He resigned as pastor-general manager of Evangel Temple in the summer of 1980 and moved to Houma. As time permits, he continues to hold meetings and serve as a guest lecturer in various places.

54. In addition to extensive involvement with TWL, Mrs. Graves has taken two broadcast courses at Nicholls State University, "Television Production" and "Television Broadcasting Workshop." Additionally, in the fall of 1976 she co-hosted a daily radio talk show aired on station KJOE-FM, Shreveport, Louisiana. In the early 1970's she made appearances as a vocal artist on station KNOE-TV,

Monroe, Louisiana. She has also made numerous appearances on radio programs as a vocal artist and guest speaker.

55. Purvis Glen Nash is a registered pharmacist who in 1975 became the owner of a pharmacy in Jonesboro where he now resides. He intends to move to Houma if TWL's application is granted.

Ultimate Findings and Conclusions

Issue 1 - TWL's Religious Program Policy

1. TWL proposes a generalized program format which, among other things, will include religious broadcasts. TWL has represented that it would make time available to religious groups which sought it and would give no preference to any group in offering free time or in rates charged for paid time. TWL plans to air one hour of religious programming on Sunday for which no charge would be made. The time would be allocated on a rotating basis among all churches in the area which wish to use the station. There is no persuasive evidence that these representations would not be carried out if TWL were to receive a grant. It is therefore concluded that the TWL proposal complies with Commission policy with respect to the presentation of religious broadcasts, i.e., that a "fair break" will be afforded to those who do not share the same religious precepts as the applicant. *Queen City Broadcasting, Inc.*, 69 F.C.C. 2d 1775, 1778 (1978); *KIRO, Inc.*, 58 F.C.C. 2d 86, 89 (1976); *K.C.O.D. Broadcasting Corp.*, 11 F.C.C. 2d 349 (Rev. Bd. 1968).

Issue 2 - TWL's Studio Location

2. Section 73.613 requires a television station to maintain a main studio within its community of license, absent Commission permission to locate elsewhere. The rule "is intended as one means of assuring that the needs and interests of the residents of [the] community [of license] are met and that the station serves as an outlet for local self-expression." *Arizona Communications Corp.*, 25 F.C.C. 2d 837, 839 (1970), *recon. denied* 27 F.C.C. 2d 283 (1971). The Commission has stated that "the main studio rules . . . are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve . . . ." *FM-TV Main Studio Moves*, 27 F.C.C. 2d 851, 852 (1971).

3. TWL proposes to locate its studio on a main highway little more than a mile outside the city limits of Houma and four or five miles from the downtown area. The building itself was formerly used by KHMA-TV during its brief period of operation in the early 1970's. Driving time from the downtown area is about 10 minutes and there is an ample parking area at the site. There is no mass transportation system in Houma so access to this or any other site would be by motor vehicle unless it were within walking distance. In the circumstances TWL has demonstrated that operation from its

proposed site would be consistent with the public interest. See *Jersey Cape Broadcasting Corp.*, 85 F.C.C. 2d 654, 661 (1981).

Issue 3 - TWL's Financial Qualifications

4. The findings demonstrate that TWL has available to it $179,200 to meet its costs of construction and first three months of operation. Its cash in the amount of $130,000 is on deposit, and its equipment supplier (Quality Media Corporation) stated that it would extend deferred credit to TWL in the amount of $49,200. This is sufficient to meet TWL's estimates for construction and operating costs. These estimates, however, are based on a number of unwarranted assumptions and are consequently grossly understated.

5. First of all, the cost of obtaining the proposed transmitter site has not been included in TWL's estimate. It proposes to use the tower and transmitter site formerly used by station KHMA-TV and has budgeted $2,000 per month for rent. TWL has never discussed this arrangement with the owner of the land, The Vanderbilt Corporation, and the president of the corporation stated that the property would not be rented except to GACO, an applicant in which Vanderbilt holds an interest. If that application is denied, the site would be made available to TWL but only through a purchase of the property. A sale price of $250,000 was mentioned, but TWL has not demonstrated capability to meet even the $100,000 which the present owner paid for the site some years ago. Nor has TWL made any contingent showing as to its ability to obtain another site. See *Belo Broadcasting Corp.*, 88 F.C.C. 2d 922, 927, n. 27 (1981).

6. TWL's allocated cost for film and tape programming is approximately $115 per day, a figure which apparently assumes Houma would be recognized as a separate market. The record convincingly establishes that Houma is within the New Orleans ADI, that it is unlikely that Houma will be recognized as a separate market, and that in any event this could not come about until the station had been on the air for a year or more. Without such status its program costs would be about three times the estimated figure and would in the words of TWL's own witness be prohibitive (Findings, paras. 30–31). Additionally, the findings demonstrate that TWL failed to make provision for such costs as advance payments for film suppliers, materials and supplies to produce local programming, news gathering costs, etc. An expert witness, Horace W. Gross, estimated that in view of understatements and omissions in TWL's program budget, its total operating costs for the first quarter would be about $50,000 more than had been allocated. The testimony on this matter is detailed and explicit and is in the presiding officer's judgment thoroughly persuasive.

7. The findings also demonstrate that TWL's estimate of $35,000 to make its proposed antenna system operable is also grossly inadequate. TWL relied for its estimate on an on-site visit in 1977 by

its equipment supplier, who initially indicated that the tower and antenna system were adequate without any additional expenditure of funds. Thereafter, based upon allegations made by other parties in this proceeding, TWL revised its estimate to $35,000. The expert testimony of Richard L. Biby, a consulting radio engineer, belies this estimate. Biby analyzed reports of on-site investigations by a firm which specializes in structural analysis of towers and by a firm which specializes in analyzing antenna radiating capability for television broadcast signals. Biby's analysis of the experts' reports was documented and indicated that the minimum rehabilitation costs to bring the tower and antenna up to insurance standards would be $100,000 at 1980 prices. Biby also noted that the reports on which his estimates were based were four years old and that no maintenance took place in the interim period. Thus, the degradation may even be greater than that reflected. The presiding officer found Biby's analysis more complete and convincing than the showing made by TWL in support of its estimate and therefore concludes that his estimate of $100,000 is a more accurate reflection of the true cost of making TWL's proposed antenna system operable.

8. TWL had the burden of demonstrating that it had sufficient equipment "on hand" or available to it within its estimated costs to construct and operate its proposed station. To meet its burden, TWL relied principally upon the testimony of William J. Kitchen, the president of its equipment supplier, and Robert D. Blazier, coordinator of instructional television at Nicholls State University. Kitchen testified that he had provided enough equipment to construct and operate a functional station. He also stated that the equipment which he provided was operable at the time he furnished it to TWL.[18] However, he admitted that he had not inspected the equipment since it was transported to Houma and stored in a trailer truck and warehouse. He also admitted that he never assembled the components of the system to see if they functioned together. Similarly, Blazier admitted that he had not inspected the equipment since it was transported (or at any prior time), but had merely observed some of it and relied upon representations that it was all available and operable or to be provided. He did not test any of the components and admitted that it would not be possible to tell from visual inspection that the equipment worked or that it would function when assembled together.

9. William B. Carr, a registered professional engineer, conducted an on-site inspection of TWL's equipment at the facilities where it

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[18] Kitchen also testified that he would replace any equipment which was not in operating condition at the time it was provided to TWL. However, he did not extend that assurance to equipment which was damaged subsequent to its acquisition by TWL. In light of the manner of storage of the equipment, a substantial question is raised as to how much it will cost TWL to replace the equipment which was damaged in transit or storage.

was stored. He had an inventory list of all the equipment which TWL purportedly had available; and based on his investigation he concluded that much of the itemized equipment was not to be found. For example, he could not find evidence of a diplexer which costs between $30,000–$40,000 or video monitoring equipment. He also discovered that much of the equipment was in damaged condition although he could not determine whether or not the damage would impair its performance. His evaluation of the equipment proposed to be used by TWL was that it was inadequate to construct and operate the proposed station.

10. Horace W. Gross, an expert radio and TV management consultant, reviewed TWL's proposal. Based upon his analysis, he concluded that certain additional items would be needed in light of the age of the equipment. He also noted that the transmitter proposed by TWL had originally operated on Channel 10 and would require substantial modification to operate on Channel 11. The cost of new equipment to convert the transmitter was estimated at $90,000 by the equipment manufacturer.

11. Based on the foregoing, it is found that TWL failed to meet its burden of proving that it has sufficient equipment "on hand" or available to it to construct and operate the proposed station. In light of the testimony of Carr, who conducted an on-site inspection of TWL's equipment, and of Gross, who analyzed TWL's list of equipment purportedly available, it is clear that a substantial question still exists as to whether TWL has the equipment it needs and that in all likelihood significant expenditures will still be required in order to construct an operable facility.

12. To conclude, TWL had the burden of demonstrating that it was financially qualified to construct and operate its proposed station for three months. TWL demonstrated the availability of $179,200 to meet its estimated costs. However, whereas TWL estimated its costs at $177,174, the record demonstrates that the actual costs will far exceed the amount shown to be available to TWL. Though it is not possible to establish a precise figure, TWL's cost of tower and transmitter site acquisition is speculative and contrary to the evidence; its estimate for tower and antenna rehabilitation is grossly understated; it has not established the availability of sufficient equipment in operational condition; and it failed to allocate sufficient funds to carry out its programming proposal. Thus it is concluded that TWL failed to establish its financial qualifications to become a permittee and that its application must therefore be denied.

Issues 4–7 - Abuse of the Commission's Processes

13. At issue here is whether TWL abused the Commission's processes through misstatements regarding equipment it proposed to utilize to construct the proposed station; failure to comply with an

order that the equipment be made available for photographing and inspection; and failure to comply with representations made to the presiding officer with regard to settlement of the case. Reduced to their essentials, the facts are these.

14. Until one week prior to the commencement of the hearing on June 15, 1981, TWL consistently represented that it had the necessary equipment (i.e., antenna system, RF generating equipment, monitoring and test equipment, program origination equipment) "on hand" to construct and begin operation of the station. Possession of such equipment in proper condition was an essential element of TWL's case since its financial proposal would otherwise be woefully inadequate, as the other applicants had contended in pretrial motions to enlarge issues. It was only after an order had been issued permitting inspection of the equipment by the other parties that TWL conceded the validity of some of the allegations which had been made against it. And even then the shortcomings, both as to the existence and the condition of some of the equipment, were significantly understated. No explanation for this conduct has been offered by TWL, which continues to insist that its representations were essentially correct.

15. As to the inspection itself, TWL's efforts to comply with the order that the equipment be made available for photographing and inspection appear to have been minimal. TWL simply sent a representative to the two sites where the equipment was stored with instructions that he unlock the storage areas. As TWL surely knew, the bulk of the equipment, nearly filling a small darkened trailer which had limited access, could not be examined in a meaningful way without being removed from the storage area,[19] something for which TWL had made no provision. Its conduct in this matter cannot be condoned; its efforts to comply with the inspection order were grudging and so insufficient that the purpose of the inspection was to a considerable extent thwarted.

16. TWL's conduct with respect to the settlement agreement is also disquieting. While it is not uncommon for settlement negotiations to break down, the consequences in this case were particularly unfortunate. The hearing had commenced and witnesses, who had traveled a considerable distance, were in the hearing room prepared to testify. When it was announced that the applicants had "reached a settlement" (Tr. 228) and its terms (including the proposed dismissal of the TWL application) were described, it was agreed that the hearing should be continued. In the circumstances all parties were clearly obliged to proceed in good faith toward effectuating the settlement. TWL failed to do so. Graves' testimony that he rejected

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[19] It appears in fact that TWL had at one point represented that all the equipment would be consolidated in a single location and displayed in a manner that would permit a thorough inspection (Tr. 871–72, 877).

the agreement because it provided for a lump sum payment rather than two separate payments is clearly an after the fact rationalization. He never sought to have the agreement modified to conform to his original understanding, but instead began dickering for more money than he had earlier authorized counsel to accept. Moreover, his alleged fear that he would receive nothing if the merged GACO/CCSI application were not granted was rendered baseless with the issuance of an order making clear that only the continued pendency of the TWL application stood in the way of a grant.[20] There is no rational explanation for Graves' conduct in this matter except that he wanted more money for dismissing his application than he had originally agreed to accept. In other circumstances, this behavior might be overlooked but here it served to frustrate the orderly conduct of the hearing. The trial of the case was seriously disrupted, and TWL's failure to advise the presiding officer in a timely fashion of its intentions created uncertainty and further delay. When the Commission accepts representations from parties to its proceedings, it expects that good faith efforts will be made to carry them out. Graves' arbitrary refusal to abide by his prior agreement does not meet this standard. Clearly more punctilious conduct is expected of applicants for a broadcast license.

17. Of the matters discussed above, the presiding officer is reluctant to draw an adverse conclusion regarding TWL's misstatements as to its on-hand equipment. Conceivably, it believed until the eve of the hearing that the equipment was adequate, earlier allegations to the contrary by the other parties notwithstanding. In any event there is no evidence of deliberate falsification.

18. The other matters are more serious. TWL's compliance with an order directing that its equipment be made available for inspection and photographing was at best halfhearted and effectively precluded a full examination of the equipment. The representation to the presiding officer, after the hearing had begun, that TWL would dismiss its application as part of a settlement agreement that would eliminate the need for further hearings and expedite service to the public, was not carried out. TWL's principal John Graves undermined the agreement by insisting on a larger monetary payment than he had originally agreed to accept. In both of these matters TWL demonstrated a cavalier disregard for the processes of the Commission which adversely affected the orderly conduct of the case. Though its behavior is perhaps not disqualifying, a serious comparative demerit is warranted.

Comparative Issue

19. In view of TWL's disqualification under the financial issue, the comparative issue will be only briefly addressed.

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[20] See FCC 81M-2654, released August 27, 1981.

20. TWL is entitled to a preference under the ownership diversification criterion since none of the principals holds an interest in any medium of mass communication, whereas one of GACO's shareholders owns a controlling interest in a Class IV AM station in New Orleans and another owns a 1 kW daytime-only station in Franklinton, Louisiana. Both applicants propose to integrate their owners[21] into the day-to-day operation of the station on a full-time basis.[22] However, TWL's proposal is less than unconditional, since it depends on the ability of one of its three directors to sell an existing business or hire a replacement for himself as pharmacist-manager of the enterprise. If neither of these plans can be accomplished, his participation in station affairs would be on a part-time basis. In view of this element of uncertainty the presiding officer has concluded that from a quantitative standpoint, GACO's proposal is to be preferred. Qualitatively GACO brings vastly more broadcast experience while TWL would provide local ownership, though none of its principals is a long-time resident of the area. TWL's proposal would also be enhanced by the presence of a female, Mrs. Graves, in station management. On balance, however, a preference will be accorded GACO because of the unequivocal nature of its representation that individuals holding a 99.5% interest would be integrated on a full-time basis, whereas some doubt exists as to whether TWL's full-time integration would be 100% or 66 $^{2}/_{3}$%. In the circumstances, the negative conclusions reached on two of the abuse of process issues against TWL assume particular significance. Though the comparative issue would otherwise be a close one, in view of the comparative demerits assessed for abuse of process the presiding officer concludes that if the decision were to be based on comparative grounds GACO has shown itself to be the better qualified applicant.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of The Way of Life Television Network, Inc. IS DENIED and the application of GACO Communications Corporation IS GRANTED subject to the condition[23] that prior to commencement of its operation on Channel 11 Seymour Smith and David

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[21] TWL is a nonstock corporation. For purposes of this comparison its three directors will be equated with shareholders.

[22] GACO's integration is actually 99.5%. In arriving at this figure, the presiding officer has credited Seymour Smith with a 50% ownership interest. While his beneficial interest is somewhat less, he will vote the 50% interest held by The Vanderbilt Corporation.

[23] See FCC 81M-2653, released August 27, 1981.

Smith shall terminate their employment agreements with WGNO(TV), New Orleans, Louisiana.[24]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

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[24] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Broadcast Experience
Diversification, of Control of Mass Media
Issue, Rule 1.65
Minority Ownership, Factors in Comparative Proceeding
Misrepresentation, Character Qualifications
Programming Proposal

Review Board Decision modified. Diversification and minority ownership entitled to less significance in an interim proceeding whereas broadcast experience has more significance than in a permanent licensing proceeding. Petition to add misrepresentation and proposed programming issues based on allegations that program plans have changed denied. Failure to report death of principal does not warrant Section 1.65 issue.
-Global B/cing Group, Inc.
BC Docket No. 82–531

FCC 83–321

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GLOBAL BROADCASTING GROUP, INC.	BC Docket No. 82–531 File No. BPIH-820409AA
NEWARK RADIO BROADCASTERS ASSOCIATION	BC Docket No. 82–533 File No. BPIH-820429AJ
For Interim Authority to Operate the Facilities of Former Station WHBI(FM) Newark, New Jersey	

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983; Released: July 8, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT; COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONERS DAWSON AND RIVERA DISSENTING.

1. Now before us are: (a) an application for review of a Review Board Decision (FCC 82R-66, released November 19, 1982), filed

December 17, 1982, and Notice of Appeal, filed November 29, 1982, by Newark Radio Broadcasters Association;[1] (b) a petition for special relief, filed February 28, 1983, by Global Broadcasting Group, Inc.;[2] (c) a motion to reopen the record and to enlarge issues, filed January 12, 1983, by Newark Radio Broadcasters Association;[3] and (d) a supplement to motion to reopen the record, filed February 7, 1983, by Newark Radio Broadcasters Association.[4]

2. *Motion to Enlarge Issues*. The Review Board refused to award any applicant in this proceeding a comparative preference for proposed programming because all of the applicants proposed to continue the multi-ethnic and multi-lingual format of former Station WHBI and no showing of substantial and material differences had been made. Relying on an interview with Global's vice president Raul Alarcon which was reported in *Billboard* magazine, Newark maintains that Global intends to adopt a Spanish language, rather than a multi-ethnic/multi-lingual, format. Newark submits that *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 465 (1979), requires the addition of a proposed programming issue to inquire into the relative need for the two formats. Since Global previously represented to the Commission[5] that it would follow the multi-lingual format, Newark also seeks the addition of a misrepresentation and/or lack of candor issue against Global.[6]

3. We will deny Newark's motion to enlarge issues. We find that Newark's allegations concerning Global's proposed programming are not supported by the requisite specificity to warrant the addition of an issue under Section 1.229 of the Commission's Rules.[7] The only

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[1] Global Broadcasting Group, Inc. filed an opposition on January 3, 1983, and Newark Radio Broadcasters Association filed a reply on January 13, 1983.

[2] Newark Radio Broadcasters Association filed an opposition on March 7, 1983 and Global Broadcasting Group, Inc. filed a reply on March 21, 1983. In its petition Global sought permission to begin immediately operating the facilities of Station WHBI(FM). In view of our action herein we will dismiss the petition for special relief as moot.

[3] Global Broadcasting Group, Inc. filed an opposition on January 26, 1983 and Newark Radio Broadcasters Association filed a reply on February 2, 1983.

[4] Global Broadcasting Group, Inc. filed an opposition on February 24, 1983, and Newark Radio Broadcasters Association filed a reply on March 3, 1983.

[5] Global's application, a comparative showing filed with the Board, and oral argument before the Board indicate that Global would maintain the multi-lingual format.

[6] Newark relies upon *Fox River Broadcasting Inc.*, 88 FCC 2d 1132, 1136 (Rev. Bd. 1982)

[7] Section 1.229 of our rules specifies: "Such motions, oppositions thereto, and replies to oppositions shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof."

support for Newark's allegations is a magazine article which is clearly hearsay.[8] Moreover, the only statement attributed to Global principal Raul Alarcon in the article simply indicates that Global will honor the station's program commitments, and thus does not contradict Global's previous representations to the Commission. In its opposition, Global denies that it intends to change its proposed programming format. Subsequent affidavits from Raul Alarcon, Jr., Emil Antonoff, and Guy LeBow confirm that Global intends to maintain the current multi-lingual/multi-ethnic format of Station WHBI(FM).[9] As Global asserts, a greater emphasis on hispanic programming is not inherently inconsistent with the proposed multi-lingual format.[10] In view of Global's uncontroverted assurance that its program plans have not changed, further inquiry into this matter would serve no useful purpose.

4. *Supplemental Motion to Enlarge Issues.* Newark also seeks a Section 1.65 issue against Global for its failure to report the December 26, 1982 death of Global principal Juan Cossio.

5. We will not add a Section 1.65 against Global. Section 1.65 of the Commission's Rules requires applicants to timely report any change in the information furnished on their applications. Thus, Global has technically violated Section 1.65 by not reporting the death of Juan Cossio.[11] However, a Section 1.65 issue is not warranted since the unreported change could have no bearing on Global's basic and/or comparative qualifications. There does not appear to have been any intent to conceal this information from the Commission and no pattern of reporting violations has been established.[12] [13]

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[8] *LeFlore Broadcasting Co.*, 48 FCC 2d 1199, 1200 (Rev. Bd 1974).

[9] The affidavits were executed on February 18, 1983, February 9, 1983, and February 18, 1983, respectively, and were attached to Global's February 28, 1983, Petition for Special Relief.

[10] Attached to Global's Opposition is an affidavit from the reporter who wrote the article in *Billboard*. It states that the reporter has no reason to believe, and did not intend to indicate, that Global is not committed to the proposed multi-lingual format.

[11] Juan Cossio was a 15% owner of Alarcon Hernandez & Cossio Assoc., and became a nonvoting shareholder of Global when the parties merged. By the terms of the merger agreement Cossio received one share of stock in exchange for services to be rendered. *See* Joint Request for Approval of Agreement, filed October 12, 1982, by Global Broadcasting Group, Balkan Echo, and Alarcon, Hernandez & Cossio Assoc.

[12] *Gainesville Media, Inc.*, 59 FCC 2d 382 (Rev. Bd. 1976); *United Broadcasting Co.*, 58 FCC 2d 1346, 1360–61 (Rev. Bd. 1976); *Post-Newsweek Stations*, 52 FCC 2d 572 (Rev. Bd. 1975); *Erwin O'Conner*, 51 FCC 2d 930 (Rev. Bd. 1975); *Western Connecticut Broadcasting Co.*, 47 FCC 2d 142 (Rev. Bd. 1974); *Lexington County Broadcasters Inc.*, 40 FCC 2d 694 (Rev. Bd. 1973).

[13] We will not, as Newark requests in its Reply, add a financial issue against Global. Newark has not submitted its request for an additional issue in the form of a motion to enlarge issues, and we do not entertain requests for new issues which are contained in responsive pleadings. *See* Section 1.44 of the Commission's Rules;

6. *Application for Review.* In a decision, released November 19, 1982, the Review Board found all three applicants fully qualified but preferred Global on comparative grounds. It awarded Global a slight preference on diversification[14] and concluded that Global and Newark were virtually equal on integration. In so concluding the Board found that Global's advantage for superior broadcast experience and local residence[15] balances out Newark's plus for minority participation.[16] Newark seeks review of the Board's determination that Newark and Global are virtually equal on integration. It maintains that the Board's Decision is inconsistent with our recent decision in *Waters Broadcasting Corp.*[17] and that its conclusion that Global is superior on local residence and broadcast experience is not supported by substantial evidence on the record.[18]

7. We substantially agree with the findings and conclusions of the Board, and they are affirmed except as they are modified herein. In determining that Global was superior to Newark on local residence and broadcast experience, the Board credited Global with 100% local residence and Newark with 60% local residence. It appears, however, that Oyster Bay Cove, the residence of Emil Antonoff,[19] is outside the service area of Station WHBI.[20] Thus,

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Milam & Lansman, 4 RR 2d 463 (Rev. Bd. 1964). Furthermore, Juan Cossio received one share of nonvoting stock in Global in exchange for services to be rendered. Thus, his death raises no question as to the financial qualifications of Global and we will not add the issue on our own motion.

[14] One of Newark's five trustees, Joseph Bahr, is the sole proprietor of Station WVIS(FM), Frederiksted, St. Croix, Virgin Islands. Decision, para. 14.

[15] All three of Global's principals were found to have extensive broadcast experience whereas only one of Newark's principals has significant broadcast experience. Decision, para. 22. The Board found that three of the five Newark principals reside in the service area whereas all three of Global's principals live in the service area. Decision, para. 21.

[16] Newark is 60% minority controlled whereas Global is one-third minority owned. Decision paras. 15 and 17.

[17] 91 FCC 2d 1260 (1982).

[18] Newark also maintains that Global is financially unqualified because it failed to certify that it was financially qualified when it amended its application on October 22, 1982 to eliminate the participation of certain of Global's non-voting shareholders which had had financial responsibility for Global. However, Global's October 12, 1982 amendment which reported the formation of Global Broadcasting Group, Inc. certified that it was financially qualified. Global was not required to recertify this matter in the October 22 amendment changing the status of the corporation to nonprofit.

[19] It is alleged by Global that Antonoff has relocated to New York City, which is within the service area. We attach little weight to residence which is not of several years duration. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Furthermore, the two principals of Newark who presently do not reside in the service area propose to move to the city of Newark. Board Decision, para. 21.

[20] Global has submitted no documentation to support its contention that Oyster Bay Cove is within the service area. We take official notice of the most recent contour map contained in the Commission's engineering file for Station WHBI(FM). It is dated April 1979 and shows that Oyster Bay Cove is outside the station's 60 dbu (1

Global is entitled to only 66 2/3% local residence credit and the applicants are virtually equal on this factor. Nevertheless, we believe that Global is entitled to a clear preference on integration. All three of Global's principals have significant broadcast experience whereas only one of Newark's principals has had any prior broadcast experience.[21] Ordinarily we would attribute little significance to Global's advantage on this factor since broadcast experience confers only an initial advantage.[22] However, broadcast experience has added significance in an interim proceeding where an applicant seeks to take over an ongoing operation. In view of the limited duration of an interim operation, we find that an experienced broadcaster is at a decided advantage because it is difficult for interim operators to attract experienced, competent staff to run the station. Consequently, it is especially important that the interim operator have broadcast experience. Here the cumulative experience of Messrs. Alarcon, Antonoff and LeBow is superior to that of Newark's principals. Moreover, the broadcast experience of Global's three principals is more closely associated with the type of operation presently in place at Station WHBI(FM) and which both applicants propose to continue. Given the importance of broadcast experience where an interim operator is being selected, Global's advantage in this area outweighs Newark's advantage for minority ownership. Accordingly, we will award Global a clear preference on integration. Although we have applied standard comparative criteria in this proceeding, we cannot ignore the fact that we are determining which of the applicants becomes the interim operator of an already operating station. Under these circumstances the weight to be given to the various comparative factors varies from the ordinary situation involving applicants for permanent facilities.

8. In addition to a clear preference on integration, Global is entitled to a slight preference on diversification, as the Board found, because Newark principal Joseph Bahr is the sole proprietor of

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mV/m) contour. *See Midwest Television, Inc.* v. *FCC*, 18 RR 2d 2001 (D.C. Cir. 1970); *International Radio, Inc.*, 1 RR 2d 701 (1963).

[21] The Review Board found that Guy LeBow has had more than thirty-five years experience in radio and television broadcasting, programming and management; that Emil Antonoff has been a broadcaster and producer of ethnic programming for approximately 20 years; and that Raul Alarcon is an experienced producer of hispanic oriented broadcasts. Newark claims that the findings with respect to Antonoff and Alarcon are not supported by substantial evidence because they are based on unverified pleadings and statements of counsel. We will adopt the Board's findings with respect to broadcast experience notwithstanding Newark's argument. Newark's purely procedural argument does not challenge the accuracy of these findings. Under the circumstances of this expedited proceeding, where there was not an evidentiary hearing before an Administrative Law Judge, it was appropriate for the Board to rely on uncontroverted statements made by counsel in written pleadings and during oral argument.

[22] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

Station WVIS in Frederiksted, St. Croix, Virgin Islands whereas Global has no other media interests. Since Global is entitled to a clear preference for integration and a slight preference for diversification, we find that the grant of Global's application would better serve the public interest.

9. ACCORDINGLY, IT IS ORDERED, That the Motion to Reopen the Record and to Enlarge Issues, filed January 12, 1983, by Newark Radio Broadcasters Association IS DENIED.

10. IT IS FURTHER ORDERED, That the Supplement to Motion to Reopen the Record and to Enlarge Issues, filed February 7, 1983, by Newark Radio Broadcasters Association IS DENIED.

11. IT IS FURTHER ORDERED, That the Application for Review, filed December 17, 1982, by Newark Radio Broadcasters Association IS DENIED, that the Decision of the Review Board (FCC 82R-66, released November 19, 1982) IS SET ASIDE; that the application of Global Broadcasting Group, Inc. IS GRANTED; that the application of Newark Radio Broadcasters Association IS DENIED; and that the Petition for Special Relief, filed February 28, 1983, by Global Broadcasting Group, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Female Ownership-Participation, Compare Credit for
FM Station, Authorization
Minority Ownership, Factor in Comparative Hearing
Review by Review Board

Review Board affirms Initial Decision, 91 FCC 2d 1198, grant of FM station construction permit to one of two competing 100%-integrated applicants. Winner has substantial enhancement credit for 100% female ownership participation in management; loser's credit is insignificant because its integrated minority ownership is only 15%.
–Horne Industries, Inc.
BC Docket No. 81–551

FCC 83R–49

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HORNE INDUSTRIES, INC. Russellville, Arkansas	BC Docket No. 81–551 File No. BPH-11185
RIVER VALLEY BROADCASTING, INC. Russellville, Arkansas	BC Docket No. 81–552 File No. BPH-800711AJ
JUDY K. PURTLE Russellville, Arkansas	BC Docket No. 81–553 File No. BPH-800807AE
For Construction Permit	

Appearances

Eugene T. Smith on behalf of Horne Industries, Inc.; *Michael A. Pace* and *J. Dominic Monahan* on behalf of River Valley Broadcasting, Inc.; and *Kathryn R. Schmeltzer* and *Martin R. Leader* on behalf of Judy K. Purtle.

DECISION

(Adopted: July 8, 1983; Released: July 13, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

Background

1. This proceeding is back before the Board on remand from the Commission *en banc. Memorandum Opinion and Order*, FCC 83-208, released May 3, 1983 (hereinafter "*Remand Order*"). The Board, after reviewing the *Initial Decision*[1] and exceptions thereto, as well as hearing oral argument on the exceptions, certified the proceeding to the Commission on the question of the relative comparative enhancement due to 100% "integrated" applicants,[2] one of which had female ownership and one of which had minority (black) ownership. *Horne Industries, Inc.*, 91 FCC 2d 1193, 1196-97 (Rev. Bd. 1982)(hereinafter "*Certification Order*"). In its *Remand Order*, the Commission observed that "there are other issues which could have a bearing on the ultimate outcome of this proceeding" (*id.*, at para. 2),[3] and that "the Board's analysis of the [policy] questions in this proceeding is appropriate" (*id.*, at para. 3). To assist us in our analysis, we invited the parties to comment on the policy matters herein.[4]

2. In his decision, the ALJ compared all three applicants and found: (1) "Horne [Industries, Inc.] is out of it," *I.D.*, Conclusions, para. 3 (footnote omitted), that applicant already owning KARV-AM, Russellville, as well as having other media interests in the Southwest which rendered it a "clear loser" under the diversification criterion, *id.*,[5] and proposing no integration whatever, *id.*, para. 4; (2)

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[1] FCC 82D-32, 91 FCC 2d 1198, (ALJ W. Miller)(hereinafter "*I.D.*").

[2] Integration, in the sense used here, is a term-of-art well-known to communications practitioners and denotes the level of active participation in station management by station owners. The higher the management integration level, the greater the credit within the comparative criterion of "best practicable service." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-96 (1965). *See also, e.g., Muncie Broadcasting Corp.*, 89 FCC 2d 123, 134 (applicant with 100% integration preferred over applicant with 39.86% integration), *recon. denied*, 89 FCC 2d 1331 (Rev. Bd. 1982), *review denied*, FCC 83-234, released May 19, 1983.

[3] The *Remand Order* specifically pointed to the finding of the ALJ that the minority principal of River Valley had been untruthful in his representations to the Commission. Our review of this finding is to be found *infra*, paras. 5-6.

[4] Letter of May 13, 1983 from Board Chairman Joseph A. Marino to counsel for the parties. The parties duly filed supplemental briefs and we, in turn, have duly considered them.

[5] "Diversification [of control of the mass media] is a factor of primary significance" in awarding broadcast licenses. *Policy Statement*, *supra* note 2, 1 FCC 2d at 394. A competing applicant which already owns a station in the community at issue is almost always at an insurmountable comparative disadvantage. *See, e.g., Thomas and Essie Collins*, FCC 83R-11, 53 RR 2d 219, 221 (Rev. Bd. 1983); *Hassayampa Broadcasting*, FCC 82R-70, 52 RR 2d 1059, 1061 (Rev. Bd. 1982), *review denied*, FCC 83-295, released June 28, 1983 (mem.).

River Valley deserves a "slight preference" for proposing auxiliary power, *id.*, para. 22, but that its 100% integration proposal was, in significant part, qualitatively inferior because a 15% principal had been "untruthful," had "less than a stable employment record," and had "dead-beat propensities," *id.*, para. 19;[6] and, (3) Judy K. Purtle, with a 100% integration credit enhanced by, *inter alia*, "nine solid years of quality broadcast experience . . . combined with her local residence, and her civic participation," *id.*, para. 23, was the

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In its exceptions, Horne does not challenge its clear loss in this competition; it merely desires that the record be updated to reflect that its principal, Michael Horne, has sold his interests in "KIKZ, Seminole, Texas; KOYY(AM & FM), El Dorado, Kansas; and KWCK(AM) and KSER(FM), Searcy, Arkansas." Horne Exceptions at 2. Although recognizing that these interests were properly charged to Horne since their sale came after the deadline for comparative upgrading, *see, e.g.*, *Alexander S. Klein, Jr.*, 87 FCC 2d 423, 427 (1981)(applicant charged with media interests owned at cut off date unless filing includes unqualified representation to divest), Horne would like the record to be "corrected" so that "Michael Horne should not be faced with the task of explaining to others that a government agency has released a document which states that he is a multi station owner rather than a single station owner." Horne Exceptions at 2.

Accordingly, and except for decisional purposes in this proceeding, *Klein, supra*, the "record" hereby reflects that Michael Horne owns whatever broadcast interests shown in current Commission files, official notice taken (*see* 5 U.S.C. § 556(e)).

[6] As noted at note 3, *supra*, the issue respecting the truthfulness of a River Valley principal, Almer Jackson (15%), is addressed textually *infra* at paras. 5–6. River Valley also excepts to the ALJ's "findings" anent Jackson's "employment record," River Valley Exceptions at 33–36, his degree of interest in the application, *id.*, at 37–39, and his credit-worthiness, *id.*, at 39–40.

With respect to these "findings," River Valley complains that the ALJ demonstrated an "unfortunate disdain for Jackson," *id.*, at 33, that the ALJ conducted an "unrelenting attack against Jackson," *id.*, at 37, and it even questions "the standards of fairness and impartiality which the ALJ used in weighing and evaluating the qualifications of River Valley," *id.*

Because of the vehemence of these complaints, the Board has reviewed minutely the record and the transcript in this proceeding. We find that, apart from the "truthfulness" aspect discussed *infra*, the ALJ's "findings" regarding Almer Jackson are exaggerated, gratuitous, and mostly irrelevant under the Commission's comparative standards; they will be disregarded by the Board for decisional purposes.

On the other hand, we observe in passing that River Valley's "exceptions" to these "findings" are almost equally exaggerated and—with their intemperate language—smack sharply of protesting "too much." For example, River Valley complains that the ALJ characterized Jackson as "shiftless, a deadbeat, unreliable and untrustworthy." River Valley Exceptions at 40. However, as Purtle accurately notes in its Reply (at 15–16), these derogatory terms (other than the ALJ's acceptance of Purtle's charge that Jackson has "dead-beat propensities," *see I.D.*, Conclusions, para. 19) are used exclusively by River Valley's own counsel. And, the ALJ also made some important positive findings about Jackson, *see I.D.*, Conclusions, paras. 16–17 (finding that Jackson will honor his $15,000 debt for his stock in the applicant and his pledge to integrate 40 hours per week).

preferred applicant. In the main, and in view of the more recent developments of law and policy relating to minority/female enhancement merits discussed *infra* at paras. 7–13, we affirm the ALJ's findings and conclusions, except as modified herein, as well as the award to Purtle.

APPLICANT QUALIFICATIONS

3. River Valley fires a salvo at the ALJ's determination that Purtle is entitled to an enhancement of its integration credit for Judy Purtle's past broadcast background and her civic activities in Russellville;[7] it alleges, in fact, that Purtle misrepresented her alleged status as operations manager of radio station KCAB for a 10-month period in 1977 and that the ALJ's crediting of her experience (*see I.D.*, para. 27) was "[k]ey to the ALJ's decision. . . ."[8] In these exceptions, River Valley uses mostly spent bullets, and its allegations with respect to Judy Purtle's past broadcast experience raise no significant or material questions of fact.[9]

4. As evidence of Purtle's purported dishonesty concerning her claim to have been the operations manager for a 10-month period, River Valley relies upon the FCC Annual Employment Reports (Forms 395) filed by her employer during the relevant period (1974–1981);[10] it also invokes the testimony of three former KCAB

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[7] *See, e.g.*, River Valley Exceptions at 4–19, 26. The 1965 *Policy Statement, supra*, affords qualitative credit for these applicant attributes, *see* 1 FCC 2d at 395–96.

[8] River Valley Exceptions at 4.

[9] For example, River Valley brings to our attention:

> Ms. Purtle demonstrated a marked inability to distinguish between titles. Thus she said the positions of 'office manager' and 'business manager' were 'basically the same.' Nor did she distinguish between an 'assistant *to* a general manager' and an 'assistant manager.' Similarly, she did not consider the position of 'Operations Manager' any more prestigious or important in this proceeding than that of 'Office Manager.'

Id., at 5 n.1 (transcript citations omitted). Its picayune carping here suggests strongly that River Valley counsel has had insufficient experience with smaller radio stations where, from time-to-time, almost any warm body might be impressed to be anything from "chief cook" to "bottle washer" and where, frequently, the only titles of internal significance are those to the tower and/or transmitter site and the studio quarters, it being nicer to own than to rent. Job titles can be useful indicators of vocational functions, *see, e.g.*, *Policy Statement*, 1 FCC 2d at 395; but *actual* functions are much more important in the long-run. *Cf. Central Texas Broadcasting Co.*, 90 FCC 2d 583, 598 (Rev. Bd. 1982)(separate statement of Bd. Mb'r Jacobs), *recon. denied*, 52 RR 2d 1383.

[10] River Valley Exceptions at 7–12. The ALJ rejected the introduction of these forms into evidence and River Valley excepts to this rejection. *Id.*, at 9. We agree completely with River Valley that the ALJ erred in refusing to admit copies of these official forms into evidence; the evidence was relevant and probative. It was also admissible. Fed. R. Evidence § 1005. However, the data in such forms is neither conclusive nor does it create any decisional presumptions. Considering

employees.[11] With respect to the Forms 395, River Valley contends that these showed no listing of a female in a management capacity. And, the testimony of three former co-employees, it contends, conflicts with Purtle's description of her KCAB functions. Purtle replies;[12]

> During the past nine years, Purtle was in charge of the station's traffic and accounting departments; supervised programming; directed the training of announcers, news people and engineers; determined what programming to air and what music to play; kept inventory checks on equipment and music; obtained music from record companies; managed in-coming and out-going mail; handled daily and weekly sales and collection reports, the public file and the political file; handled bookkeeping; prepared and reviewed program logs; posted accounts receivable and payable; sold commercial spots; prepared substantial portions of the stations' license renewal applications; and participated in the stations' ongoing ascertainment effort.

These assertions are factually unrebutted and the testimony and evidence invoked by River Valley do no more than suggest that—in describing her prior experience—Purtle was uninhibited by modesty. The record evidence does not shake Purtle's basic claims as to her KCAB functions and it adequately affirms Purtle's entitlement to the enhancement of past broadcast experience which, in any event, the Commission has described as "not so significant as local residence" and merely of "some value."[13] While Purtle's local civic activities have not been nearly as extensive as some applicants we have seen,[14] her activities combined with her long-time Russellville residence do "indicat[e] a knowledge of an interest in" the community.[15] River Valley's exceptions on that score are essentially rejected and Purtle is entitled to some enhancement, though slight, for community activities.

5. As noted previously, River Valley also excepts in the strongest terms to the ALJ's determination that Almer Jackson, a 15% owner of the applicant entity, was "untruthful" with respect to his academic achievement and that his untruthfulness, in pertinent part, rendered River Valley's integration proposal "qualitatively subaverage."[16] This disputation emanates from Jackson's represen-

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that, as well as the other evidence and testimony in this case supporting Purtle's KCAB experience, the error here was harmless.

[11] *Id.*, at 13–17. River Valley also submits (without substantiation) that Purtle's two awards as KCAB "Employee of the Year" and her "sundry managerial titles" were the product of "a romantic relationship which started in 1973 and ended in 1976." *Id.*, at 18.

[12] Purtle Reply at 8 (*citing to* Purtle Exh. 1; Tr. 227–30; 234; 238–50; 256–70; 350–54). We have closely reviewed the transcript and record and find no genuine basis for contesting these descriptions.

[13] *See Policy Statement*, 1 FCC 2d at 396.

[14] *See I.D.*, paras. 30–31.

[15] *Policy Statement*, 1 FCC 2d at 396.

[16] *I.D.*, paras. 17–18; Conclusions, para. 19. *But see supra* note 6 (certain other ALJ "findings" re Jackson gratuitous and irrelevant).

tation that he held a Bachelor of Arts degree from Arkansas Tech University.[17] However, Purtle produced a notarized letter, under seal, from the university's Registrar, Charles Shelton, indicating that its records did not reflect a degree awarded to Jackson.[18] River Valley objected at hearing to the introduction of this document as hearsay; but the ALJ accepted it[19] and River Valley excepts to that action here.[20] The ALJ accepted the document under Fed. R. Evidence 902 (self-authentication).[21] We believe that the document was admissible as reliable under the hearsay exceptions since the likelihood of forgery here is infinitesimal, if not under Rule 902 alone than certainly in conjunction with Rule 903,[22] *see generally* D.W. Louisell & C.B. Mueller, *Federal Evidence*, §§ 543–44 (1981); *cf.* Rule 803(6), (8) and (24), but the issue is effectively moot since River Valley admits that Jackson needed further academic course credit for a B.A. degree.[23] River Valley asserts: "Jackson simply misspoke when he equated completion of degree requirements with the completion of courses in his major field of study. It is obvious they are not the same. . . ."[24]

6. River Valley argues that there is "confusion in Jackson's testimony about his college experience" and that "while Mr. Jackson could have been more careful in his written statement [River Valley Exh. 5], the critical point, his *intention* to be forthcoming, was evident from his live testimony."[25] But, the only confusion apparent here is that sought to be injected by the *post-hoc* rationalizations of counsel; indeed, it is Jackson's "live testimony" itself demanding that his further courses had "nothing whatsoever" to do with his B.A. degree (*see supra* note 17), while River Valley now concedes that

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[17] River Valley Exh. 5, at 1; *see also* Testimony of Almer Jackson (Tr. 162):

> Q. * * * Did you in fact receive a degree from Arkansas Tech?
>
> A. Yes, I did.

Jackson further stated that he had completed "[a]ll the courses that were necessary for the degree" but that he "needed a three hour expansive [elective] course" that "had nothing whatsoever to do with my degree itself." *Id.*

[18] Purtle Exh. 5.

[19] Tr. 442–47.

[20] River Valley Exceptions at 28–29.

[21] *See* Tr. 443–446. Commission Rules require that hearings be conducted according to "the rules of evidence governing [federal] civil proceedings in matters not involving trial by jury. . . ." 47 CFR § 1.351.

[22] Fed. R. Evidence 903 provides:

> The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

[23] River Valley Exceptions at 29–30.

[24] *Id.*, at 30.

[25] *Id.* (Emphasis in original.)

further course work was a B.A. prerequisite, that underscore the patent contradiction.[26] Thus, the ALJ's finding that Jackson's claim to a B.A. degree was "false"[27] is accurate. We acknowledge that there is energy in Justice Jackson's dictum that "willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946). However, Jackson's useless fib (Almer's, that is) was, unlike the subject misstatement in *WOKO*, unrelated to any matter of FCC regulatory interest;[28] and, even in cases where a relevant misstatement is perceived, Judge Mikva has taught that although an applicant may have slipped slightly on the forthcomingness index, absolute disqualification is not mandatory.

> There is no doubt that the Commission could have evaluated the character issue [misrepresentation] in the measured forum of a comparative hearing. Demerits could have been assessed against WADECO for whatever it did wrong or did not do right.

WADECO, Inc. v. *FCC*, 628 F.2d 122, 133 (D.C. Cir. 1980) (dissenting statement) (footnote omitted). Both the Board and the Commission have given life to that juridical enjoinder, *see Fox River Broadcasting, Inc.* , 88 FCC 2d 1132 (Rev. Bd. 1982), *modified* 53 RR 2d 44, 46 (1983) (Comm'n) ("we concur in the Board's imposition of a slight comparative demerit against [applicant] based on [principal's] lack of care in making his statements. . . ."), *recon. denied*, FCC 83I–43, released April 20, 1983. We believe that - just as in *Fox River* - while Jackson's claim to a college degree "goes beyond 'exaggeration' and 'puffing' [*citing to John C. Roach* , 43 FCC 2d 685, 689 (Rev. Bd. 1973)] . . . it does not stretch far beyond that ambit." 88 FCC 2d at 1143. In view thereof, we agree with the ALJ's implicit holding that no absolute disqualification is warranted and that, to the extent that his "qualitative" penalization of River Valley[29] is coextensive with a very slight demerit, we find no decisional error.

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[26] River Valley asserts:

> However, long before the purported registrar's letter was ever introduced, it was Jackson himself who volunteered in the context of a question as to completed degree requirements, that he 'needed' another three hour elective; *a course which he erringly said was unrelated to his degree.*

River Valley Exceptions at 29–30. (Emphasis added.)

[27] *I.D.*, para. 18.

[28] We nevertheless disagree with River Valley's argument that no censure should occur because Jackson had no apparent motive to deceive the Commission. River Valley Exceptions at 33. Motive is merely a clue in the cogitative process employed to deduce to the potential falsity of a claim or fact; it is not the end-product. Here the falsity is manifest.

[29] *I.D.* , Conclusions, para. 19.

MINORITY/FEMALE OWNERSHIP

7. In its exceptions, River Valley contends that Purtle's female ownership is not entitled to as much enhancement merit as its black ownership because case law and Commission policy have stressed minority ownership while, at best, giving female ownership only token consideration.[30] In our *Certification Order* , we acknowledged that comparative recognition of female ownership apparently germinated from Review Board dictum in *Mid-Florida Television Corp.* , 69 FCC 2d 607 (Rev. Bd. 1978), *vacated* 87 FCC 2d 203 (1981) (Comm'n). Although stating that "the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks - women have not been excluded from the mainstream of society as have black people," 69 FCC 2d at 652, the *Mid-Florida* Board nevertheless ventured:

> We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance. The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value.

Id. Mid-Florida was followed by the Board in *Alexander S. Klein, Jr.* , 69 FCC 2d 2134, 2147 n.26 (Rev. Bd. 1978) ("Female ownership and participation warrants only a slight merit . . . less significant than black ownership and participation"), *aff'd* 86 FCC 2d 423 (1981),[31] and in *Radio Gaithersburg, Inc.* , 72 FCC 2d 820, 829 (Rev. Bd. 1979) ("the credit awarded for female participation is less than that accorded black participation"), *review denied* FCC 80-734, released December 4, 1980 (mem.), *aff'd per curiam without opinion* , D.C. Cir. No. 81-1028, October 19, 1981.

8. Our *Certification Order* also observed that, at about the same time the Board was deciding the foregoing cases, the Commission itself was contemplating the question of whether or not to include female ownership under certain preferential treatment devices it then was fashioning to increase minority ownership (discussed more fully *infra* , paras. 11-12), but decided:

> . . . we have not concluded that the historical and contemporary disadvantagement suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's

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[30] River Valley Exceptions at 19-26; Supplemental Brief at 4-10.

[31] Although, in affirming *Klein* , the Commission cursorily referenced the Board's treatment of "minority and female ownership-participation," 86 FCC 2d at 429, the Commission's decision may be read to have turned on minority ownership alone, *see id.* , at 430-432.

> population in a preferential category defined by the presence of 'minority groups.'

Minority Ownership of Broadcast Facilities , 69 FCC 2d 1591, 1593 n.9 (1978).[32] At the time our *Certification Order* was issued in this case, it seemed therefore that the thrust for preferential recognition of female ownership was fueled by "Review Board law," and so we sought affirmation and clarification from the full Commission.

9. Such affirmation was not long in coming, for shortly after the release of our November 26, 1982 *Certification Order* the Commission issued variegated statements which ratified the female preference first suggested by the *Mid-Florida* Board. Most important, perhaps, is the language of the *Remand Order* in this very case which declared that "[w]e have previously stated our commitment to fostering greater participation by minorities and women in broadcasting."[33] Presaging that declaration was the Commission's December 1, 1982 release of its decision in *Waters Broadcasting* (later cited in the *Remand Order* , *see supra* note 33) in which it held that the winning applicant was entitled "to a substantial enhancement for its 100% minority and female ownership integrated with full-time management." 91 FCC 2d at 1266. What is more, and as possibly distinguished from its decision in *Klein* , *supra* , the Commission gave isolated recognition to female ownership in *Waters* by noting that the losing applicant's "enhancement for 24% [minority] female ownership integrated with full-time management is substantially less." 91 FCC 2d at 1266. Further indications followed. Thus, on the same day the Commission issued its *Remand Order* herein, it affirmed without opinion the Board's decision in *North Carolina Radio Service, Inc.* , 52 RR 2d 993 (Rev. Bd. 1982), where the sole comparative distinction between the competing applicants was the winner's 49% (non-minority) female integrated ownership.[34] And, the Commission has lately represented to the U.S. Court of Appeals in unequivocal terms: "Female ownership is also considered an

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[32] In that same footnote 9, however, the Commission apparently took tacit recognition of the Board's 1978 decisions in *Mid-Florida* and *Klein* , *supra* (which had been issued just several months before the Commission issued its 1978 *Minority Ownership* document, *supra*), and it indicated that it "has, in appropriate factual circumstances, recognized female involvement as contributing to potential diversity of programming and awarded merit in a comparative proceeding on that basis."

[33] *Remand Order* , at n.5, *citing* both the aforecited footnote 9 of its 1978 policy statement on *Minority Ownership* and *Waters Broadcasting Corp.* , 91 FCC 2d 1260 (1982) (hereinafter "*Waters* "), *reversing on other grounds* 88 FCC 2d 1204 (Rev. Bd. 1981), *appeal docketed sub nom* . *West Michigan Broadcasting Co.* v. *FCC* , No. 82–2513 (D.C. Cir. 1983).

[34] *See Order* , FCC 83–211, released May 3, 1983 (mem.).

enhancement factor but is entitled to lesser weight than minority ownership."[35] Finally, two Commissioners have very recently voiced their view that significant preferences ought to be accorded to female ownership *per se* under the lottery scheme authorized by Congress for awarding licenses for, *inter alia* , low power television stations;[36] and, it seems, the Commission may soon release a notice proposing for comment just such a female lottery preference.[37]

10. Hence, and as we apprehend this dynamic policy area, distaff ownership is now brightly fixed in the constellation of preferences, credits, enhancements and merits that light the distance to our ultimate destination, the comparative "Star." The weights and measures appending many of those "pulses" are outlined in the 1965 *Policy Statement, supra*, and - in the Anglo-Saxon tradition of the common law incorporated into the American system of jurisprudence - highlighted by the application of implemental policy standards in an ever-expanding galaxy of case law precedents. This adjudicatory means of developing comparative standards was expressly anticipated by the Commission:

> We pointed out at the outset that in the normal course there may be changes in the views of individual Commissioners as membership on the Commission changes or as Commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

Policy Statement, supra, 1 FCC 2d at 399. The choice of enunciating public policy through either rules and policy statements - Code Law, in the Napoleonic tradition - or through case-by-case adjudication is an election which lies "primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). The emphasis on particular applicant attributes chosen by the Commission to be considered as positive comparative factors flows from its daily administration of the "public interest" standard of the Communications Act,[38] a lodestar that has been described as "'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.'" *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 593 (1981), *quoting FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The bulwark against arbitrary or capricious shifts of policy standards is consistency with prior precedent or a reasoned explanation for departure. *See generally Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (agency has a duty to provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law"). Although we are unaware of any independent Commission exposition on the rationale supporting a female ownership preference, it may now be assumed more confidently that the Commission has adopted the *ratio decidendi* of the Board's *Mid-Florida* discussion set out in para. 7, *supra*. The very recent Commission pronouncements ratifying an enhancing merit for female ownership, and referenced in the paragraph immediately above, reflect a policy bent now luminously discernible. Purtle, a 100% female-owned applicant, is therefore entitled to a solid, qualitative integration enhancement.

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[35] Brief for FCC in *West Michigan Broadcasting* (*Waters*), *supra* note 33, filed April 29, 1983, at n.2 (*citing to* the Board's 1979 decision in *Radio Gaithersburg* , *supra*).

[36] *See Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings* (hereinafter "*Competing Applications Using Random Selection* "), 53 RR 2d 1401, 1438 (1983) (separate concurring statements of Comm'rs Jones and Dawson). *But see* Concurring Statement of Chm'n Fowler (*id.* , at 1435–1437) (opining that governmental preferences based on biological differences may be constitutionally infirm and, in any event, undersirable public policy).

[37] *See id.*, Concurring Statement of Comm'r Dawson. Commissioner Dawson's view is that although the new lottery statute authorizes special preferences for "minority group" applicants (*see* 47 U.S.C. § 309(i)(3)(A), as amended by Pub. L. 97–259 (1982)), and no specific mention is made of women in the statutory definition (*see id.*, at § 309(i)(3)(C)(ii)), Congress did not intend its "minority group" definition as words of limitation. We also note that Commissioner Dawson adverted to the recent recognition of female ownership in comparative licensing cases (*citing Waters, supra*), but remarked that such recognition was perhaps "not a well-defined one." Concurring Statement, at n.2.

11. Ascending in parallel to the Commission's heightening recognition of integrated female ownership is the dimension of the weight to be accorded various levels of minority ownership. Thus, while a limited level of minority ownership might tip the comparative scales in an almost deadlocked case, *see, e.g., Klein, supra*, 86 FCC 2d at 431, it appears increasingly evident that the Commission's grants of preferential treatment are linked firmly to minority "control." For example, in *Competing Applications Using Random Selection, supra* note 36, the Commission restricted the statutorily-mandated minority preference to those lottery participants whose minority owners hold "a majority interest." 53 RR 2d at 1420.[39]

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[38] 47 U.S.C. §§ 301, 303 309(a), 310(d).

[39] In so doing, the Commission was tracking Congressional intent as expressed in the Conference Report accompanying H.R. 3239, which legislation matured into the minority lottery preference now set forth in § 309(i) of the Communications Act (*see* 96 Stat. 1087). That Report stated:

> The Conferees intend that in the administration of a lottery to be used for granting licenses or construction permits for any media of mass communications.

Similarly, even while expanding its opportunities for minority preferences in its recent *Minority Ownership In Broadcasting*, 52 RR 2d 1301 (1982) (hereinafter "*Minority Ownership II*") by permitting the issuance of an IRS tax certificate (*see* 26 U.S.C. § 1071) or permitting a "distress sale"[40] where the minority "general partner" owns more than 20% of the entity and the non-minority entrepreneurs are "limited" partners, the Commission retained its previous requirement for minority control. *See id.*, at 1305–07; *see also id.*, at 1307–09, where the Commission indicated that it would now permit non-minority owners to receive a tax certificate for a deferred sale of their ownership shares if, in general, the sale does "not reduce minority ownership of and control in the entity below 51 percent."

12. The Commission's concentration on minority control as a prerequisite to the preferential devices of tax certificates or "distress sales" is embodied in *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) (hereinafter "*Minority Ownership I*"), *clarified*, 44 RR 2d 479 (1979). Therein, the Commission stated that these devices could be extended where "a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased," 68 FCC 2d at 983; it quantified that "likelihood" by stating that "[w]e currently contemplate issuing a [tax] certificate where minority ownership is in excess of 50% or controlling," *id.*, at n.20.[41] To the same effect is *Clear Channel AM Broadcasting*, 78 FCC 2d

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> the Commission award a significant minority ownership preference to those applicants, a majority of whose ownership interests are held by a member or members of a minority group.

Rep. No. 97–765, 97th Cong., 2nd Sess. 44 (1982).

[40] A "distress sale" permits a licensee about to face a hearing to determine whether its license should be lost to sell out at a "discount" price (*i.e.*, 75% of market value, *see Grayson Enterprises, Inc.*, 77 FCC 2d 156, 164 (1980)). For a more complete discussion of the "distress sale" mechanism, *see Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1981) (*aff'g* "distress sale" procedure; but not necessarily minority preference policy, *see* 652 F.2d at 1029 and concurring statement of Judge Nichols, *id.*, at 1032).

[41] The Commission's contemplated 50% prerequisite was effectuated with rigor. *See Long-Pride Broadcasting Co.*, 48 RR 2d 1243 (1980), where it denied a tax certificate to a transferee which was 45% minority owned, even though the minority owner also held a voting trust over another 10%; it held that the transferee's minority interest was insufficiently "significant," *id.*, at 1244, and further held that "minority ownership in excess of 50%" would be the benchmark, *id.*, at 1245.

The *Long-Pride* rationale was reflected, in part, in our recent *HLD&M Communications*, 53 RR 2d 732 (Rev. Bd. 1983), where we held that 45% minority ownership, although integrated, was less than controlling and therefore insufficient to "determine whether there is a substantial likelihood that diversity of programming will be increased." *Minority Ownership I*, 68 FCC 2d at 983. The award in *HLD&M* went to a 100% integrated competing applicant on the basis of comparative superiority. *See also Las Misiones De Bejar Television Co.*, 53 RR 2d 119 (Rev. Bd. 1983).

1345, *recon. granted in part and denied in part*, 83 FCC 2d 216 (1980).[42] Therein, the Commission amended its rules to permit the acceptance of applications for AM stations in the larger cities where "more than 50% of the ownership interest . . . is held by minority persons. . . ." 78 FCC 2d at 1369; *see also* 47 CFR § 73.37(e)(2) (rules).

13. In view of the foregoing, it appears to us that the general threshold for awarding any significant comparative qualitative enhancement for integrated minority ownership should be set at a more-than-50% (or otherwise controlling) interest level to ensure the "substantial likelihood that diversity" of viewpoints will be increased. *Minority Ownership I, supra*, 68 FCC 2d at 983; *see also Minority Ownership II, supra*; *Clear Channel, supra*; *Long-Pride, supra* note 41. Although a lower level of integrated minority ownership may be decisional in otherwise deadlocked cases, *see, e.g., Klein, supra*, an applicant with less than controlling integrated minority ownership cannot expect to be preferred over a comparatively superior applicant. *HLD&M Communications, supra*. The same general threshold would be appropriate, of course, with respect to comparative merit for female ownership.[43] To do otherwise would

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[42] The general tenets of the *Clear Channel* rulemaking were affirmed *sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir. 1982). The minority preference aspect of the new clear channel rules was reiterated by the Commission in *Bunkfeldt Broadcasting Corp.*, 88 FCC 2d 1696 (1982), *aff'd per curiam without opinion*, D.C. Cir. No. 82–1212, decided January 6, 1983, *petition for writ of certiorari*, No. 82–1607, filed March 30, 1983.

[43] Affirmation of this principle is found in *Waters* where the Commission stated that its "minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings." 91 FCC 2d at 1266.

It concluded that "Waters is also entitled to a *substantial enhancement* for its *100% minority and female ownership* integrated with full-time management," *id.* (emphasis added), thus instructing necessarily that a lower ownership interest should receive a proportionately lower enhancement value. Indeed, in reviewing the doctrinal base for minority ownership preferences, the *Waters* Commission specifically invoked *Minority Ownership I* and *Clear Channel*, the preferential mechanisms of which are tautly tied to minority control.

We do note, however, that at one time the Commission contemplated adding more specificity to the comparative measure to be accorded minority ownership, and stated:

> *Minority Involvement in Applicants Involved in Comparative Proceedings.* We believe minority ownership involvement should continue to be a significant factor in comparative evaluations of applicants for broadcast authorizations, and are actively examining methods to rationalize such consideration of this issue as well as refining the comparative hearing and decision process generally. However, we believe a more appropriate resolution of NTIA's proposals in this area will be to consider them as part of our review of the broad comparative process.

Minority Ownership of Broadcast Facilities, supra, 69 FCC 2d at 1595–96 (footnote omitted). Until such time, case-by-case analysis is appropriate. *S.E.C.* v. *Chenery Corp.*, *supra*.

be to entreat endless "qualitative" comparisons of fractional ownership levels (*e.g.*, 30% female *v.* 20% minority - or *vice versa*), none of which, as the Commission has clearly indicated, bode especially meaningful as auguries of viewpoint diversity. Against that premise, River Valley's 15% minority ownership is comparatively insignificant in this case and warrants little, if any, preferential consideration.[44]

SUMMARY AND CONCLUSIONS

14. Purtle is a fully qualified applicant, qualitatively enhanced in the manner generally described by the ALJ, *see I.D.*, Conclusions, paras. 8–11. Additionally, in light of the Commission's unambiguous ratification of a comparative merit for female ownership, we likewise accord with the ALJ's conclusion that "Judy Purtle's 100% integration proposal is greatly enhanced by her own female participation as the Station's General Manager." *Id.*, at 12. River Valley's exceptions to these aspects of the *Initial Decision* have been rejected. Hence, for the reasons more fully set forth hereinabove, River Valley is found comparatively inferior even if *arguendo* we assess no demerit whatsoever for the inopportune misstatements of its minor principal.[45] Its 15% minority ownership, as we have said, cannot compete under our amplified comparative criteria with Purtle's qualitative attributes, even if we lightened somewhat the enhancement for her past broadcast experience and her civic participation that the ALJ factored into his ultimate conclusion. *See id.*, at para. 23.

15. ACCORDINGLY, IT IS ORDERED, That the application of Judy K. Purtle (File No. BPH-800807AE) IS GRANTED, and the applications of Horne Industries, Inc. (File No. BPH-11185) and River Valley Broadcasting, Inc. (File No. BPH-800711AJ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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[44] As with all factors which enhance integration (*e.g.*, local residence, civic activities, past broadcast experience), the enhancement drops off sharply in proportion to the ownership level. *See generally Policy Statement*, 1 FCC 2d at 395–96.

[45] Because Almer Jackson holds only a relatively insignificant interest in River Valley, thus entitling it to only passing recognition for minority ownership, equilateral justice would dictate that any comparative demerit for Jackson's misstatements would be of commensurate scale.

Bankruptcy
Control, Transfer of, Procedures
License, Assignment of, By Receiver in Bankruptcy
License, Assignment of, Involuntary
License, Assignment of, Procedures
Trustee in Bankruptcy

While the Commission has a general policy of not questioning the appointment of a receiver or trustee in bankruptcy by state and federal courts, where such an appointment involves the enforcement of a reversionary interest in a broadcast license and the recognition of a security interest in that license by creditors, the application seeking consent to assign the broadcast license to receiver or trustee is unacceptable for filing.
–Kirk Merkley

FCC 83–310

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KIRK MERKLEY, RECEIVER For Involuntary Assignment of License of Station KPRQ, Murray, Utah.*	File No. BAL-
KIRK MERKLEY, RECEIVER (Assignor) and TRI-ALPHA BROADCASTING CORPORATION (Assignee) For Assignment of License of Station KPRQ, Murray, Utah.	File No. BAL-
MURRAY BROADCASTING COMPANY, INC. For Renewal of License of Station KPRQ, Murray, Utah.	File No. BR-800529UY

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983 Released: July 11, 1983)

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* The call letters for station KPRQ were recently changed to KLAF. For ease of reference and to facilitate an understanding of the pleadings, the former call letters, KPRQ, have been used throughout this document.

By the Commission: Commissioner Fogarty not participating.

1. The Commission has before it for consideration: (1) an FCC Form 316 application for the involuntary assignment of the license of station KPRQ(AM), Murray, Utah, to Kirk Merkley, Receiver, which has not been accepted for filing; (2) a contingent application to assign the license from the Receiver to Tri-Alpha Broadcasting Corporation, which has also not been accepted for filing; (3) objections to the acceptance for filing of these assignment applications by Murray Broadcasting Company, Inc. (MBC), licensee of KPRQ; (4) an application for the renewal of the license of station KPRQ filed by MBC; (5) an informal objection to the renewal application filed by the Receiver; and (6) various related pleadings.

Preliminary Matters

2. The Receiver argues that MBC's objection to the acceptance of his involuntary assignment application is an unauthorized pleading. Specifically, he contends that the pleading is in the nature of a petition to deny and that, under the Communications Act and Commission Rules, such petitions against involuntary assignment applications are not permitted. Citing *McClatchey Newspapers, Inc.*, 63 FCC 2d 669 (1977), *Barnes Enterprises, Inc.*, 55 FCC 2d 721 (1975) and *Gulf Coast Radio, Inc.*, 45 FCC 1865 (1964), the Receiver maintains that MBC's pleading does not lie against his application as a matter of law, and even if it was found acceptable, the Commission has a policy of not permitting challenges to applications which have not been accepted for filing. *University of Tennessee*, 44 RR 2d 1082 (1978). Thus, the Receiver contends that MBC's submission should be dismissed without consideration. We find, however, that this proceeding presents an unusual set of circumstances in which it is appropriate to consider MBC's pleading on its merits as an informal objection, pursuant to Section 73.3587 of the Rules.

3. Before addressing the specific facts of this case, we will briefly review applicable communications policy so as to set the issues presented in proper perspective. The Commission has consistently held that a broadcast license, as distinguished from the station's plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right. *See* Sections 301, 304, 309(h), 310(d), of the Communications Act, as amended, and Section 73.1150 of the Commission's Rules. *See also*, *Radio KDAN, Inc.*, 11 FCC 2d 934, *recon. denied* 13 RR 2d 100 (1968), *affirmed on procedural grounds sub nom.*, *W. H. Hansen* v. *FCC*, 413 F. 2d 374 (D.C. Cir. 1969). As stated in *Radio KDAN*, "This principle is firmly rooted in Commission practice, its rationale being that such hypothecation endangers the independence of the licensee who is and who should be

at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust." 13 RR 2d at 102.

4. The Commission has had a rule prohibiting reversionary interests in broadcast licenses since 1949.[1] This prohibition is presently contained in Section 73.1150 of the Rules. This rule provides:

> (a) In transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever.
>
> (b) No license, renewal of license, assignment of license or transfer of control of a corporate licensee will be granted or authorized if there is a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment or transfer, such rights, as stated in paragraph (a) of this section, are retained.

In *KDAN*, we stated: "In interpreting the prohibition of reversions contained in . . . [Section 73.1150], the Commission has consistently refused to grant applications for transfer of control of a corporate licensee or for an assignment of a station license where a former owner or licensee has retained . . . a right or a power to regain the status of licensee through a reversion of stock control or the reassignment of the station license." 13 RR 2d at 102.

KPRQ - Background

5. On June 26, 1974, agreements were executed to assign the license for station KPRQ (then KMOR), from O. J. Wilkinson to Seagull Enterprises, Inc. Essentially, the agreements provided, in pertinent part, that Seagull Enterprises (Seagull) was to make a series of payments to Wilkinson in consideration of the sale of the station's assets and the assignment of its license. These agreements contained the following provision:

> DEFAULT BY BUYER. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 90 days thereafter, the Seller, at his option, shall have the following alternative remedies:
>
> A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the buyer agrees that the Seller may at his option *re-enter and take possession of said premises without legal processes as in its first and former estate*, together with all improvements and additions made by the Buyer thereof, and the said additions

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[1] *But see Policy Statement and Notice of Proposed Rulemaking* (Gen. Docket No. 82-797), 52 RR 2d 1301 (1982), whereby the Commission is currently examining the appropriateness of modifying somewhat its general practice regarding reversionary interests.

> and improvements shall remain with the land, and become property of the Seller, the Buyer becoming at once a tenant at will of the Seller; . . . [Emphasis added].[2]

Before the Commission approved the assignment of the station license to Seagull, this provision was amended to eliminate the Seller's right to "re-enter and take possession of said premises without legal processes," *i.e.*, a right of reversion to the station and its license and to provide, as an alternative remedy in the event of a default, a "bona fide public sale" subject to prior Commission approval. The Commission approved the assignment on December 13, 1974.

6. Soon after being assigned the license, Seagull encountered financial difficulties. Consequently, it began to negotiate a sale of the station to an individual, Tim Themy. However, no agreement was reached and Seagull eventually defaulted on its payments to Wilkinson. Nonetheless, after Wilkinson began to exercise his rights under the default provision, Themy negotiated with Wilkinson and eventually acquired Wilkinson's rights under the 1974 contracts. Also, around this same time, Seagull executed an agreement to assign the station's license to Shirley K. Watson, doing business as Murray Broadcasting Company (MBC), and submitted an application to the Commission seeking approval of the license assignment.

7. Themy filed an objection to the Seagull-MBC assignment application, based upon the rights he had acquired from Wilkinson. Themy alleged that he was successor to the former licensee's interest in the station's real property and broadcast equipment and to the obligation of Seagull to make installment payments with respect to this property under the 1974 agreements. Themy stated that the proposed assignee of the license, MBC, had refused to accept responsibility for Seagull's financial obligations. He noted that he had filed a complaint in a local state court against Seagull and principals of MBC, as well as a creditor who also claimed a security interest in certain of the station's assets. In his complaint, he sought the appointment of a receiver and a determination that these parties had no right or interest in the bulk of the real and personal property used in the operation of the station.[3] Themy argued that MBC could not expect to use the Seagull equipment and property once his claims were executed. Consequently, he contended that MBC was only acquiring a bare license and that it had failed to show its financial qualifications for purchasing new broadcast facilities. Themy also expressed a concern that a grant of the assignment application

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[2] There were two agreements involved in the assignment transaction, one involving the station's real property, the other concerning its remaining assets. The above provision was contained in both agreements.

[3] Themy's request for the appointment of a receiver was denied by the court. The other aspects of Themy's complaint were still before the court.

might substantially impair any possibility that Seagull's obligations would be paid.

8. MBC responded that it was attempting to negotiate a lease whereby it could use the properties which were subject to Themy's claims. It demonstrated further that, even if the broadcast equipment were ultimately foreclosed upon and unavailable, MBC possessed the funds necessary to purchase new facilities.

9. By letter of March 4, 1977, the Chief of the Broadcast Bureau, acting on delegated authority, granted the application assigning the license to MBC. In denying Themy's objections, the Bureau Chief concluded that MBC was not acquiring a bare license, but "an operating station with value as a going concern." The letter noted that Themy's objections to the assignment related to his private interests rather than public interest considerations. In denying the objection and granting the assignment application, the Bureau Chief applied the Commission's policy of not assuming jurisdiction in such private matters and stated that the appropriate forum for Themy's claims to the real and personal property of the station was the local courts. There was no evidence that Themy had sought, or was seeking, a court order to enjoin the sale to MBC pending disposition of his claims.

10. Subsequent to the assignment, MBC acquired new facilities, no longer using any of the property to which Themy claimed an interest.[4] Also, Themy continued his suit against MBC in the Utah state courts. For some unexplained reason, however, the original unamended security agreement containing the former licensee's right to take possession of the station was litigated. On November 2, 1977, the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, entered a summary judgment in favor of Themy based on the unamended default provision. This judgment provided in part:

> The interest of defendants Seagull Enterprises, Inc. . . . and Murray Broadcasting Company, Inc. *in the FCC license* described in and arising out of the Purchase Agreement for sale of the broadcasting equipment and license dated June 26, 1974, are forfeited by virtue of the default of the buyer thereunder. [Emphasis added.]

An appeal was taken to the Utah Supreme Court which affirmed the District Court's finding that KPRQ's license was forfeit. *Themy* v. *Seagull Enterprises, Inc.*, 595 P.2d 526, 45 RR 2d 775 (1979). The decision was remanded to the District Court, which appointed a receiver to seek the involuntary assignment of the KPRQ license.[5]

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[4] Also about this time, the station's call letters were changed from KMOR to KPRQ. In addition, a *pro forma* assignment of the station's license was executed from Shirley Watson d/b/a Murray Broadcasting Company to Murray Broadcasting Company, Inc.

[5] After the appeal was taken but before the Utah Supreme Court rendered its

The Receiver also filed an informal objection to MBC's 1980 application for renewal of license. The current proceeding is to determine which party has a valid claim to the KPRQ license.

Allegations

11. MBC argues that the Receiver has no interest in any of KPRQ's assets except its license. It further contends that an assignment of the license alone would be contrary to a long-standing policy of not granting "bare" authorizations. It states that all the broadcast equipment involved in the Seagull-Wilkinson transaction has been placed in storage, subject to a series of garnishments by creditors and that the station is operating solely with MBC purchased equipment. Moreover, MBC argues that the Receiver has also sought the assignment of a non-broadcast license which has no connection to the agreements defaulted upon by Seagull.[6] Furthermore, MBC questions the Receiver's authority to seek KPRQ's license since he was designated to represent Themy, at a point when Themy had already disposed of his interests. See footnote 5 *supra*. For these reasons, MBC requests that the Receiver's application be either returned, dismissed or denied. In response, the Receiver argues that he is not just seeking the assignment of a "bare" license, but the acquisition of all assets associated with that license. He points out that the Utah Supreme Court found all the assets of Seagull, including the license as well as real and personal property, to be forfeited. The Receiver also argues that the Commission's rationale for denying Themy's informal objection to the Seagull-MBC assignment requires a grant of the current assignment application. He states, "Having referred Mr. Themy to the state courts to vindicate his rights, the Commission can not now turn a deaf ear to the judgment of those courts" (referring to the letter of March 4, 1977, from the Chief of the Broadcast Bureau). See paragraph 8 *supra*. Moreover, the Receiver emphasizes that Commission policy has been not to question the final judgment of state courts in appointing receivers. *H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973). Consequently, the Receiver requests that MBC's filings be dismissed due to their being based on a misconception of fact and an erroneous interpretation of the law.

12. In an informal objection to MBC's renewal application, the Receiver reasserts his interest in the KPRQ license and refers the Commission to his pending unaccepted assignment applications.

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decision, Themy reassigned his rights back to O. J. Wilkinson (the former licensee). Subsequently, Wilkinson again assigned the rights to Harry J. Pappas, who then assigned them to Tri-Alpha Broadcasting Corporation. Consequently, the Receiver represents the interests of Tri-Alpha, on whose behalf he has submitted the second "contingent" assignment application.

[6] MBC states that the Receiver is also requesting assignment of KPRQ's license, Aural STLWCO 518, which was licensed to MBC after it acquired the station.

Consequently, he states, "while the question of Murray Broadcasting Company's legal qualifications to continue to operate KPRQ is in litigation before the Commission, the Commission should not prejudge the issue by acting on the pending application of . . . [MBC] for renewal of KPRQ's license."[7] In a memorandum requesting renewal of its license and dismissal of the assignment applications, MBC presents additional arguments challenging the Receiver's claims. MBC asserts that the Commission has exclusive power over the licensing of broadcast stations and that local state courts may take no action conflicting with or impinging upon the agency's authority. It states, furthermore, that based on this authority, the Commission has adopted rules which prohibit former licensees from holding reversionary interests in broadcast licenses as security. MBC then asserts that the Receiver's claim is based upon just such an interest. Specifically, MBC emphasizes that, according to the Utah Supreme Court, the Receiver's claim originated when Seagull forfeited the KPRQ license to Wilkinson, the original licensee of the station. MBC maintains that this forfeiture constituted a reversionary interest prohibited by Commission rules.

13. MBC also argues that the Utah Supreme Court committed an error of fact when it reviewed the agreements' default provisions. It states that the error further supports the conclusion that the Receiver is pursuing an improper reversionary interest. Specifically, it asserts that the court only reviewed the unamended agreements which provided the former licensee with the right to repossess the station in the event of default, and not the public sale remedy which was incorporated in the amended contract.[8] Thus, MBC contends that the original default provision containing the right to repossession, the one the court actually considered, had been amended for the very reason that it contained a reversionary interest and would not have received the Commission's approval. Consequently, MBC avers that the Commission is not required to give any weight to a state court decision which not only intrudes on the agency's licensing authority and results in a disposition which is contrary to its established policies, but that is also based upon a mistake of fact.

14. In response, the Receiver argues that the Utah Supreme

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[7] In a letter of September 25, 1980, from the Chief of the Broadcast Bureau's Renewal and Transfer Division to the Receiver's attorney, notice was given that the KPRQ renewal would remain in deferred status pending resolution of the issues concerning the unaccepted assignment applications.

[8] See paragraph 5 *supra*. In its decision, the Utah Supreme Court only made one reference to the actual wording of the default provision. The court states: "Both documents [1974 sales agreements] were closely patterned after the Standard Uniform Real Estate Contract often used in this state; for example, both provided the seller with the same alternative remedies in the event of a breach by buyer: (1) seller could, after giving five days written notice, declare the interest of the buyer to be forfeited and take possession of the premises. . . ." 595 P.2d at 528, 45 RR 2d at 775.

Court did not exceed its jurisdiction in finding the KPRQ license forfeit. In support he cites *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), for the proposition that a state supreme court may consider a contractual dispute affecting the disposition of a broadcast license, as long as it issues no order requiring the license's assignment. The Receiver states that in the current situation the Utah court only adjudicated the dispute between the parties and issued no order regarding the license itself. The Receiver, while admitting the court considered the wrong provision, also argues that the final versions of the 1974 sales agreements were not significantly different from those the court actually reviewed. He contends that the forfeiture provisions were identical and that only the remedy was changed in the amended version; *i.e.*, a public sale rather than repossession.

15. The Receiver further contends that, if we sustain MBC's position regarding reversionary interests, then no seller-secured party could protect itself in a broadcast assignment transaction. He states that, although real estate and personal property could be subject to security interests, the value of such assets alone without the related broadcast license would be greatly reduced. He also maintains that by ignoring the Utah court's decision, the Commission would be committing an action which would be "arbitrary, capricious and unreasonable warranting judicial review." Specifically, he argues that MBC would have the Commission decide whether the Utah Supreme Court is deprived of jurisdiction, while principles of comity and federalism require the agency to give the court due deference. He also maintains that the argument that the court reviewed the wrong default provision misses the point in that it only considered the issues of jurisdiction and forfeiture, not the actual remedy which should be imposed. The Receiver states that, in any event, the Utah courts should be given the chance of reviewing the correct agreement before MBC presses the issue before the Commission. He further contends that the several assignments of the Wilkinson interest qualify as a public sale under the amended default provision. Moreover, that even if the assignments do not qualify as such a sale, MBC is now barred by Utah law from raising it as an issue.[9] Consequently, the Receiver argues that a grant of the involuntary assignment application would serve the public interest.

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[9] The Receiver attached to his pleadings a memorandum from Themy's Utah counsel, who argued his client's claims before the state supreme court. He admits that the court considered the wrong contracts, indicating that, inadvertently, the correct versions had not been submitted to the court for review. However, he argues that the differences between those the court reviewed and those with the amended default provisions would have made no difference to the disposition of the case. He also states that, in any event, MBC would probably be barred by the principles of equitable estoppel from raising the mistake to the court at the present time. As to the effect of the "public sale" provision, he states that Utah

Discussion

16. Generally, with respect to receivership proceedings, we do not question a court-appointed receiver's request for assignment of a license. *H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973). In cases of bankruptcy or general receivership proceedings, the Commission usually gives its consent to the temporary acquisition of the license by a trustee or receiver, pending disposition of station assets. We recognize that the operating authorization must usually accompany the physical assets, pending ultimate passage of all to a qualified applicant. This is to permit trustees or receivers to fulfill the obligations of their appointment and, in some cases, to assure the continued operation of the licensed facility. We find, however, that the current situation presents special circumstances warranting a departure from this general policy. First, unlike most receivership proceedings, the current licensee has not encountered severe financial difficulties requiring protection for its creditors. In fact, the broadcast assets of the present licensee are not the subject of the receivership proceeding. There appears to be no question that MBC is both successful and qualified to remain a Commission licensee. The issues at hand originated with MBC's predecessor in the license, Seagull. The assignment of the license from Seagull to MBC was approved in 1977 despite objections from the party then entitled to the contract rights this Receiver purports to protect. That party did not seek Commission or court review of that assignment or in any way seek to enjoin the sale of Seagull's interests to MBC pending state court resolution of his rights. Some two years elapsed between our assignment of the license from Seagull to MBC, and the filing of the application to assign the license to the present Receiver. Furthermore, as discussed below, we find that the Utah Supreme Court decision upon which the Receiver bases his claim was, by admission of the parties, based upon an incorrect contract containing a clause prohibited by FCC policy. Under the circumstances presented in this case, assignment of the license to the Receiver is inappropriate.

17. This case seemingly involves a conflict between state and federal law which requires consideration of the relationship between the Commission's disposition of an assignment application and the decision of a local state court which interprets an assignment contract. In *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), the United States Supreme Court discussed this relationship in overturning a decision of the state supreme court in Nebraska. Under the facts of the case, the state court had found that Nebraska's law on

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law does not indicate what constitutes such a sale. He states further that Themy, and the others who were assigned the Wilkinson interest, attempted to act in a manner which they felt was in accordance with what the Commission would consider a public sale.

fraud had been violated in the assignment of a broadcast license. Consequently, the state court ordered the parties involved in the transaction to seek the reassignment of the license back to the original licensee. The United States Supreme Court ruled on review that the state court had exceeded its jurisdiction by controlling the conduct of parties before the Commission and that the Commission was the ultimate arbiter of matters concerning the disposition of the license. 326 U.S. at 131. However, the Court also indicated that where there is a conflict of the Commission's licensing authority with the powers of a state court over local matters, attempts should be made to reconcile both interests. Thus, the Court recognized the Commission's responsibility to establish a nationally consistent licensing policy, while it also recognized the responsibility of local courts in enforcing state laws. In emphasizing the need for reconciliation, the Court observed that "if the State's . . . [laws] can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which lead to the granting of a license, the principle of fair accommodation between state and federal authority . . . should be observed." 326 U.S. at 132. Therefore, while there is no question that the Commission has exclusive authority over a station's license, we are also charged with the responsibility of accommodating state law, where appropriate.

18. For this reason we have established procedures which acknowledge bifurcated authority in certain licensing areas. For example, where a licensee is accused of breaching a contract to assign its license, the determination of whether a breach occurred is left to a local state court. *Carnegie Broadcasting Co.*, 5 FCC 2d 882 (1966). The Commission does not possess the resources, the expertise or the jurisdiction to adjudicate such claims fully. *See Regents* v. *Carroll*, 338 U.S. 586 (1950). On the other hand, we have determined that limits on the ability of licensees to hold certain types of interests and engage in certain types of contracts are required under the Communications Act. Thus, we have adopted policies and procedures which have effectively limited the ability of licensees in these areas. One example of this is our treatment of reversions, discussed earlier. Another example is in the area of media ownership and the Commission rules limiting the interests which can be held in conjunction with broadcast properties. *See* Section 73.35; 73.240; 73.636; and 76.501 of the Rules. Thus, the Commission would not approve the assignment of a license which would cause a violation of its multiple or cross-ownership rules, regardless of the contractual power of a licensee to acquire such an interest under state law. Similarly, if an assignment application's related contract of sale violated existing rules or policies, we would withhold our approval until the problem was corrected. In this way, while the interpretation and enforcement of contracts are within the jurisdiction of state courts, the Commission has established certain public interest

limitations on a licensee's contractual authority and imposes these limits by withholding its approval of a pending assignment application. Moreover, through this procedure, conflicts between Commission policy and state laws can be avoided.

19. In 1974, Wilkinson and Seagull submitted their sales agreements to the Commission for review. As a consequence, the provision which we found constituted a prohibited reversionary interest, and which the Receiver now asks us to recognize, was eliminated with a more appropriate remedy substituted in its place.[10] Nonetheless, once a dispute arose, the parties apparently inadvertently commenced to litigate their rights under the contract as originally written. Thus, the effect was to circumvent the procedure established to assure that our policies and rules are observed. If parties were allowed to make one representation to the Commission, while a contrary course was pursued at a later time, in another forum, our obligation to review license assignment transactions under the Act would be thwarted. Consequently, we find that to acknowledge the Receiver's claim at this point would be inappropriate, not only because it is derived from a reversion, but because it also jeopardizes our prior consent procedure.

20. We also reject the Receiver's argument that there is little meaningful difference between the original assignment agreement, upon which the court acted, and the amended version, which the Commission approved. The change reflects a difference in the default remedies and this change has significant impact on the question of whether the provision violates Commission rules. Under the original agreement, the former licensee was given the right to regain control automatically of the station and its license. Under the amended version, it was provided that the parties to the agreement could "after public notice, offer the pledged assets at a bona fide public sale." Thus, in the latter version, no control or automatic reacquisition of the license by the former licensee was contemplated. For the Commission to now recognize the Receiver's right to the license through the enforcement of the original agreement's provision would be tantamount to a recognition of a vested security interest in the license itself. Clearly, this is contrary to established law and policy.

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[10] The reversionary interest provision contained in the original Wilkinson/Seagull contract clearly contradicts existing FCC policy. First, and most importantly, it treats the broadcast license as the property of the former licensee, Wilkinson. The provision allows him to "take possession of the license, reestablishing him in his "first and former estate." Second, it provides Wilkinson a right to the license in excess of the license term. The agreements indicated that Seagull was to make payments over 180 months. Thus, since a default could take place at any time during that period, Wilkinson could essentially claim a right to to license for some fifteen years. Finally, the contract provisions also allow the former licensee to take control of the license without seeking prior Commission approval. Specifically, the agreements allow Wilkinson to take possession "without legal processes." *See* Section 310(d) of the Act.

Finally, we believe the argument that the court's disposition would have been the same had it reviewed the amended contractual provisions is speculative at best. Moreover, it is not a matter for resolution in this forum. *Regents* v. *Carroll*, 338 U.S. 586 (1950).

Conclusion

21. In view of the foregoing, we find that the Receiver's interest in the KPRQ license cannot be recognized, despite a judgment of forfeiture by the Utah Supreme Court. Consequently, the Receiver's assignment applications are unacceptable for filing and his informal objection to the renewal of license of station KPRQ will be denied. Finally, we find that the public interest would be served by a grant of MBC's renewal application.

22. Accordingly, IT IS ORDERED, That the informal objection by Murray Broadcasting Company, Inc., to the acceptance for filing of the above-captioned assignment applications, IS GRANTED.

23. IT IS FURTHER ORDERED, That the application for the involuntary assignment of station KPRQ from Murray Broadcasting Company, Inc., to Kirk Merkley, Receiver, and the contingent application to assign the license from the Receiver to Tri-Alpha Broadcasting Corporation, ARE UNACCEPTABLE FOR FILING.

24. IT IS FURTHER ORDERED, That the Receiver's informal objection to the renewal of license of station KPRQ, IS DENIED.

25. IT IS FURTHER ORDERED, That the license renewal application for station KPRQ, filed by Murray Broadcasting Company, Inc., IS GRANTED.

26. IT IS FURTHER ORDERED, That the Mass Media Bureau of the Commission shall send, by Certified Mail, Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Frequency Allocation Rules
Interference, Cochannel
International Agreements

Commission reaffirmed grant of CP for AM station. Section 73.37(b)(2) of Commission's domestic allocation rules waived and international treaties not considered a bar to grant of construction permit.
–*Lares Broadcasting Corp.*
Docket No. 20969

FCC 82–233

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
LARES BROADCASTING CORPORATION
Lares, Puerto Rico
For Construction Permit

Docket No. 20969
File No. BP-20119

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983; Released: May 20, 1983)

BY THE COMMISSION:

1. Presently before the Commission is a proceeding originally involving the mutually exclusive applications of Radio Lares and Lares Broadcasters[1] who filed for construction permits for a new daytime only standard broadcast station to operate on 1200 kHz from Lares, Puerto Rico. When this case was designated for hearing on November 4, 1976,[2] the Commission was faced with the problem of possible mutual interference between the proposals of the competing applicants and a station operating in the Dominican Republic, HIBS, on the same clear channel, 1200 kHz frequency. The Commission then ruled that although interference from HIBS appeared likely, it would not reduce the Lares' "service area to an unsatisfactory level." In reaching this conclusion the Commission in effect waived Section 73.37(b)(2) of its rules.[3] At the same time it

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[1] On July 7, 1977 the two applicants were granted approval of their request to merge into Lares Broadcasting Corporation and the Radio Lares application was dismissed. *Lares Broadcasting Corp.*, FCC 77M-1193.

[2] *Radio Lares*, FCC 76–960, released November 4, 1976.

[3] Under Section 73.37(b) of the Commission's rules an application for a new daytime only standard broadcast station, which will be the first AM facility in the

conditioned grant of any construction permit on the resolution of interference that might be caused to HIBS, a situation governed by international agreement. The Commission at that time also recognized the probability that the Dominican Republic had failed to give notification of the operation of Station HIBS and that the United States had priority use of the 1200 kHz frequency, as set forth in the North American Regional Broadcasting Agreement (NARBA) to which the United States and the Dominican Republic were both signatories.[4]

2. In denying a petition for reconsideration of the designation order,[5] filed by Pepino Broadcasters, Inc. (hereinafter Pepino or WFBA), an intervenor and licensee of Station WFBA, San Sebastian, Puerto Rico,[6] the Commission reiterated its intent to permit a conditional grant. At that time the Commission ruled that "preliminary engineering studies suggested that the potential interference problem was not incompatible with our public interest responsibilities and could probably be eliminated through negotiations with the government of the Dominican Republic."

3. Thereafter the Administrative Law Judge approved an agreement between the competing applicants authorizing the merger of Radio Lares and Lares Broadcasters into Lares Broadcasting Corporation (hereinafter Lares or WGDL). At the same time the Administrative Law Judge also certified two questions to the Commission which were resolved favorably to Lares.[7] The second of these questions[8] queried whether grant of a construction permit must await the outcome of negotiations with the Dominican Republic,

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community of license, may be granted if there is no overlap between the 1 mV/m contour of the proposed facilities and the 0.05 mV/m contour of any co-channel station. Section 73.37(b) constitutes an exception to Section 73.37(a) and is designed to facilitate local AM broadcast service to as many communities as possible. *Report and Order on Amendment of Part 73 of the Commission's Rules*, 45 FCC 1515, 1524 (1964). Accordingly, the amount of permissible interference to be received by a new local AM station under 73.37(b) may be greater than that contemplated under Section 73.37(a). Since the Lares' station would be the first AM facility in its community, 73.37(b) is applicable to this case.

[4] NARBA is a regional agreement between contracting governments and is designed to minimize interference between the broadcast stations of signatory countries.

[5] *Radio Lares*, 63 FCC 2d 305 (1977).

[6] Pepino is a potential commercial competitor of the new Lares station but will suffer no electrical interference from that station. The license and assets of Pepino Broadcasters, Inc. were assigned to Mr. Luis Raul Perez-Perez effective February 28, 1982. Upon the death of Mr. Perez-Perez, Gloria Mendez vda. de Perez succeeded to the ownership rights of her husband. On March 29, 1982, Mrs. Mendez requested that she be substituted for Pepino Broadcasters, Inc. We see no impediment to granting Mrs. Mendez's unopposed request and we hereby authorize Mrs. Mendez to participate in this proceeding in lieu of Pepino Broadcasters, Inc.

[7] *Radio Lares*, FCC 77M-1193, released July 7, 1977.

[8] *Lares Broadcasting Corporation*, 69 FCC 2d 841 (1978), *reconsideration denied*, FCC 79-191, released April 10, 1979. The first question pertained to the meaning of the word "market" as used in the Commission's regional concentration of control rule

given the probable co-channel interference to and from Station HIBS. On this point the Commission reiterated its reliance on preliminary engineering reports indicating *de minimis* interference, the priority right to the use of the channel by the United States, and the lack of notification by the government of the Dominican Republic. Based on these considerations the Commission stated that "public interest factors already exist in this case warranting a waiver of Section 73.37(b)(2) regardless of the outcome of any negotiations with the Dominican Republic."

4. The presiding Administrative Law Judge subsequently granted a conditional construction permit to Lares and terminated this proceeding.[9] Pepino thereafter filed an appeal with the United States Court of Appeals for the District of Columbia Circuit, questioning whether the Commission acted properly in granting a construction permit before resolving all problems of co-channel interference.[10]

5. While preparing its brief in the case, counsel for the Commission discovered that the earlier referenced "preliminary engineering studies", were not part of the record. Accordingly, the Commission sought and was granted remand to address this deficiency.[11]

6. Upon further analysis the Commission thereafter issued a Memorandum Opinion and Order re-affirming its grant of a conditional construction permit to Lares.[12] Noting that the Dominican Republic was acting in contravention of the North American Regional Broadcasting Agreement (NARBA), by operating on a clear channel frequency allocated to the United States for priority use and by not giving the required notification of the operation of HIBS, the Commission held that this illegal operation should not be the basis for denying grant of a lawfully authorized station operating on the same frequency.[13]

7. Again the case returned to the exclusive jurisdiction of the court, with Pepino additionally seeking review of the Commission's

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(Section 73.35). Pepino later based its appeal to the Court on the Commission's resolution of these questions, *inter alia*.

[9] *Lares Broadcasting Corporation*, FCC 78M-1596, released October 27, 1978, *appeal denied*, FCC 79R-20, released May 14, 1979.

[10] *Pepino Broadcasting, Inc.* v. *FCC*, Case No. 79–1614 (D.C. Cir.), filed June 13, 1979.

[11] *Order* dated December 19, 1979.

[12] *Lares Broadcasting Corporation*, FCC 80–540, released September 22, 1980.

[13] "Where the only question concerning the operation of a proposed United States station arises from the existence of a foreign station which has failed to comply with the applicable provisions of NARBA, as is the case here, we believe that sound public policy warrants the waiver of Section 73.37(b)(2). Thus, whether or not negotiations ultimately render the interference question moot, it is clear that the operation of a domestic broadcast station should not be precluded because of interference emanating from a foreign station which is required under NARBA to afford protection to the dominant Class I-A station on that frequency and which is operating in contravention of that treaty obligation." (Footnote omitted). *Lares Broadcasting Corp.*, FCC 80–540, released September 22, 1980.

September 22, 1980 reaffirmation order as well. During preparation for the latest phase of the court appeal, Commission counsel discovered evidence outside the record of this proceeding suggesting that the Dominican Republic's notification of operation had in fact been sent and accepted.[14] Because of the impact this might have on the pending court case, the Commission again sought and was granted limited remand to investigate the question.[15] Accordingly, on September 1, 1981, the Commission issued an order[16] directing the parties to address the questions of whether HIBS was operating in violation of NARBA and the rights HIBS might have for protection against interference from the proposed new Lares station.[17]

8. While this case was pending, the United States was simultaneously involved in negotiating a new international treaty which would establish an overall spectrum allocation scheme among all the countries of North, Central and South America. To effectuate this scheme representatives of all interested countries convened at Rio de Janeiro, Brazil, for a Region 2 Conference held November 9, 1981 through December 19, 1981. The participating countries understood that the plan to be adopted at the Conference would replace NARBA, but that unresolved differences would still be handled through mutual negotiations between the affected countries. Since it appeared that the provisions of NARBA would no longer be governing, the Commission sought comments on what effect the tentative new international agreement might have on future negotiations and the probable consequences of any new agreement on the existing construction permit. While the responses[18] satisfactorily addressed

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[14] Notice was published in the Federal Register of August 11, 1976, 41 F.R. 33940 and read as follows: "Although not provided strictly in accordance with notification procedures, the Commission recognizes this as a valid notification."

[15] *Order*, dated July 28, 1981.

[16] *Lares Broadcasting Corp.*, FCC 81-402, released September 1, 1981.

[17] The specific question asked were as follows:

(a) Is HIBS now operating in violation of NARBA? If so, provide specific details concerning any engineering studies and other documentation supporting this conclusion.

(b) Does HIBS have a right under NARBA or otherwise to be protected against interference from the Lares proposal?

(c) Are negotiations with the Dominican Republic concerning this matter feasible and are they likely to result in resolution of the projected interference problem?

(d) Does the proposed Region II Conference have any impact on HIBS' present rights?

[18] On October 7, 1981 Lares and the Broadcast Bureau filed their respective responses, with the Broadcast Bureau filing on erratum on October 9, 1981. On November 9, 1981 Pepino Broadcasters, Inc. filed comments on the responses of Lares and the Bureau. Thereafter, Lares filed a reply to Pepino's comments on November 19, 1981.

the first two questions, they failed to provide sufficient insight into the effect of the tentative new agreement on this proceeding. The Commission's staff therefore solicited responses to twelve additional questions centering on the impact of the Agreement reached at the Region 2 Conference on the instant proceeding.[19]

9. Before addressing the question of whether a construction permit should be granted to Lares, it is important to note that the question of whether a proposed new domestic station will be receiving excessive interference from an existing foreign station is governed by the Commission's rules.[20] Conversely, the question of whether an existing foreign station will be receiving excessive interference from a proposed United States station is governed by international treaty.[21] This demarcation reflects an appreciation of the fact that our domestic allocation rules are not designed simply to protect existing domestic stations from interference caused by new proposals.[22] Those rules are also intended to insure that applicants for new stations do not propose a service that would be receiving destructive interference from an existing broadcast station, whether domestic or foreign. Accordingly, we must look to Section 73.37 of our rules to determine if WGDL will be receiving excessive interference from HIBS and to NARBA and its tentative successor to ascertain whether HIBS will be receiving interference in excess of limits prescribed by international treaty.

10. We address first the question whether our authorization of the Lares station would violate an international treaty by causing excessive interference to an existing foreign station, HIBS. An examination of the pleadings confirms that on June 28, 1976 the government of the Dominican Republic forwarded a letter to the United States containing certain information as to the operation of Station HIBS, San Pedro de Macoris, Dominican Republic on the 1200 kHz frequency. Although this letter failed to include all of the basic information required by NARBA, the Chief of the Broadcast Bureau caused to have published in the Federal Register a public

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[19] *Lares Broadcasting Corp.*, FCC 82I-31, released April 5, 1982.

[20] *See* C.F.R. §73.37 n.3; *AM Station Assignment Standards*, 4 RR 2d 1567, 1572-1573 (1965).

[21] *Id.*

[22] It has been the Commission's practice to enforce strictly Section 73.37 as it pertains to the question of protecting the broadcast signals of existing stations. *In re Application of ICBC Corporation*, 89 FCC 2d 447 (1982), appeal pending *sub nom. ICBC Corporation* v. *FCC*, D.C. Cir. No. 82-1342; *Major Market Stations, Inc.*, 4 Rad. Reg. (P&F) 2d 650, 651 (1965). A proposal for a new service which causes interference within a protected contour will in fact not even be accepted for filing. On the other hand, the Commission has shown a greater inclination to waive its rules in those situations where the only pertinent question is the amount of interference to be received by the new station. *See Newcastle Broadcasting Corp.*, 1 FCC 2d 1124 (1965).

notice acknowledging the operation of HIBS on 1200 kHz from the Dominican Republic.[23] The responses of the parties also reveal that on March 31, 1977 the Commission formally objected to the technical operation of Station HIBS and that the Dominican Republic never responded to this objection.

11. In light of the information contained in the parties' latest pleadings, we conclude that events subsequent to the receipt of the Dominican Republic's June 28, 1976 letter effectively nullified any claim that the Dominican Republic might otherwise have had to operate on 1200 kHz under NARBA. First, the government of the Dominican Republic failed to supply the required supplemental information,[24] including the antenna systems being used, although such information was to be filed no later than 60 days after submission of the required basic information.[25] This failure rendered the June 28, 1976 preliminary notification absolutely null and void.[26] Second, when the United States formally objected on March 31, 1977,[27] it was officially notifying the Dominican Republic that the technical operation of HIBS was unsatisfactory and incompatible with the terms of NARBA. By so acting the United States further negated its earlier response to HIBS' incomplete notification.

12. Besides not giving proper notification, the very operation of HIBS is in violation of NARBA. Under the terms of that agreement the United States is entitled to interference free operation on the 1200 kHz frequency.[28] Unchallenged engineering studies provided by the Broadcast Bureau[29] and Lares[30] both indicate that HIBS' signal

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[23] *See* note 14, *supra*.

[24] In light of subsequent deficiencies we need not address the question of the validity of the Dominican Republic's original "letter of notification."

[25] Supplementary information shall consist of the following: (1) call sign; (2) geographical location of the midpoint of the antenna system in degrees and minutes of latitude and longitude; and (3) additional information depending on whether a directional or omnidirectional antenna system is to be used. NARBA, Part III, Section F, para. 2(a)(2), Current Service RR 41:16.

[26] "Any . . . notification of a new broadcasting station assignment or of a change in an existing broadcasting station assignment shall cease to have any effect if, within the period specified [60 days] in paragraph 2 of this Section F, the supplementary information shall not have been supplied." *Id.* at Part III, Section F, para. 8(b). Current Service RR 41:20.

[27] A protesting country must file its objection within 30 days of the receipt of supplementary information or it will be deemed to have accepted the notification. *Id.* at Part III, Section F, paras. 7(c)-(e). When it became obvious that no supplementary information would be forthcoming, the United States took the added measure of protesting the operation of HIBS, notwithstanding the Dominican Republic's failure to provide proper notice. Letter dated March 31, 1977 from the Chief of the Broadcast Bureau to the Director General of Telecommunications, Dominican Republic. Bureau's October 7, 1981 Response, Attachment 4.

[28] The 1200 kHz frequency is a designated United States Class I-A clear channel station under NARBA.

[29] Bureau Response, Attachment 2. This engineering report, dated August 11, 1976

is penetrating the border of the continental United States in violation of NARBA. For notification to be valid, the new broadcast station must be in accordance with the Agreement.[31]

13. Looking at the first two questions we thus reach the conclusion that HIBS is operating in violation of NARBA, that under NARBA HIBS is therefore not entitled to protection against interference from the Lares proposal, and that the Lares application can be granted. In sum, the Dominican Republic has failed to supply supplementary information needed to perfect its preliminary, conditional notification; it continues to broadcast a signal penetrating the border of the continental United States in contravention of NARBA; it has filed no formal objection to the valid notification of the Lares proposal; and it has not responded to the formal objection lodged by the United States on March 31, 1977.

14. Having concluded that Lares is not precluded from grant of a construction permit under NARBA, because of interference that might be caused to HIBS, two primary questions remain for consideration on this point. First, is NARBA still in effect and thus controlling? Second, if NARBA is no longer the governing treaty, can a construction permit still be granted under the new international agreement emerging from the Region 2 Administrative Conference? Previously released Commission Orders indicate that during the transition period necessary to implement the Region 2 Plan the provisions of NARBA will continue to apply to its signatories.[32] At the same time the Commission has stated its intent to conform with the procedures and protection standards contained in the Final Acts, as they pertain to interference caused to a foreign station.[33] Accordingly, an applicant such as WGDL must be able to satisfy the requirements of both international agreements. To this end we have already concluded that WGDL may be granted a construction permit under NARBA. Assuming that under the new Region 2 Agreement HIBS will be a ligitimately operating station, the question then becomes whether this change in status compels a different conclusion. In considering this question it will be helpful to review the

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was based on the skeletal information provided by the Dominican Republic in its June 28, 1976 "notification," and shows that from the very beginning the Commission expressed concern over the deficiencies in the technical operations of HIBS.

[30] Lares' October 7, 1981 Response, Attachment B.

[31] NARBA, Part III, Section F, para. 7(b), Current Service RR 41:19.

[32] *The Administrative Conference for AM/Broadcasting in Region 2, Fourth Report (Fourth Report)*, FCC 82–93, Attachment 1 (*Report of the United States Delegation*, p.2 n.2, released March 10, 1982. See also Public Notice, FCC 82–230, released May 18, 1982, where the Commission set forth the applicable protection standards governing the respective rights between neighboring countries.

[33] *Id.* The Final Acts adopted at the Region 2 Conference comprise a Regional Agreement and its various annexes, including a Regional Plan (Annex 1) and technical criteria (Annex 2), and several Resolutions and Recommendations pertaining to post-conference procedures. *Fourth Report*, pp. 1-3.

parties' submissions concerning the degree of interference HIBS would be receiving and whether this amount is excessive under the new agreement and hence a bar to the Lares application.

15. As already noted, the Region 2 Agreement is the product of negotiations spanning the last seven years[34] and involves potentially all the countries of the Western Hemisphere.[35] Its purpose is to establish a hemisphere-wide spectrum allocation scheme for reciprocal protection of each country's AM services. One major objective of the Rio de Janeiro conference was to identify those radio stations receiving or causing no objectionable interference. Two lists of stations were prepared. Those stations placed on List A were purportedly receiving or causing no unacceptable interference while List B encompassed stations with interference problems. At the end of the Conference numerous interference problems between many countries remained outstanding. Mechanisms were thus set up to resolve these questions and to permit verification and correction of the lists, as modified during the course of the Conference. As of the conclusion of the Region 2 Conference, HIBS was on List A and WGDL was on List B.

16. Any significance attached to being on either List A or B must be considered, however, in light of the tentative nature of those lists. It should be noted initially that the specification of stations on List A is subject to verification and challenge. In this regard studies of daytime interference had not been conducted by the time of the Conference and thus this factor was not considered in the preparation of Lists A and B. The amount of acceptable and unacceptable interference caused and received by HIBS and WGDL has accordingly yet to be assessed.

17. Although no engineering studies of daytime interference were completed at the Region 2 Conference, unchallenged engineering studies submitted by Lares show that the interference to be received by HIBS "occurs approximately 37 miles from HIBS, near the southeastern tip of the Dominican Republic,"[36] with the total area of interference being approximately 38 square miles. Thus, while there may be some interference to the HIBS signal, under the circumstances of this case it appears insignificant and subject to modification following negotiations between the two countries. If this minimal amount of interference is in fact considered objectionable by the Dominican Republic, that country can seek recourse under the Region 2 Agreement to resolve any problems.[37] To date,

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[34] Planning for the Region 2 Conference was begun in November 1975 by the Inter-American Telecommunications Conference (CITEL), which is responsible for coordinating inter-American telecommunications matters.

[35] Region 2 countries consist of those found in North, Central and South America, the Caribbean, Greenland, Hawaii and various small islands in the Atlantic and Pacific Oceans. *Fourth Report*, Attachment 1, p.2 n.2.

[36] Response of Lares Broadcast Corporation, Appendix 1, p.2, filed June 29, 1982.

the Dominican Republic has raised no formal objection to the potential operation of WGDL. We therefore conclude that grant of the Lares application is not precluded by the new Region 2 Agreement under the circumstances reflected here.[38] Moreover, since this agreement does not govern the question of the amount of overlap that can be received by WGDL, a question left to our domestic rules, the new agreement does not stand as an impediment to a grant of the Lares application.

18. We turn now to the question of whether the Lares station would receive excessive interference from HIBS under our Rule 73.37(b)(2) and, if so, whether that rule should be waived. In view of our responsibility to promote the most efficient use of the broadcast spectrum available to the United States, it would ordinarily be important that we determine, prior to authorization, the degree of interference which will be received by a proposed service. However, unless a construction permit is first granted we may never reach this question under the unique situation presented here.

19. Under the circumstances of this case it would be unreasonable to expect the government of the Dominican Republic to enter into negotiations with the United States unless its domestic radio stations were actually receiving interference from an operating United States station. At the same time it is equally unreasonable to expect the Lares applicant to bear the expense and trouble of constructing a radio station without a reasonable assurance that it will be granted a license to operate that station in the future. Our approach to this dilemma was to waive Section 73.37(b)(2) so that a construction permit could be granted. We recognize that this waiver was made without first determining the precise degree of signal

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[37] If any problems should arise, we are confident they can be resolved through negotiation and, if necessary, modification of WGDL's facility. As explained in the attachment (*Report of the United States Delegation*) to the *Fourth Report*, "resolution of incompatibilities will depend on the results of . . . negotiations." p. 32. Indeed, this has been the Commission's position since the designation order issued and the original grant was made to Lares. More specifically, in its Designation Order the Commission included the following language:

> [Any] grant is subject to acceptance of any interference that may be caused by operation of station HIBS at San Pedro de Macoris, Dominican Republic, on 1200 kHz and the technical facilities authorized herein may be modified in any manner as may be appropriate after discussion with the Dominican Republic.

[38] In passing we note that under the Region 2 Agreement WGDL was denominated operational as of January 1, 1982 and therefore does not fall under the proscription of paragraph 12 of Annex 2, Resolution COM 4/1 which provides: "A planned station in List B may be put into operation unless it causes unaccepted interference to a station which was in operation as of January 1, 1982." Final Acts of the Regional Administrative MF Broadcasting Conference (Region 2). WFBA complains that the listing was based on a fiction since WGDL is not in reality operational. However, we cannot ignore the practical effect of the unopposed listing. In view of this listing and the other factors described above, the Final Acts do not serve as a bar to our reaffirmation of the grant to Lares.

overlap. Yet, countervailing public interest benefits justified waiver. Foremost, the applicant would be providing the first aural broadcast facility licensed to Lares, Puerto Rico.[39] Secondly, protection of our rights under international treaty must override mechanical application of our domestic allocation rules. In this regard, the ability of the United States to protect its interests under international law would be seriously undermined if we were to stand idly by and allow any country to unilaterally violate governing treaty provisions.[40] Accordingly, it is imperative that this agency adopt that position most consistent with our rights under existing treaties, even though the effect is to reduce the emphasis ordinarily placed on our domestic allocation rules.[41] By the same token it appears that the preclusive effect, if any, may be greatly ameliorated following negotiations and technical modifications.[42] Thus, there appears little reason to preclude grant on the basis of a rule that Lares may hereafter be able to satisfy.

20. In conclusion we believe it would be contrary to the public interest to foreclose an otherwise qualified applicant from an opportunity to obtain a construction permit and ultimately a license because of the improper operation of a non-protesting foreign station.[43] For these reasons we feel that waiver of Section 73.37(b)(2) which presupposes that the source of interference emanates from a legitimately operating station, is warranted.[44] Having examined the situation from all relevant perspectives we again reach the conclusion that a construction permit was properly granted to Lares

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[39] Application of Radio Lares for a construction permit for a new broadcast station in Lares, Puerto Rico, filed June 30, 1975, Exhibit 5.

[40] The United States has long ago objected to the unauthorized operation of HIBS on the 1200 kHz frequency. As we have repeatedly stated, the unlawful status of HIBS is a relevant factor, *inter alia*, for us to take into account in deciding whether a waiver of our "interference received" rule is appropriate. Similarly, as already mentioned, under NARBA the United States has a priority right to the use of 1200 kHz and the Dominican Republic has failed to comply with the notification requirements of that treaty.

[41] The existence of the new Region 2 Agreement does nothing to undermine the rationale for granting a construction permit to the Lares application because of past treaty infractions. We reached our determination on the basis of nonconformity with international treaty. Thus, although the governing treaty may have changed, the basis for our action remains valid.

[42] Intervenor Pepino previously predicted that the prohibited overlap received by Lares from HIBS might cover as much as 35% of the area and 33% of the population falling within the protected 0.5 mv/m contour of the applicant. Petition for Reconsideration or, In the Alternative, Petition for Leave to Intervene, filed December 4, 1976, Engineering Statement, p. 4.

[43] *Cf. Newcastle Broadcasting Corp.*, 1 FCC 2d 1124 (1965), *rev'd. on other grounds*, 11 FCC 2d 523 (1968).

[44] Compare *Arroyo Broadcasting, Inc.*, 49 FCC 2d 578 (1974), where waiver was denied when the originator of the interference was not a NARBA signatory; and *Golden Gate Corp. (WHIM)*, 6 FCC 2d 825 (1967), where waiver was denied in the absence of sound public interest justification.

Broadcasting Corporation and that the Commission's action remains fully viable.

21. ACCORDINGLY, IT IS ORDERED, That the previous determination in this proceeding granting the application of Lares Broadcasting Corporation for a construction permit for a new commercial standard broadcast station to operate on the 1200 kHz frequency at Lares, Puerto Rico, IS REAFFIRMED.

22. IT IS FURTHER ORDERED, That the Petition for Substitution filed April 1, 1982 by Gloria Mendez vda. de Perez IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Specialized Services
Inquiry by FCC
Wide Area Telephone Services (WATS)

> Rules adopted for computation and assessment of end user and carrier's carrier access charges and the creation of an exchange carrier association to prepare access charge tariffs and distribute pooled access charge revenues.
> –*MTS/WATS Market Structure*
> CC Docket No. 78–72

FCC 83–252

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MTS and WATS Market Structure	CC Docket No. 78–72, Phase I

SUPPLEMENTAL ORDER

(Adopted May 26, 1983 Released: May 31, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSIONER SHARP ABSENT.

1. In the *Third Report and Order* in this docket, FCC 82–579, released February 28, 1983, we established a system of access charges through which telephone companies will after January 1, 1984, receive compensation for the use of their facilities to complete interstate and foreign telecommunications. Recognizing that after that date AT&T should no longer perform its traditional role of tariff filing agent and administrator of revenue pools associated with interstate services provided by local carriers, we also mandated the creation of an exchange carrier association to assume the task of preparing and filing access charge tariffs and administering the revenue pools created by these tariffs. We concluded that membership in the association would be limited to telephone companies participating in the access charge revenue pools and that the association's governing board should be composed exclusively of representatives from these companies. In order to assure appropriate representation for different classes of carriers, we decided that a rule defining the board's membership was needed. We recognized, however, that we could not appropriately prescribe a rule to achieve

this result until we knew which carriers would choose to participate at least during 1984 in the voluntary common tariff arrangements permitted by the *Access Charge Order*.[1] With that information available, we are now prepared to prescribe the rule that will define the composition of the association's board of directors. We also take this opportunity to prescribe the steps that must be taken to elect the association's first board of directors and to perform other preliminary organizational activities.

I. *The Structure of the Association's Board of Directors*

2. In the *Third Report and Order* we established two groups of access elements for which exchange carriers might enter into a voluntary common tariff arrangement with associated voluntary revenue pools. The first group comprised the three access elements charged to end users: dedicated access line; pay telephone and end user common line, while the second included the "traffic sensitive" access elements charged to interexchange carriers: line termination; local switching; intercept; information; operator assistance; common transport; dedicated transport; special access; and billing and collection. In addition we required all exchange carriers to enter into a mandatory common tariff arrangement and revenue pool in order to recover certain non traffic sensitive costs.

3. We created the exchange carrier association to prepare and file these tariffs and to administer and distribute the three associated revenue pools. Recognizing that there was insufficient time for the association to prepare the initial access service tariffs, which must be filed by October 3, 1983, we ordered AT&T to prepare and file these tariffs. As the first step in this process, we required all exchange carriers to notify AT&T by April 9, 1983, of their decision to file tariffs separate from the association tariffs for 1984. We also required that AT&T provide periodic progress reports to us until it files the initial tariffs.

4. On April 25, 1983, AT&T filed its first progress report. That report indicated that 1202 independent telephone companies had chosen to join both voluntary pools created in the *Access Charge Order*, 47 independents and 10 Bell Operating Companies (BOCs) chose to join only the voluntary pool for carrier traffic sensitive access charges, while four independent telephone companies chose to join only the voluntary pool related to end user access charges. The remaining carriers that responded to the letter, 11 BOCs and 83 independent telephone companies, plan to file separate tariffs for all voluntary elements.

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[1] At that time we expressed our intent to issue the rule without soliciting additional comment since we had already sought and received comment on the structure of the association's governing board in response to our Fourth Supplemental Notice of Inquiry and Proposed Rulemaking in this docket, 90 FCC 2d 135 (1982) ("Fourth Supplemental Notice"). See *Access Charge Order* at n. 117.

5. With this information we believe that we can now act to define the membership of the association's governing board so that the board's composition initially reflects and over time continues to reflect the relative interest of different classes of carriers in the association's tariff-related activities. Accordingly, we now prescribe the following rule to define the composition of the exchange carrier association's board of directors:

69.602. Board of directors.

(a) For purposes of this section, the association membership shall be divided into three subsets:

(1) The first subset shall consist of all the Bell System Operating Companies other than Cincinnati Bell Inc. and Southern New England Telephone Company;

(2) The second subset shall consist of all other telephone companies with annual operating revenues in excess of forty million dollars;

(3) The third subset shall consist of all other telephone companies.

All commonly controlled companies shall be deemed to be one company for purposes of this section.

(b) There shall be fifteen directors of the association.

(c) In 1984 and 1985, five directors shall represent the first subset, three directors shall represent the second subset and seven directors shall represent the third subset.

(d) In 1986 and 1987, four directors shall represent the first subset, three directors shall represent the second subset and eight directors shall represent the third subset.

(e) In 1988 and thereafter, six directors shall represent the first and the second subset jointly and nine directors shall represent the third subset.

(f) Each subset shall select the directors who will represent it through an annual election in which each member of the subset shall be entitled to vote for the number of directors that will represent such members subset.

(g) For each access element or group of access elements for which voluntary pooling is permitted, there shall be a committee composed only of directors from companies participating in the pooling for that element or group of access elements. Each such committee shall be responsible for the preparation of charges for the associated access elements that comply with all applicable sections of this Part.

(h) Directors shall serve for a term of one year commencing January 1 except that the initial directors shall serve from the time of election until December 3, 1984.

6. We had first raised the issue of the board's composition in the *Fourth Supplemental Notice*. In its comments responding to that *Notice*, the Rural Telephone Coalition (RTC) had presented a detailed proposal for the governing board's structure. *See* RTC's Comments at pp. 52–56. The rule we now adopt incorporates several features of that proposal and, insofar as that rule departs from RTC's plan, we believe that the board members selected in accordance with

the rule's requirements will more accurately reflect and will be more responsive to the concerns of the companies they represent. For example, the rule we adopt today creates categories of exchange carriers based upon annual operating revenue rather than number of telephones because, as deregulation of customer premises equipment continues, the ability of a local telephone company to know the number of telephones in its system will diminish. We believe that because there is a correlation between the number of lines a carrier provides and its operating revenues, the latter is an equally reasonable basis for categorizing carriers as "large" or "small." The rule also creates fewer classes of carriers than the RTC proposal. The rule recognizes, however, that while in 1984 and 1985 the larger companies will rely upon the mandatory revenue pool to recover a substantial part of their non-traffic sensitive costs, over time because the share they will recover through the pool will drop significantly, their relative interest in the association's tariffing activities will diminish in comparison to the interest of smaller companies generally, and those with high costs particularly. The rule accomplishes this by gradually reducing the representation of the larger carriers and concomitantly increasing the representation of the smaller carriers on the board. The rule also recognizes that the telephone companies choosing to enter the common tariff arrangements for the end user or the traffic sensitive access element groups share a common interest in the rate structure of the association's tariff for these elements, and that this interest is not necessarily based on a carrier's size. Accordingly the rule assigns responsibility for developing the charges for each of these groups to a committee whose membership is restricted to board members whose companies have chosen to join the common tariff to be filed for that group of elements.

7. We recognize that future developments that cannot be predicted with certainty at this time may require adjustments in the 1986–1987 or the 1988 and after formula and expect to institute proceedings at an appropriate time to consider revisions. We may also elect to designate separate representation for carriers that do or do not receive Universal Service Fund distributions at a later date. It would not be feasible to create such categories at this time because we do not have sufficient information to devise a suitable formula and this Commission has not yet received the Joint Board's Recommendations in CC Docket No. 80–286.

II. *Election of the First Board of Directors and Other Organizational Activities*

8. Once the exchange carrier association is organized, the association will conduct annual elections to select board members in accordance with the rule we adopt today. Because it will be the 1984 board members who, in fact, organize the association, the association

itself clearly cannot conduct the election of this first governing board.

9. We have been advised that USITA, the Bell Operating Companies and the Rural Telephone Coalition have formed an industry committee to advise AT&T on the development of the exchange carrier association's initial tariffs and to perform steps preliminary to the association's organization. In particular, the committee has offered to conduct and supervise the election of the association's first board of directors. The letter, dated May 9, 1983, in which the committee makes this offer is attached as an appendix to this *Order*. The alternatives to having the committee conduct the election are to order AT&T to hold the elections or for the Commission itself to conduct the election. Neither of these alternatives is preferable to having the committee conduct the election. The committee already represents the interests of all segments of the telephone industry and has the resources at its disposal to undertake this formidable task. We shall therefore authorize and direct this industry committee to conduct the election of the association's 1984 board of directors. This election should be held as soon as possible in order to create a board that can provide some policy guidance in the formulation of the initial tariffs.

10. In the election process, each carrier shall be entitled to vote for the number of directors allotted to its subset. For example, a carrier that had revenues in excess of forty million dollars in 1982 and that is not a divested BOC may vote for three different persons as association directors. Such a carrier could not cast more than one vote for any one candidate.

11. In its May 9 letter the industry committee also states that it will be necessary to perform other activities of the type described in that letter at this time. The creation of a functioning organization that will be able to perform all association functions on January 1 is, of course, essential to the success of the access charge plan. It is also desirable that representatives of independent telephone companies provide advice to AT&T in the early development of the initial access charge tariffs. In view of the time that will be required to elect the initial directors, we have concluded that the industry committee should also be authorized and directed to perform the type of activities described in the May 9 letter until the initial board of directors has been elected.

III. *Ordering Clause*

12. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. §§154(i) and (j) and 203, Section 69.602 IS ADDED to Part 69 of the Rules of this Commission as set forth in this Order, effective on the date following publication in the *Federal Register*.

13. IT IS FURTHER ORDERED That the industry committee described in the Appendix to this Supplemental Order is authorized

and directed to conduct an election to select the initial association directors and to perform other association activities of the type described in such Appendix until the initial directors have been elected.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

May 9, 1983

Mr. Gary M. Epstein, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Epstein:

Part 69, Subpart G of the FCC's Rules (adopted December 22, 1982) mandates the creation of an Exchange Carrier Association (ECA). This association will prepare and file access charge tariffs, as well as collect and distribute related revenues, on behalf of all telephone companies that participate in the Association. This letter is intended to inform the Commission of industry activities in this regard, as well as to seek counsel and/or action on matters of concern to the industry.

The Commission noted that the task of preparing and filing complex ECA access charge tariffs is formidable, particularly since such tariffs must be acceptable to all industry participants and at the same time be in compliance with the Commission's Rules. The Commission recognized that the ECA could not be created in sufficient time to prepare the initial common access charge tariffs, and accordingly required AT&T to file such tariffs on behalf of the telephone industry and report its activities in connection with access tariff preparations (paragraphs 371 and 372, FCC Third Report and Order, CC Docket No. 78-72). The FCC rendered findings that a "common tariff arrangement that most of the exchange carriers can use is clearly necessary to make any access charge rules work" and that "such arrangements would, therefore, presumably be immune from anti-trust sanctions because they are necessary to make the regulatory scheme work—" (pp. 95-96). It necessarily follows that once the ECA is established, its activities pursuant to the FCC's order would be immune from anti-trust sanctions.

If the Commission's access charge plan is to be fully functioning beginning on January 1, 1984, a significant amount of work must be done in 1983 in addition to the initial development and filing of tariffs. An ECA organizational structure must be developed and the work functions, job descriptions and personnel skill requirements specified. All of the operational plans and data systems necessary to administer tariffs and collect and disburse revenues associated with each of the access charge pools must be designed and tested, and contracts governing the relationship between the ECA and each member company have to be developed and consummated. These pool administration methods, to the greatest extent possible, should be developed by the same people who will have to make them work in 1984. Staffing policies have to be created and implemented, and the people possessing requisite skills must be identified and recruited. Office space, equipment, and furniture has to be procured. Questions which relate to people's personal lives such as work location, salary schedules, pensions and other benefits all must be resolved. Legal questions concerning issues like incorporation, tax status and insurance must be also addressed.

It is clear that if the ECA is to be operational by January 1, 1984, work on these preparatory activities cannot be delayed—in fact some initiatives in this regard have been taken by the industry and work has begun. Specifically, pending the Commission's supplemental order, the telephone industry has established an ECA Ad Hoc Committee (see attached list of members) to provide advice and support to AT&T's data collection and tariff development activities, as well as to begin the many administrative and operational activities essential to the creation of the ECA.

The members of the ECA Ad Hoc Committee believe that all of their activities have been in support of the tasks that the Commission has mandated for AT&T and the ECA. In addition, the Committee stands ready to provide the Commission with any assistance it may request in the formation of the ECA or its Board of Advisors. However, recognizing the Commission's admonition at Paragraph 344 the Ad Hoc Committee will not engage, "in activities that are not directly related to the preparation of access charge tariffs or the distribution of access charge revenues unless such additional activities are expressly authorized by . . . [the] Commission."

We would be happy to discuss the nature of our activities further, or answer any questions you may have. However, because of the urgent need to move forward with the preparatory activities we have described above we will assume that our course of action has your concurrence unless we hear otherwise.

A. Gray Collins, Jr.
Vice President - Access Tariffs
Central Services Organization:
On Behalf of the ECA
Ad Hoc Committee

Attachment

ECA Ad Hoc Committee Members

Representation from the USITA Member Companies:

J. Naset: General Telephone and Electronics Corp.

B. J. Boritzki: United Telephone Systems, Inc.

W. B. French: Shenandoah Telephone Co.

Representing the Rural Coalition (NTCA, OPASTCO, NREATA):

D. Cosson: NTCA

E. Copsey: Fidelity Telephone Co.

Representation from the Regional Bell Operating Companies:

T. R. Glenn: Midwest and Far West Regions

B. W. Baldwin: Northeast and Mid-Atlantic Regions

C. Perkins, Jr.: Southeast and US West Regions

R. A. Harris: Southwest Region

Dissenting Statement
of
Commissioner Anne P. Jones

In Re: In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I (Exchange Carrier Association)

An essential component of the Commission's access charge plan adopted in the *Third Report and Order* in this docket last December was the Exchange Carrier Association (ECA). In effect, the ECA will replace the traditional industry mechanism of settlements and division of revenues administered by AT&T. In many respects, the ECA replicates in form and function the existing mechanism for pooling and distributing industry revenues among local exchange carriers. So long as rate averaging and arbitrary jurisdictional cost allocation remain attributes of the structure of the telephone industry, some mechanism for revenue pooling is necessary.

My objection to the ECA, both in December and now, is that such an organization is both inconsistent with and inimical to the development of a competitive telecommunications industry. As I said last December, "I object to the creation of the ECA and question the Commission's authority to mandate the existence of such an organization. As a matter of public policy, the ECA is unnecessary since pooling is unnecessary. . . . I fear, however, that the ECA organization contemplated by the Commission's [access charge plan] will prove a hazard to telecommunications competition."[1] My views on the ECA in December are unchanged today, and as a matter of policy and principle I cannot support the *Supplemental Order* presently before the Commission that defines the composition of the ECA's board of directors.

The existing industry settlements and division of revenue process and its successor, the ECA, are institutions consistent with a closed-entry, regulated monopoly industry. They are inherently mechanisms for industry cooperation and potential collusion, not vigorous competition. I think the Commission should realize that regulatory policy that attempts to preserve traditional industry practices may seriously impede the ongoing evolution of a telecommunications industry that is destined to be competitive. In a sense, the creation of the ECA reflects a certain hesitancy by the Commission to accept the full implications and consequences of its pro-competitive policies. The day is long past, however, for the Commission to second-guess the wisdom of its pro-competitive decisions. I am confident that competition is the proper foundation of our policies toward the telephone industry. Thus, the Commission should move ahead with its pro-competitive agenda, not linger over the past.

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[1] Separate Statement of Commissioner Anne P. Jones Concurring and Dissenting in Part *In Re*: MTS and WATS Market Structure, CC Docket 78-72, Phase I, April 4, 1983, pp. 42-43.

In my view, the ECA is a vestige of the past and an impediment to the future. I can support neither the ECA in concept nor rules governing its organization. Therefore, I respectfully dissent from the Commission's decision to adopt rules for the establishment and management of the ECA.

CATV Carriage, Significant Viewing Test
Declaratory Ruling

Granted in part request of television broadcast station to be declared significantly viewed. Station met test levels in seven counties in 1976, but no longer meets levels in one county today. *–Octagon B/cing Co.*

FCC 83–308

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
OCTAGON BROADCASTING COMPANY Petition for Special Relief	CSR-2209

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983 Released: July 19, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. On September 13, 1982, Octagon Broadcasting Company (hereinafter "WMBB"), licensee of Television Broadcast Station WMBB (ABC, Channel 13), Panama City, Florida, filed a "Petition for Declaratory Ruling" seeking to be declared significantly viewed in the following counties: Dale, Geneva, and Houston, Alabama; Gadsden, Jackson, and Leon, Florida; and Decatur, Georgia. WMBB's petition is opposed by Allen Communications, Inc. (hereinafter "WECA"), licensee of Television Broadcast Station WECA (ABC, Channel 27), Tallahassee, Florida, and by Southeast Alabama Broadcasting Company, Inc. (hereinafter "WDHN"), licensee of Television Broadcast Station WDHN (ABC, Channel 18), Dothan, Alabama. WMBB has replied.

2. In support of its petition, WMBB states that it became operational (as Television Broadcast Station WDTB) on October 4, 1973, which was after the surveys used to establish the Commission's list of significantly viewed signals in the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 378–463 app. B (1972). Accordingly, pursuant to Section 76.54(d) of the Commission's Rules, WMBB may utilize county-wide data to establish its status as significantly viewed, provided that such data is from the station's first three years of operations. WMBB submits Arbitron data from 1976, which reveals that WMBB achieved the following levels of viewing:

County	*Total County Share of Viewing*	*Total Net Weekly Circulation*
Dale, AL	4%	35%
Geneva, AL	7%	58%
Houstan, AL	10%	56%
Gadsden, FL	15%	76%
Jackson, FL	19%	84%
Leon, FL	14%	56%
Decatur, GA	6%	37%

Section 76.5(k) of the Rules defines a significantly viewed network affiliate as one which achieves in noncable households "a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent. . . ." Based on the above data, WMBB seeks to be declared significantly viewed in the referenced counties.

3. WECA opposed WMBB's petition on November 12, 1982, and supplemented this opposition on November 16, 1982.[1] WECA argues that Panama City, WMBB's city of license, is a separate market from both Tallahassee, Florida,[2] and Dothan, Alabama, yet WMBB seeks to require its carriage on cable systems in those latter markets. In addition, notes WECA, WMBB would be entitled, as a significantly viewed signal, to receive "full, undeleted carriage of all its programming, network and non-network," even though WECA currently receives network program nonduplication protection on cable systems in the affected counties. WECA contends that this protection is particularly vital for its survival in Tallahassee, whose cable system serves approximately 30,000 subscribers, which constitute about 20 percent of the homes in the Tallahassee Area of Dominant Influence (ADI). WECA contends that its local competitor, Station WCTV (CBS, Channel 6), Tallahassee, Florida, does not suffer from network program duplications. WECA asserts that it "has never made an operating profit in its six years of operation," and that WMBB seeks to create "an unnatural competitive situation. . . ." WECA states that in 1980–1981 it endured duplication of its network programs on the Tallahassee cable system, when Station WJHG-TV (NBC, Channel 7), Panama City, Florida, was an ABC affiliate. During this period, argues WECA, the station suffered a revenue loss, and also lost at least four advertisers to WCTV, whose programming was not duplicated. WECA maintains that marketplace forces — which are defied by the significant viewing rules — should be allowed to work undisturbed, and that the public would lose much and gain nothing from granting WMBB significantly viewed status.

4. WECA states that, while WMBB's data is technically in

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[1] WMBB did not serve its petition on parties until October 13, 1982.

[2] WECA notes that Panama City is 85 air miles from Tallahassee, and over 100 miles distant by available highways.

compliance with Section 76.54(d) of the Rules, WECA was not on the air at the time of WMBB's survey data, nor was WMBB itself on the air when the Tallahassee system gained most of its current subscribership level. WECA estimates that it will lose 5 to 10 percent of its gross revenues if WMBB's petition is granted, and states that WECA has been able to hold its annual expense increases to between 4 and 6 percent for the past three years. WECA projects that its losses would force it: (1) to fire two persons hired to work on its daily public affairs show "A. M. Tallahassee," and perhaps to drop the program entirely; (2) to fire two persons doing general production work; and (3) to fire two or three members of the news staff and to restrict news coverage to metropolitan Tallahassee. Citing *KDUB-TV, Inc.* (Dubuque, Iowa), FCC 81–530, 88 FCC 2d 450 (1981), *recon. denied*, FCC 82–182, 89 FCC 2d 994 (1982), and *Desert Empire Television Corporation*, FCC 82–471, 52 RR 2d 798 (1982), WECA claims that it is entitled to retain nonduplication protection, and that pending rulemakings and legislative proposals should be resolved prior to ruling on WMBB's petition.

5. WDHN opposed WMBB's petition on November 12, 1982. WDHN contends that WMBB's data is out-of-date and unreliable, because of WMBB's 1982 affiliation change from NBC to ABC, and because of population shifts in the affected counties. WDHN submits the following population data:

County	*1970 Population*	*1980 Population*	*% Change*
Dale, AL	52,995	47,821	−9.8
Geneva, AL	21,924	24,293	+10.6
Houston, AL	56,574	74,632	+31.9
Gadsden, FL	39,184	41,565	+6.1
Jackson, FL	34,434	39,154	+13.7
Leon, FL	103,047	148,655	+44.3
Decatur, GA	22,310	25,496	+14.3

Citing the *Report and Order in Docket No. 20371*, FCC 75–1145, 56 FCC 2d 265, 269 (1975), WDHN contends that WMBB's data is unreasonably out-of-date and is no longer reliable.

6. WMBB replied to WECA and WDHN on December 2, 1982. WMBB contends that WECA's arguments merely echo those made by the station in the "Petition for Rulemaking" (RM-3745) filed in 1980 by the Smaller Market UHF Television Stations Group, to which WECA belongs, and are irrelevant to WMBB's demonstrated viewership levels. Citing the *Memorandum Opinion and Order in Docket No. 19995*, FCC 78–217, 67 FCC 2d 1303 (1978), *recon. denied*, FCC 78–597, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. FCC*, 619 F.2d 314 (4th Cir. 1980), WMBB argues that significantly viewed signals are local signals, and that the nonduplication rules are not designed to protect network affiliates from competition from stations affiliated with other networks. WMBB notes that WECA concedes that WMBB's data

meets the Commission's requirements, and argues that its levels of viewing are in part due to Tallahassee viewers. WMBB notes that *Docket No. 20371, supra*, mandates the use of data from a station's first three years of operations, and that this data has been publicly available for years. WMBB denies that it must make a showing that its petition is in the public interest, because a significantly viewed signal is in fact a local signal, citing the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143 (1972). WMBB argues that WECA's opposition contains none of the factual evidence required by *KDUB-TV, Inc., supra*, and maintains that pending administrative and legislative proposals should not deter action on the instant petition.[3]

7. In order to be declared a significantly viewed signal in a particular county, WMBB must have achieved, during the first three years of its operation (*i.e.*, between October 1973 and October 1976), at least a 3 percent share of total week viewing hours and at least a 25 percent net weekly circulation. According to the data submitted, WMBB did so in each of the counties in question. The concerns raised by WDHN concerning population shifts do not affect this conclusion. WMBB must achieve a percentage of viewing, which ordinarily will not be affected by changes in total population. With regard to WDHN's allegations concerning the effect of WMBB's affiliation change, we note that the criteria for significant viewing status which the station must meet are sufficiently low to represent the signal's availability rather than its popularity. Additionally, the three major networks nationwide generally achieve similar viewing levels, and in fact WMBB remains significantly viewed in most cases (*see*note 4, *infra*.) WECA's concerns based upon Panama City's distance from Tallahassee are equally unavailing. If WMBB's signal is available beyond its city of license at the required level of viewing, it is therefore significantly viewed. To rule otherwise would be disruptive of the competitive marketplace forces WECA argues are at stake in this case. Nor does WECA offer any factual data to substantiate its hypothesized financial difficulties should WMBB's petition be granted. While WECA notes that it once before experienced a loss of non-duplication protection vis-a-vis a competing affiliate of the same network, WECA does not submit the detailed audience and financial analysis that led the Commission to grant

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[3] In addition, WECA filed an unauthorized and untimely pleading on June 28, 1983, one day prior to this item's consideration, reiterating its earlier argument (*see*paragraph 4, *supra*) that action on the instant petition be deferred, citing in addition *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983), and also noting the pendency of the July 1983 audience ratings period. WMBB opposed WECA's filing that same day. WECA offers no justification for the filing of its unauthorized pleading, nor explains why it could not have filed its pleading earlier. Furthermore, in view of our analysis herein (*see*paragraph 8, *intra*), we see no reason to postpone action today based on the pendency of future surveys. Consequently, WECA's request will be denied.

relief in both *KDUB-TV, Inc.*, *supra*, and *Desert Empire Television Corporation*, *supra*. Barring a showing of need for regulatory intervention, we see no reason why a signal significantly viewed and readily available over the air should not be carried by a local cable television system.

8. At the same time, we are aware that WMBB's data is some seven years old. During these years, certain shifts in viewing levels have occurred. While these shifts have not generally affected WMBB's status as significantly viewed in six of the counties in question, in Dale County, Alabama, we note that WMBB's total county share of viewing in 1982 has dropped to 1 percent, and that WMBB's total net weekly circulation has dropped to 11 percent.[4] Accordingly, WMBB would not today be considered to be significantly viewed in Dale County, having failed to achieve the required 3 percent share and 25 percent net weekly circulation. We realize that our rules require the submission of viewing data, in WMBB's case, from within the period 1973–1976; however, in its decision in *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983), the United States Court of Appeals for the District of Columbia Circuit raised issue regarding the Commission's and other parties' reliance on old data in determining the significantly viewed status of television stations. In view of this decision, we feel it appropriate at this time to defer action on WMBB's request that we declare it to be significantly viewed in Dale County, Alabama.[5] Apart from this one exception, however, we are satisfied that the data submitted shows WMBB to be significantly viewed in the other counties in question. The issue of WMBB's status in Dale County will be resolved subsequent to our issuance of a decision responding to the Court's concerns in *KCST-TV, INC. V. FCC, supra*, and the parties will be given an opportunity to file pleadings at that time.

9. In view of the foregoing, we find that grant of WMBB's petition, to the extent indicated above, is in the public interest.

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[4] The 1982 Arbitron figures for WMBB in all affected counties are:

County	*Total County Share of Viewing*	*Total Net Weekly Circulation*
Dale, AL	1	11
Geneva, AL	4	47
Houston, AL	8	56
Gadsden, FL	10	79
Jackson, FL	n/a[*]	n/a[*]
Leon, FL	8	54
Decatur, GA	8	46

[*] Arbitron does not place cable controls in this county, and therefore no non-cable data is available.

[5] We note, therefore, that the staff is reviewing current Arbitron data in cases of this nature pending final resolution of *KCST-TV, Inc. v. FCC, supra*.

10. Accordingly, IT IS ORDERED, That the "Petition for Declaratory Ruling" filed September 13, 1982, by Octagon Broadcasting Company IS GRANTED to the extent indicated in paragraph 8, *supra*, and in all other respects is DEFERRED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Reconsideration, Petition for, Partial Grant of

Order adopted granting partial reconsideration of the Commission's Report and Order (adopted November 18, 1982) in CC Docket No. 81-343, where petitioner had shown willingness to use circuit-multiplication equipment to increase the effective capacity of its cable circuits.
-Pacific Telecommunications
CC Docket No. 81-343

FCC 83-270

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry Into the Policies to Be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981-1995	CC Docket No. 81-343

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released: June 16, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. On December 3, 1982, we released our Report and Order in this proceeding, *Pacific Planning*, FCC 82-513, ___FCC 2d ___, 47 Fed. Reg. 57,040 (1982), in which we adopted policies and guidelines applicable to requests for authorization of submarine cable and satellite telecommunications facilities to meet needs in the Pacific Ocean region (POR) during the period 1982-1986. We now have before us a petition filed on January 3, 1983, by Hawaiian Telephone Company (HTC) seeking partial reconsideration of that order. Specifically, HTC requests reconsideration of (a) our authorization for it to acquire ownership of 60, rather than 120, voice-grade circuits in the ANZCAN North cable[1] for service between Hawaii

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[1] ANZCAN is an acronym referring to the Australia/New Zealand-Canada submarine telephone cable. The ANZCAN cable is a 14 MHz facility, channelized to yield 1380 voice-grade circuits each with a nominal bandwidth of 4 KHz. The ANZCAN cable consists of two segments: ANZCAN North, linking Hawaii and Vancouver, British Columbia; and ANZCAN South, linking Australia, New Zealand, Fiji, Norfolk Island and Hawaii. The ANZCAN cable is a joint venture of the telecommunications entities of Australia, Canada, France, the Federal Republic of Germany, New Zealand, the Independent State of Papua, New Guinea, the Philippines and the United Kingdom. The ANZCAN owners will grant U.S.

READEX FICHE best copy available

and Canada, (b) our denial of authorization for it to acquire ownership of 35 circuits in the ANZCAN North cable for service between Hawaii and several points in Europe, and (c) our authorization for it to acquire ownership of 32, rather than 60, voice-grade circuits in the ANZCAN South cable for service between Australia and Hawaii. On January 18, 1983, the State of Hawaii filed an Opposition to Petition for Partial Reconsideration of HTC which supports our original decision and urges denial of HTC's requests. On January 31, 1983, HTC replied to the State of Hawaii's comments.

2. The Report and Order at issue here is the end product of the proceeding we initiated in June 1981 looking into the development of facilities construction and use guidelines for the POR for the period 1981–1995.[2] This proceeding marks our first attempt to analyze the U.S. carriers' facilities needs in the POR on a comprehensive basis. The various U.S. carriers providing service in the POR, Comsat, federal governmental entities responsible for communications matters and the State of Hawaii have been actively involved throughout the development of the comprehensive plan. These entities filed extensive comments and alternative proposed facilities plans. Further, since international communications are a cooperative venture between two or more countries, our process took cognizance of the views of the foreign entities concerned, directly or through the submissions of the U.S. participants.

3. In our Report and Order we generally found in the public interest the facilities plan proposed by the United States carriers, including the proposal to acquire a variety of permanent ownership and temporary IRU interests in circuits in the ANZCAN North and ANZCAN South cables. However, while generally approving HTC's request for circuits, we denied or modified specific requests in three particulars. First, we granted HTC authorization to acquire ownership of 60 circuits in ANZCAN North for service between Hawaii and Canada, rather than the 120 circuits HTC had requested. Second, we denied HTC authorization to acquire ownership of any circuits in ANZCAN North for service between Hawaii and various countries in Europe; HTC had requested authority for 35 such circuits. Third, we granted HTC authorization to acquire ownership of 32 circuits in ANZCAN South for service between Hawaii and Australia, rather than the 60 circuits requested.

4. With respect to the Canadian and Australian circuits, we found that HTC had shown a need for some of the requested circuits,

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carriers full ownership in their ratable share of the circuits in which they acquire permanent interests. They will grant those carriers indefeasible right of user (IRU) in those in which they acquire temporary interests.

[2] We initiated the process with a Notice of Inquiry, 46 Fed. Reg. 31,286 (1981). That Notice was followed by a Notice of Proposed Rulemaking, 47 Fed. Reg. 21,868 (1982), which initiated the formal portion of the process leading to the adoption of the facilities plan at issue here.

but that it had not proposed to use them in the most effective way. We noted that HTC had not proposed to use circuit-multiplication equipment with either the Canadian or Australian circuits.[3] We further found that through use of such equipment HTC would be able to meet its forecasted demand to Canada with only 60 circuits and to Australia with only 32 circuits. With respect to the circuits to Europe, we found that HTC had proposed to use those circuits to route Europe-bound traffic to Canada, to transit Canada, via leased terrestrial facilities, to Canada's East Coast INTELSAT earth station at Mill Valley, and then to connect with the INTELSAT AOR (Atlantic Ocean Region) satellite. We noted that HTC had failed to justify its proposal; it argued only that such a routing is necessary to avoid a "double hop." That is, HTC argued that the only facility available to it for European service is the AOR satellite and that the only option it has to connect with that satellite is to use ANZCAN North or the U S. domestic satellite. Because carriers seek to use only one satellite link on any given circuit, HTC argued that it is compelled to use ANZCAN North.[4]

5. We disputed HTC's claim that it has no option in routing Europe-bound traffic and noted that its proposed routing is unduly expensive. We noted that HTC could route its European traffic via a U.S. domestic satellite to an earth station in Pennsylvania and connect to circuits in the TAT-7 cable. We also found that such a routing would be more direct, involve much less transiting, and would be less costly. Finally, we noted that HTC should have no trouble obtaining TAT-7 circuits since, in authorizing AT&T to construct the TAT-7 cable, we required AT&T to make circuits available to other U.S. carriers such as HTC. HTC now asks us to reconsider the above three actions.

6. *Service to Canada.* Turning first to the Canadian circuits, HTC asks us to reconsider our denial of the second 60 circuits and our requirement that it use circuit-multiplication equipment with the 60 circuits we did authorize. In support HTC notes that the Master Loading Plan it had submitted with its modified circuit requests is in need of clarification. That plan, at Table Number 21, shows a need for a total of 411 circuits to Canada by 1995, 160 to be provided over ANZCAN North and 251 via satellite. *See* HTC, Master Loading

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[3] Circuit multiplication refers to the process by which the effective capacity of cable facilities can be increased by as much as a factor of two. Circuit-multiplication equipment exploits the fact that one party to a telephone conversation is usually silent while the other speaks, and that speakers often hesitate. The equipment senses these silences and routes portions of other calls over the momentarily idle circuits.

[4] Because satellites are located 22,300 miles above the earth, signals must travel a longer distance than they do on terrestrial facilities. This extra length of travel means that a satellite circuit has a slightly greater delay than terrestrial circuits. As a result, whenever possible, carriers seek to use only one satellite link in a given transmission.

Plan, attached to its Comments in CC Docket No. 81–343, June 28, 1982. HTC notes, however, that its Master Plan shows a need for 160 circuits in ANZCAN North, or 40 more than the 120 circuits it had requested, but that it does not make clear how HTC proposes to acquire the remaining 40 circuits. HTC asserts that under the Master Plan the 120 requested circuits will be exhausted by 1989 and will be supplemented through use of circuit multiplication equipment or by reconfiguring the ANZCAN North cable to increase its capacity by changing the bearer circuits from 4 KHz in width to 3 KHz in width. HTC states that it regrets this lack of clarity, since it appears to have misled us into believing that its needs could be satisfied with only 60 circuits.

7. HTC also noted that its correspondent for the circuits in question, Trans-Canada Telephone System (TCTS),[5] is concerned about our failure to approve all 120 circuits requested. HTC indicates that TCTS believes our action will have an adverse impact upon TCTS's investment in the ANZCAN cable. HTC also notes that TCTS has "expressed an unwillingness to consider use of [circuit-multiplication equipment] at the outset" of its use of ANZCAN North. HTC Petition for Reconsideration at p. 4. Finally, HTC notes that it does not operate directly with Canada and that the opening of such direct service is tied to the introduction of the ANZCAN cable. HTC states that it is concerned that our denial of the 60 circuits will jeopardize the introduction of direct service. HTC requests that, since this Commission is on record as favoring direct service, we reconsider our denial of the second 60 circuits to Canada. In return, HTC has revised its Master Loading Plan for Hawaii-Canada to show that circuit-multiplication equipment (more specifically TASI[6]) will be introduced in 1990.

8. *Service to Europe*. The second area in which HTC seeks reconsideration is our denial of the 35 half circuits it requested in ANZCAN North for service to Europe. HTC argues that our denial will seriously disrupt the correspondent relationships on which its ability to provide service depends. HTC notes our concern about the cost effectiveness of routing Europe-bound traffic through Canada and the INTELSAT satellite, and agrees that our alternative proposal routing European traffic through a U.S. domestic satellite and TAT-7 would be more direct, but states that such a routing would not be acceptable to its correspondents. HTC notes that its correspondents have made investments in ANZCAN North based on HTC's proposal to use the 35 circuits for service to Europe and that

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[5] TCTS is an association composed of a number of Canadian telephone carriers plus Telesat Canada, the Canadian domestic satellite carrier.

[6] TASI is a specific type of circuit-multiplication equipment which can be used to achieve a multiplication factor of 2. TASI is an acronynm standing for Time Assignment Speech Interpolation.

those circuits would go unused if HTC were to reconfigure its network as the Commission has proposed. HTC further notes that, notwithstanding our power to order AT&T to sell HTC TAT-7 circuits, some of its European correspondents "may not" have TAT-7[7] circuits available for service with Hawaii. Finally, HTC notes that its correspondents are "upset" by our "abrupt and unilateral reconfiguration of agreed upon facilities usage." HTC Petition at 7. HTC includes with its petition telexes from its German and United Kingdom correspondents indicating their support for HTC's original proposal.

9. *Service to Australia.* Finally, HTC seeks reconsideration of our decision to authorize it only 32 circuits (instead of 60) in the ANZCAN South cable for service to Australia and our requirement that HTC use circuit-multiplication equipment on those circuits we did authorize. Again HTC notes our concern about the cost effectiveness of its circuit request, but states that its Australian correspondent, the Overseas Telecommunications Commission (OTC), refuses "to consider use of [circuit-multiplication equipment] on ANZCAN South because of the additional investment that would be required." HTC Petition at 8. HTC charcterizes this position as "understandable," since it notes that OTC has made substantial investments in "cable circuits which are now spare." HTC states that the 32 circuits we authorized are enough for its current Australia service needs, but notes that future needs will be placed in serious jeopardy, since it cannot guarantee that cable circuits will then be available to it at reasonable cost.

10. *Opposition of the State of Hawaii.* The State of Hawaii generally supports the decision in our Report and Order to limit HTC's acquisition of circuits in ANZCAN North and South and states that it believes HTC has shown nothing new which would justify changing that decision. The State of Hawaii notes that, as the representative of the users within its boundaries, it is legitimately concerned that HTC use its facilities in the most efficient way. The state also argues that such users are disserved by non-essential and non-cost-effective facilities investments.

11. With respect to HTC's proposed Canada service, the State of Hawaii notes that HTC does not dispute the finding in our Report and Order that its proposal to use 120 circuits is not the most efficient use. The State notes that even HTC's latest Master Loading Plan shows less than optimal use of TASI.[8] Further, the State argues

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[7] TAT-7, the seventh transalantic telephone cable, connects the United States and the United Kingdom. It is scheduled to enter service on July 1, 1983.

[8] The State of Hawaii refers here to the proposed, revised Table No. 21 HTC submitted with its Petition for Partial Reconsideration. The details of that revised plan are set out in footnote 11, *infra*. In brief, revised Table 21 shows introduction of TASI on HTC's ANZCAN North circuits in 1990.

that, since HTC has not yet been authorized to serve Canada directly, the public has not had a chance to examine the cost effectiveness of any direct service to Canada at all. The State argues that such a determination can only be made at such time as HTC files an application under Section 214 of the Communication Act, 47 U.S.C. §214 (1976), and that the existing record is certainly inadequate. The State of Hawaii also notes that the agreement with TCTS on which HTC seeks to rely was entered into before HTC had presented its proposal to the Commission for review, and before it has been authorized to serve Canada, and is therefore of no decisional value.

12. With respect to European service, the State of Hawaii indicates agreement with our tentative preference for routing such traffic through a U.S. domestic satellite and TAT-7. The State further notes that HTC does not dispute our finding, and even concedes in its Petition for Partial Reconsideration that such a routing "would result in a more direct, presumably more efficient configuration." HTC Petition at p. 7. Again, the State of Hawaii notes that HTC has not yet sought authorization to serve any European points directly and that as a result the public has had no opportunity to comment on the cost of such direct service. Finally, with respect to the Australian circuits, the State of Hawaii argues that the purported unwillingness of the Australian entity to make efficient use of its cable investment should have no decisional importance before the Commission. The state of Hawaii also argues that, should it happen that the 32 circuits we authorized would at some future date be insufficient to handle all of HTC's peak traffic to Australia, HTC does not need to handle all its peak traffic over its own direct circuits, but that it can use alternate routings which assure full and efficient use of circuitry.

DISCUSSION

13. After reviewing the relevant portion of our December 3 Report and Order, HTC's petition, the State of Hawaii's comments and HTC's reply, we have decided to grant HTC partial relief. With respect to its request for 120 circuits for service to Canada, we note that HTC has now proposed to use circuit-multiplication equipment. We, therefore, shall grant HTC authority to acquire permanent interests in all 120 circuits in ANZCAN North which it had requested. With respect to the other aspects of HTC's petition, the circuits in ANZCAN North for service to Europe and in ANZCAN South for service to Australia, we find HTC has shown no reason to suggest that the analysis in our December 3 Report and Order was in error. Accordingly, we shall affirm our prior holding with respect to those circuits.

14. *Service to Canada (ANZCAN North).* Turning first to the matter of the 120 circuits in ANZCAN North for service to Canada,

we note that HTC does not challenge the analysis in our Report and Order that was based on data that it had provided prior to the Report and Order, referred to here as its June 28 comments. Rather, HTC concedes that the circuit-loading plan for Canada it submitted was ambiguous in that it did not clearly indicate how HTC proposed to use the requested circuits or specify any use of TASI or other circuit-multiplication equipment. HTC notes, however, that its correspondent, TCTS, is currently unwilling to consider use of TASI in the early years of service. As a result, the 60 circuits we authorized in our Report and Order will not be sufficient to meet HTC's forecast of demand for circuits even in the first year of operation.

15. We agree that HTC's Master Loading Plan for Canada included in its June 28 comments is ambiguous. While the plan shows a need for 160 circuits in ANZCAN North in 1993, HTC had requested authority to acquire no more than 120 bearer circuits.[9] HTC's plan does not show how it proposes to meet its claimed need for 40 additional circuits. In its Petition for Reconsideration, however, HTC indicates that it had proposed to generate the additional 40 circuits by reconfiguring its holdings in ANZCAN North to decrease the nominal bandwidth of the circuits from 4 KHz to 3 KHz.[10] As HTC notes, reconfiguration of the 120 circuits it requested would increase the number of voice-grade circuits available to it by one-third to 160 (one-third of 120 is 40 additional circuits). However, HTC included with its petition a proposed, modified Table No. 21 which it requests permission to substitute in its June 1982 Master Loading Plan. That substitute plan indicates that HTC has changed its plans and will not reconfigure its ANZCAN North holdings before 1995. Rather, the substitute schedule shows that HTC will acquire a total of 120 4 KHz circuits and that it will introduce TASI on those circuits in 1990.[11] With the

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[9] HTC's original Master Loading Plan showed that HTC would activate the 120 requested circuits by 1985. That level of use would have held constant until 1990, when the plan called for 126 circuits. In 1991 the plan called for 141 circuits, 157 in 1992, and 160 in 1993, 1994 and 1995. The plan showed no TASI and did not explain the source of the additional 40 circuits.

[10] The ANZCAN cable owners had originally proposed to build ANZCAN North with a bandwidth of 9 MHz, channelized into 1200 voice-grade circuits. Later, they increased the size of the cable to a 14 MHz system, to be channelized into 1840 voice-grade circuits with a bandwidth of 3 KHz. However, because of declining projections of traffic growth in the Pacific, the owners concluded that they would not need 1840 circuits. As a result, they proposed to reconfigure the 14 MHz cable to reduce the number of circuits to 1380 by using different channelizing equipment to yield circuits with a bandwidth of 4 KHz. The cable owners can change the configuration again at a later date if they find they need more circuits by installing new channelizing equipment to reduce the bandwidth of the circuits to 3 KHz.

[11] Specifically, HTC's modified Table 21 shows the following use of ANZCAN North for Canada service:

proposed use of TASI, HTC will be able to increase the effective capacity of its holdings in ANZCAN North to 240 circuits, even without reconfiguration.[12]

16. The analysis in our December 3 Report Order was based upon the plans submitted in this proceeding and concerns only the period through 1995. Our conclusions were even more limited, being restricted only to year-end 1986 and construction of the ANZCAN cable. The carriers, however, are required now to acquire facilities to meet needs throughout the period and, indeed, the life of the cable. The ANZCAN North Cable will be introduced in late 1983 and will have a useful life of 24 years. The cable will, thus, be in service through roughly the end of the year 2007. Viewed over the entire life of the cable, HTC's proposal to acquire 120 4 KHz bearer circuits appears reasonable. Based on its revised Master Loading Plan, through use of TASI circuit multiplication, HTC will have sufficient cable capacity to meet projected growth in Hawaiian/Canada traffic through 1995. In the event of greater-than-projected growth on that route, or to meet larger demands beyond 1995, HTC and its Canadian correspondent will have the option of reconfiguring their 120 ANZCAN circuits to reduce their bandwidth from 4 KHz to 3 KHz to derive an additional 40 bearer circuits, and through TASI use, to derive an additional 40 effective circuits.

17. We, thus, do not find HTC's decision not to reconfigure its ANZCAN North circuits at the outset to be unreasonable. Reconfiguration will remain as an option throughout the life of the cable should traffic demands require it and we can address that question in detail in subsequent planning proceedings. For present purposes, we note that HTC's revised loading plan for Canada shows a more efficient use of the circuits it requested than the one it had previously filed. HTC's revised Table 21 projects the use of TASI

1984	109 circuits	1990	120 circuits
1985	120 circuits	1991	120 circuits
1986	120 circuits	1992	120 circuits
1987	120 circuits	1993	120 circuits
1988	120 circuits	1994	120 circuits
1989	120 circuits	1995	120 circuits

The Plan shows the following use of TASI on ANZCAN North:

1984	0 circuits	1990	24 circuits
1985	0 circuits	1991	44 circuits
1986	0 circuits	1992	72 circuits
1987	0 circuits	1993	96 circuits
1988	0 circuits	1994	120 circuits
1989	0 circuits	1995	120 circuits

[12] If HTC later decides to reconfigure its ANZCAN North circuits, it will be able to increase its available bearer circuits to 160 and, with full TASI use, their effective capacity to 320 voice circuits.

circuit multiplication on its ANZCAN North circuits beginning in 1990 and on all 120 by 1994.[13] HTC, thus, has addressed the concern we expressed in our December 3 Report and Order concerning its refusal to use circuit multiplication. We, thus, will modify our December 3 Report and Order to provide for HTC's acquisition of 120 circuits for Canada service.

18. *European Service (ANZCAN North).* We turn now to the question of HTC's request for 35 circuits in ANZCAN North for service to Europe. In our Report and Order we denied HTC authority to acquire the circuits on the grounds that its proposal to use these circuits to serve Europe by transiting Canada and the INTELSAT AOR satellite was inefficient and unduly costly. HTC does not challenge our finding. Indeed, HTC's petition acknowledges that our proposed, alternative routing via the U.S. domestic satellite and TAT-7 would be more direct, and probably more efficient than routing traffic through Canada. The only reason HTC offers for asking us to reverse our prior finding is that it believes some of its overseas correspondents "may not" be able or willing to effect the proposed, alternate routing. In the first instance, HTC does not clearly state that its correspondents have refused to use the alternate routing or that they will not have TAT-7 circuits available for such use. HTC says only that that "may" be the case. The four countries involved, France, Germany, the Netherlands and the United Kingdom are all participants in the TAT-7 cable and, thus, have TAT-7 circuits they could use with HTC if they so elected. Of these four countries, HTC is now authorized to provide service directly only to the United Kingdom and Germany and did not participate in the proceeding which planned the TAT-7 cable. The parties also did not separate Europe/Hawaii traffic from other United States service. As a result, Hawaii traffic was included in the TAT-7 partners' overall projections. HTC has shown no reason why those will not be facilities available for this traffic.

19. We note that HTC included in its petition for reconsideration comments from its German and United Kingdom correspondents indicating a preference for using ANZCAN North for Hawaii/Europe service. Those entities, however, do not refuse to consider an alternative. At most, Germany speculates that its use of a U.S. domestic satellite is likely to be more costly than routing the traffic

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[13] As shown in footnotes 11 and 12, *supra*, HTC's revised Table 21 reflects use of 120 bearer circuits and the use of TASI to derive an additional 120 effective voice circuits. The table, however, does not reflect any change in overall circuit demand during the planning period. Table 21 shows that the traffic to be carried on these additional TASI-derived circuits is traffic which it formerly had proposed to carry over the INTELSAT Pacific Ocean Region satellite. For example, in 1994, the year in which HTC's ANZCAN circuits will be fully equipped with TASI, HTC states that it will use 135 satellite circuits, where it had previously planned to use 215, and that its cable/satellite loading ratio will go from 42.7 per cent cable to 64.0 per cent cable.

via Canada and the INTELSAT satellite system. It does not, however, state any reason for this conclusion and, indeed, asks HTC to find out which is less costly. HTC does not include any information in its pleading on this point.[14]

20. HTC notes, generally, that its European correspondents are concerned that our denying HTC authority to purchase these circuits will adversely affect their investment in ANZCAN North. As we have indicated throughout our facilities planning proceedings, we have a statutory obligation to protect the U.S. ratepayers. While we are mindful that the European owners of ANZCAN wish to use the cable in which they have invested, we do not see this as a justification for imposing too-high costs upon our own ratepayers. Further, we see no reason why the alternate routing we have proposed would not be cost-effective for both entities. Further, since HTC is not now authorized to serve France or the Netherlands directly, HTC cannot reasonably argue that those entities based their decision to build the ANZCAN cable upon HTC's desire to purchase these 35 circuits, or that our denial of these circuits will unduly adversely affect those owners' investment decision. This controversy illustrates the advantage of advance planning efforts which involve all entities who will be affected by construction of a projected facility. We hope to avoid such problems in the future.

21. *Australia Service (ANZCAN South).* We are similarly unpersuaded by HTC's arguments concerning our refusal to authorize all 60 of the circuits it requested in ANZCAN South. In our Report and Order we found that HTC could meet its demand forecasts for service to Australia and maintain service quality with the 32 circuits we authorized—if it makes appropriate use of circuit-multiplication equipment—at a substantially lower cost. HTC does not challenge our finding. The only argument it offers in support of its request is its assertion that OTC is "unwilling" to consider use of circuit-multiplication equipment on ANZCAN South and that OTC believes that its investment in the 28 circuits we disallowed will go unused. As a result, HTC notes that, although it can meet its immediate needs to Australia via the 32 circuits we authorized, without circuit multiplication, it will need more circuits at some point in the future. HTC states that our action here will jeopardize its ability to meet those needs, because it has no assurance that OTC will agree to

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[14] As we noted in our Report and Order, HTC's argument in favor of transiting Canada is inconsistent with its arguments in favor of direct service to Canada. In that request HTC stated that routing Canada traffic through U.S.-owned cables, which land on the West Coast of the United States, is not acceptable for direct Canada service because that would require transiting the United States to the Canadian border. HTC cannot, therefore, reasonably argue in favor of routing its European traffic via ANZCAN North and the INTELSAT Atlantic satellite, which will require transisting of Canada over terrestrial facilities, when it can use a direct domestic satellite hop virtually to the TAT-7 cable head.

introduce TASI, or that, if it does not so agree, there will be cable circuits available at such time as it needs them.

22. We are not persuaded that HTC will not be able to meet its traffic projections with the 32 circuits we authorized. OTC does not completely rule out the possibility of using TASI or other circuit-multiplication equipment on ANZCAN South.[15] We note that HTC's Master Loading Plan for Australia (Table 12) does not project the use of TASI at any time during the planning period. Indeed, it does not even project activation of all 60 requested circuits in ANZCAN South until 1994[16] and does not project use of any greater number of circuits. Yet, by contrast, during the same period, OTC and AT&T project full use of TASI on their ANZCAN South circuits. *See* AT&T Master Loading Plan. As a result, we do not believe that OTC will refuse to use TASI or other circuit-multiplication equipment.

23. As we found in our Report and Order, we have a duty to assure that U.S. carriers make the most efficient use of the facilities they include in their ratebases. HTC has not shown that its proposed use of the ANZCAN South circuits it requested is efficient. Based on HTC's own figures, HTC will be able to meet its demand forecasts through 1995 with 32 bearer circuits and the timely introduction of TASI. HTC did not make any projections of circuit needs beyond 1995. With TASI, HTC will be able to derive from those 32 circuits an effective capacity of 64 circuits, more than enough to meet its projections through 1995. Beyond 1995 HTC will be able to reconfigure its ANZCAN South circuits from 4 KHz to 3 KHz in the same way as it will its ANZCAN North circuits. Reconfiguration will allow HTC to derive an additional 10 (3 KHz) bearer circuits. If HTC then applies TASI it will have a total effective capacity of 84 circuits. Based on the growth patterns in its Master Loading Plan, those 84 circuits should allow HTC to meet its circuit needs for several years beyond 1995. If, however, traffic grows faster than expected, and HTC needs more circuits than its plan shows, HTC will be able to acquire capacity in the Pacific satellite or other facility. In any

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[15] OTC in fact, states that it had planned to use such equipment as soon as the 60 circuits it requested are filled. OTC further states that, in view of its heavy investment in ANZCAN South, it is "reluctant" to incur the additional cost of introducing such equipment at the earlier date contemplated by our Report and Order. OTC's argument is set forth in a telex attached to HTC's petition for Reconsideration, Appendix B.

[16] HTC's June 28, 1982, Master Loading Plan calls for the following use of ANZCAN South circuits

1984 – 0 circuits
1985 – 8 circuits
1986 – 13 circuits
1987 – 16 circuits
1988 – 22 circuits
1989 – 26 circuits
1990 – 32 circuits
1991 – 42 circuits
1992 – 49 circuits
1993 – 58 circuits
1994 – 60 circuits
1995 – 60 circuits

event, the likely course of events beyond 1995 is too speculative to make any firm projections at this time. It was, indeed, for that reason that we deferred such questions to a later planning process.

24. While we can understand OTC's wish to maximize the use of its investment in cable facilities, we must also expect that it will give consideration to our desire to assure efficient use of such facilities. International comity cuts two ways. We believe that our authorization of HTC to purchase 32 circuits and to require timely use of TASI represents a reasonable way for HTC to meet its service-quality and traffic requirements while preserving the efficient use of facilities. We thus find no reason to overturn our prior findings.[17]

25. Accordingly, IT IS ORDERED that the above-referenced Petition for Partial Reconsideration of Hawaiian Telephone Company is GRANTED in part, and that, subject to the conditions set forth herein, paragraph 54 of the Commission's December 3, 1982, Report and Order is MODIFIED to read as follows:

> (6)We find that Hawaiian Telephone Company's acquisition of permanent ownership interests in 120 half circuits in ANZCAN North for service between Hawaii and Canada will serve the public interest;

but that the petition is otherwise DENIED in all respects.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[17] We thus find unpersuasive HTC's argument that it may not be able to find cable circuits available once the 32 circuits we authorized it have been placed into service. We note first that this argument is inconsistent with its companion argument that the 28 circuits we failed to approve will go unused. If there is no other use for those circuits, they should be "available" to HTC should it later need them. Additionally, as we have noted, reconfiguration of the 32 circuits we have approved, with TASI, will give HTC substantial additional capacity.

Application, Amendment of, Current Information
Character Qualifications, Lack of Candor
Cut-Off Rules
Intervention, Request for Denied
Remand from Court of Appeals
Standing

Commission remanded comparative proceeding to ALJ for expedited consideration of renewal applicant's qualifications. Case before Commission by virtue of Court remand order directing the Commission to inquire into impact of licensee's disqualification in a related case. Standing of competing applicant affirmed, petitions for leave to amend granted for limited purpose of complying with Rule 1.65.
–*RKO General, Inc. (KHJ-TV)*
Docket No. 16679

FCC 83–274

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO GENERAL, INC. (KHJ-TV) Los Angeles, California For Renewal of Broadcast License	Docket No. 16679 File No. BRCT-58
FIDELITY TELEVISION, INC. Norwalk, California For Construction Permit for New Television Broadcast Station	Docket No. 16680 File No. BPCT-3655

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released: June 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. Before the Commission for consideration is a Decision[1] by the

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[1] *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (1981), *cert. denied*, 102 S.Ct. 1974, 2931 (1982).

United States Court of Appeals, District of Columbia Circuit, remanding a Commission Order[2] finding RKO General, Inc. (RKO) unqualified to remain the licensee of Station KHJ-TV, Los Angeles.[3] In its Decision the Court affirmed that part of the Commission's action finding RKO unqualified to remain the licensee of WNAC-TV, Boston, but did so on the single ground of lack of candor.[4] Given this more restricted view of RKO's disqualifying acts, the Court has directed the Commission to assess the impact of RKO's disqualification in Boston on RKO's qualifications as the licensee of KHJ-TV, noting that RKO's misconduct on the lack of candor issue did not occur directly before the trier of fact in the Los Angeles proceeding. The Court further directed the Commission to afford RKO an opportunity to demonstrate that KHJ-TV deserved treatment different from that accorded its Boston station.

Motion to Terminate

2. Also pending before the Commission is a Motion to Terminate the Los Angeles proceeding filed by RKO.[5] RKO argues that the involvement of the competing party in the Los Angeles case, Fidelity Television, Inc. (Fidelity), with respect to the Boston case was limited to questions pertaining to reciprocal trade practices, which have now been resolved in RKO's behalf.[6] RKO contends that Fidelity has no

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[2] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 355 (1980).

[3] This Order accompanied a Commission Decision finding RKO unqualified to remain the licensee of WNAC-TV, Boston, Massachusetts. *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980). The appeal of the subject Order had been consolidated by the Court with the appeals of the Commission's Boston Decision and a similar Order issued in Docket Nos. 19991–92. *RKO General, Inc. (WOR-TV)*, 78 FCC 2d 357 (1980).

[4] The Commission found RKO unqualified for its lack of candor in not reporting an investigation by the Securities and Exchange Commission (SEC) into the improper corporate practices of the General Tire & Rubber Company, the corporate parent of RKO, and for unequivocally denying charges raised by Community Broadcasting of Boston, Inc., a challenger in the Boston proceeding, when RKO knew or should have known that there was substantial truth to the allegations raised; for intentionally filing false and improper annual financial reports; and for engaging in illegal reciprocal trade practices. Reciprocal trade practices, or reciprocity, is the practice whereby one company conditions its purchases of goods from another company on the second company's willingness to purchase other products from the first.

[5] Motion of RKO General, Inc. for Termination of Pending Comparative Proceeding for Channel 9, Los Angeles and Norwalk, California filed August 25, 1982. Oppositions were filed September 17, 1982 by both Fidelity and the Broadcast Bureau, to which RKO filed a consolidated reply on October 4, 1982.

[6] After the Los Angeles case was designated for hearing, *RKO General, Inc. (KHJ-TV)*, FCC 66–503, released June 8, 1966, RKO and General Tire were charged by the Department of Justice with engaging in improper reciprocal trade practices violative of the antitrust laws. *U.S.* v. *The General Tire & Rubber Company, et al.*, Civil Action No. C-67–155, U.S.D.C., Northern District of Ohio, Eastern Division. Because of the impact these practices might have on RKO's basic qualifications, the Commission conditioned any grant of renewal in both the Los Angeles and

further role to play in this proceeding and its application for a construction permit should therefore be unconditionally denied.

3. RKO's pleading brings into sharp focus the question of whether the conditional language in the Los Angeles case was intended to cover all issues arising out of the Boston proceeding which might bear on RKO's qualifications or whether it was limited specifically to the reciprocity issues.[7] This question has been before the Commission on several occasions previosly, and it is clear that an expansive interpretation was the intention of the Commission.

4. In its Decision finding RKO unqualified to be the licensee of WNAC-TV, the Commission was faced with the question of the interrelationship between the Boston and Los Angeles proceedings. The Commission rejected RKO's contention that Fidelity's interest was limited to the pre-1975 designated issues on reciprocity and that those were the only issues bearing on RKO's qualifications to remain the licensee of KHJ-TV.[8] The Commission held that the two proceedings were interrelated because questions of reciprocity and the "matters under consideration as a result of the SEC investigation" both pertained to RKO's basic qualifications.[9] The Commission

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Boston cases on the outcome of the antitrust suit. See *RKO General, Inc. (KHJ-TV)*, FCC 68–892, 14 RR 2d 90 (Rev. Bd. 1968) and FCC 68M-394, released March 11, 1968 and *RKO General, Inc. (WNAC-TV)*, 20 FCC 2d 846 (1969), respectively. However, the antitrust suit was terminated before questions of RKO's reciprocity were resolved. The Commission then directed that such questions should be addressed in the Boston proceeding, adding that any grant of renewal for KHJ-TV would be subject to the outcome of the Boston case. *RKO General, Inc. (KHJ-TV)*, 31 FCC 2d 70 (1971). The Commission made Fidelity a party to the Boston proceeding, and stated that final action in the KHJ-TV proceeding "would be held in abeyance pending the conclusion of the adjudicatory proceeding involving WNAC-TV Boston, Docket No. 18759, and that thereafter such action would be taken as appears to be necessary and appropriate in light of the evidence introduced in, and the outcome of, the Boston proceeding concerning the qualifications of RKO to be or to continue to be a licensee." *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 123, 137 (1973). The Administrative Law Judge in the Boston proceeding thereafter concluded that there was "no reason to either disqualify RKO as a licensee or to assess [a] comparative demerit against its proposal . . ." under the reciprocal trade practices issue. *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 147, 335 (I.D. 1974). The Commission reached a different conclusion, *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980), but was reversed by the Court, *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981).

[7] Two issues based on reciprocity were designated against RKO in the Boston proceeding: 1) whether RKO had engaged in illegal reciprocal trades and 2) whether General Tire and RKO employees had testified falsely in the Los Angeles proceeding regarding their knowledge of the reciprocal trade practices of General Tire and RKO.

[8] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d at 24–25.

[9] After the parties had filed exceptions to the ALJ's Boston Decision, Community Broadcasting, Inc. (Community) filed a petition to enlarge issues against RKO. Community Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearing, filed December 10, 1975. Community charged General Tire, RKO's corporate parent, with a vast array of improper foreign and domestic practices. RKO unequivocally denied any impropriety. Opposition to Community's

also relied on the Court's earlier pronouncement that Fidelity could appeal any decision reached in Boston "and the agency's interpretation of it in deciding whether to revoke RKO's license for KHJ. . . ."[10]

5. Additionally, when RKO requested approval of its assignment application to the two competing Boston applicants, Community and The Dudley Station Corporation (Dudley), Fidelity filed a petition in that proceeding asking the Commission to refrain from taking any action that might be prejudicial to its rights against RKO in the Los Angeles proceeding.[11] RKO in turn asserted that Fidelity had no standing to participate in the Boston proceeding on questions not pertaining to reciprocity.[12] The Commission in effect rejected RKO's contention when it subsequently permitted Fidelity to participate in oral argument and to file pleadings on the impact of questions raised by the Special Report on RKO's qualifications in the Boston case.[13]

Petition to Reopen filed January 21, 1976. Meanwhile, the Securities and Exchange Commission (SEC) had, by May 1975, initiated its own investigation into the same questions raised by Community. The SEC upgraded its inquiry into a formal investigation in February 1976. General Tire reported the SEC's inquiries to its stockholders in its annual stockholders report, 1975 Annual Report of the General Tire & Rubber Company, pp. 4–5. *See* Proposed Findings and Conclusion of Fidelity Television, Inc., pp. 35–37 and Exhibit 3, submitted August 27, 1979 in the Boston proceeding. However, RKO did not report these matters to the Commission until after the SEC had filed a Complaint, *SEC* v. *The General Tire & Rubber Company and Michael Gerald O'Neil*, No. 76–0799, filed May 10, 1976, against General Tire and had negotiated a final judgment of permanent injunction (Final Judgment) ordering General Tire to cease its questionable overseas and domestic activities. Final Judgment of Permanent Injunction against the General Tire & Rubber Company and Michael Gerald O'Neil, No. 76–0799, filed May 10, 1976. The Commission ultimately concluded that RKO was unqualified to remain the licensee of WNAC-TV for, *inter alia*, its lack of candor in reporting the SEC investigation. *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980). As a consequence of the interrelationship between the Boston and the Los Angeles proceedings, the Commission further concluded that RKO's disqualification in Boston compelled its disqualification in Los Angeles. *Id.* at 117 and *RKO General, Inc. (KHJ-TV)*, 78 FCC 2d 355 (1980).

[10] *Fidelity Television, Inc.* v. *FCC, supra*, 515 F.2d at 693 n.13.

[11] Petition to Deny Assignment Application and Comments on Joint Petition for Approval of Agreement filed October 6, 1978 by Fidelity (Docket Nos. 18759–61). Fidelity subsequently argued that it had an absolute right to participate in the Boston proceeding without any restrictions as to the issues bearing on RKO's qualifications. See, Reply to Joint Opposition to Petition to Deny filed November 13, 1978 with addendums filed November 14 and 18, 1978; Reply to Comments of RKO General, Inc. filed December 21, 1978; Comments on Joint Motion for Expeditious Disposition, filed March 5, 1979; Reply to RKO's Proposed Findings and Conclusions filed September 24, 1979. These pleadings were all submitted in the Boston proceeding.

[12] *See Joint Opposition to Petition to Deny, filed October 26, 1978; Comments on Fidelity's Reply, filed December 7, 1978; Proposed Findings, Conclusions and Proffered Evidence, filed August 27, 1979 (Appendix B); and Reply of RKO General, Inc. filed September 24, 1979. These pleadings were also filed in the Boston proceeding.*

[13] *See* Order, *RKO General, Inc. (WNAC-TV)*, FCC 79–403 released June 28, 1979.

6. We also reject RKO's assertion that this proceeding should be opened to new applicants. Fidelity has thus far been found basically qualified to be a Commission licensee.[14] Under our rules and procedures, an applicant in an adjudicatory proceeding is entitled to a final Commission decision on the merits of its application without consideration of belated challengers.[15] Other than Fidelity and RKO, no entity filed an application prior to the cut-off date. Only if both applicants were found unqualified would we have reason to entertain new applications for this station.[16]

Issues on Remand

7. Having disposed of this preliminary matter, we turn next to a discussion of the questions which must now be considered in the context of the RKO/Fidelity contest. In its Boston Decision, the Commission found three independent grounds for RKO's disqualification: 1) RKO's involvement in illegal reciprocal trade practices; 2) RKO's intentional filing of false and misleading annual financial reports; and 3) RKO's lack of candor in its dealings with the Commission.[17] Relying on the language conditioning renewal of KHJ-TV's license on the outcome of the Boston proceeding, the Commission further concluded that RKO's disqualification in Boston compelled a similar conclusion with regard to RKO's stewardship of Station KHJ-TV.[18]

8. On review, the Court rejected the Commission's conclusion that RKO's reciprocal trade practices warranted its disqualification. The Court also found an inadequate basis for the Commission's conclusion that RKO had intentionally, and with an intent to deceive, filed false annual financial statements. The Court held that it was error to premise disqualification on this ground, without holding a further evidentiary hearing. However, the Court agreed that RKO's lack of candor supported the Commission's conclusion

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[14] *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 149 (I.D. 1969); *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 123 (1973). The Court did not disturb this conclusion. *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974). *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, *rehearing denied* 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

[15] *Ashbacker Radio Radio Corp.* v. *FCC*, 326 U.S. 333 (1945), and *see generally RKO General, Inc. (WNAC-TV), supra*, 78 FCC 2d at 319–321. *Ranger* v. *FCC*, 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).

[16] *See, e.g., FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), *WORZ, Inc.* v. *FCC*, 345 F.2d 85 (D.C. Cir. 1965).

[17] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980).

[18] *RKO General, Inc. (KHJ-TV)*, 78 FCC 2d 355 (1980). A similar conclusion was reached in a third proceeding, which involved RKO's renewal application for Station WOR-TV, New York City. *RKO General, Inc. (WOR-TV)*, 78 FCC 2d 357 (1980). That case has since been terminated upon RKO's agreement to relocate its VHF channel in Secaucus, New Jersey. FCC 82–559, released March 29, 1983.

that RKO was unqualified to remain the licensee of WNAC-TV, Boston.

9. In light of the narrower grounds underlying RKO's disqualification, and the fact that the sole remaining basis for finding RKO disqualified occurred only in the Boston proceeding, the Court rejected the Commission's conclusion that RKO's disqualification in Boston automatically compelled a similar conclusion in the Los Angeles case. It thus remanded the Commission's Los Angeles Order for further consideration.[19]

10. *Candor*. In its Decision the Court recognized that RKO's lack of candor in the Boston proceeding is *res judicata.*[20] *Accordingly, no further evidence on this narrow question need be permitted and the parties may address the resultant legal question, i.e.*, the impact of that conclusion on RKO's qualifications to remain the licensee of KHJ-TV, by written submissions and/or oral argument, as deemed appropriate by the ALJ. Furthermore, before making this determination, RKO will have an opportunity to make a broad showing of the broadcast history and policy of KHJ-TV in mitigation of any adverse findings that might otherwise be made.[21]

11. *Barter and Trade*. General Tire kept inaccurate records of its barter and trade transactions involving exchanges of unsold air time for programming, merchandise, services and other things of value. As a direct result of these inaccurate records, RKO submitted false financial reports to the Commission. In its remand the Court stated, at page 226: "Whether RKO submitted inaccurate reports knowingly and with intent to mislead the Commission remains an unresolved and material question of fact. . . ." An issue will be specified to allow resolution of this matter.

12. A second area of concern has developed as a result of the barter and trade practices. During the course of the Boston proceeding RKO informed the Commission that the Internal Revenue Service (IRS) had initiated an audit of RKO's barter and trade transactions.[22] At that time RKO stated its belief that "it ultimately will be able to provide information satisfactory to the IRS for all but a small fraction of the total barter transactions reported to the FCC for the years [1971–76] in question. Even as to the remaining fraction for which documentation sufficient to meet IRS requirements for validating expense deductions may not be found, RKO believes it will

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[19] The Court stated: "RKO's misconduct did not occur before the trier of fact in either the Los Angeles or New York City proceedings. Accordingly, these decisions must be remanded to the Commission for further consideration as it deems appropriate." *RKO General, Inc. (WNAC-TV) v. FCC, supra*, 670 F.2d at 236.

[20] *Id.* at 237.

[21] *Id.* See also fn. 43, *infra*.

[22] Proposed Findings, Conclusions and Proffered Evidence filed August 27, 1979 by RKO, at p. 29 (Docket Nos. 18759–61).

be able to obtain some reasonable proof as to the disposition of a portion thereof." In Reply Comments filed September 24, 1979 RKO reported that "[I]t now appears that RKO will ultimately be able to document to the satisfaction of the IRS the disposition of all but a small fraction of its barter consideration."[23]

13. Approximately a year later, and after the Commission had issued its decision finding RKO unqualified in Boston, RKO notified the Commission that the IRS examination had been completed and a report had been issued.[24] RKO then reported that the IRS proposed assessing an additional income tax against General Tire and its subsidiaries of $24,494,538, of which $20,100,000 was in dispute. Again RKO represented that it intended to submit "additional documentation with respect to the deductibility of the items disallowed by the Internal Revenue Service in the examination reports."[25]

14. On December 31, 1981, RKO filed a "Statement for the Information of the Commission" indicating that it had reached an agreement with IRS to pay $13 million in additional income tax. On April 20, 1982, RKO reported an assessment of still additional income tax for years not covered by the earlier settlement. We will not inquire into the conduct that resulted in the tax underpayment. Our concern is limited to RKO's efforts to assuage Commission concern over the then pending IRS investigation. Whether RKO had a basis for predicting an optimistic outcome to the investigation in the light of all other pertinent circumstances is critical. An appropriate candor issue will be specified.

15. We will remand this case to an ALJ for further proceedings in accordance with the Court's Order. In order to insure the earliest possible determination concerning RKO's qualifications, we will direct the presiding ALJ to consider on an expedited basis the questions concerning RKO's basic qualifications, *i.e.*, RKO's lack of candor, whether RKO intentionally filed false annual financial reports, and whether RKO was lacking in candor in its assurances regarding the IRS investigations into its past tax deficiencies. At the same time, the ALJ should also consider what impact, if any, these matters have upon RKO's comparative qualifications. Upon completion of these proceedings, the ALJ shall prepare, consistent with the need for expedition, a Supplemental Initial Decision covering the above matters. Any appeal from the Supplemental Initial Decision will be filed with the Commission.

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[23] Reply of RKO General, Inc. filed September 24, 1979 at p. 25.

[24] Statement for the Information of the Commission filed August 12, 1980 by RKO General, Inc.

[25] *Id.*

Remaining Considerations

16. At this time we will also dispose of a number of other pleadings which have accumulated over the course of this proceeding. The first of these is a Fidelity Motion to Expedite and to Place KHJ-TV's Profits in Escrow.[26] By our action today we are moving towards a resolution of this protracted case at the earliest possible time. With respect to the question of placing KHJ-TV's profits in escrow, such a course of action is statutorily prohibited. Under Section 307(d) of the Communications Act, 47 U.S.C. §307(d), the Commission is obliged to continue the license in effect when it has not acted upon a renewal application prior to the expiration of the previous license term. Unlike the cases relied upon by Fidelity, RKO has not been found finally disqualified. Hence, it is entitled to continue as the licensee of KHJ-TV until a final determination is reached. Accordingly, this aspect of Fidelity's petition will be denied.

17. Two petitions for Leave to Intervene are also pending before the Commission. The first of these is part of a Petition for Extraordinary Relief filed February 27, 1980 by The Committee to Eliminate the UHF Handicap on Television in Los Angeles (Committee). Section 1.223 of the Rules requires that a potential intervenor must set forth its interest in the proceeding; show how its participation will assist the Commission in its determination of designated issues; delineate any proposed new issues which should be considered; explain why it was unable to file its petition within 30 days after publication in the Federal Register of the hearing issues or any substantial amendments thereto; and submit affidavits from persons with knowledge of the facts set forth in the petition. On analysis of the Committee's pleading we conclude that the petition was untimely and totally lacking affidavits from persons having personal knowledge of the alleged facts which the Committee wishes to have the Commission consider; and has failed to explain how its participation will in any way assist the Commission in disposing of the issues before us. Having failed to make the threshold showing necessary for intervention, the Committee's request will be denied.

18. Moreover, the Committee's suggestion that new applications be accepted would require waiver of the Commission's cut-off rules. The cut-off rules are designed to permit this agency to close the door to new parties so that a choice can be made between timely filed applicants,[27] thereby giving timely filed applicants protection[28]

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[26] Motion to Expedite Los Angeles Remand Proceeding and Place KHJ-TV Profits in Escrow filed November 4, 1982 by Fidelity. An Opposition was filed by RKO on November 16, 1982 and Comments by the Broadcast Bureau on November 23, 1982.

[27] *See RKO General, Inc. (WNAC-TV)*, 89 FCC 2d at 320–321, for a comprehensive discussion of the policy and practice underlying the cut-off rules.

[28] *Ranger* v. *FCC*, 111 U.S. App. D.C. 44, 47, 294 F.2d 240 (1961).

against opportunistic late-comers. The Committee has shown no unusual and compelling circumstances warranting waiver of this rule. The remaining aspects of the Committee's request for extraordinary relief envision combining rulemaking[29] with the present adjudicatory proceeding. In light of the different standards governing rule making and adjudicatory proceedings, it has been the Commission's policy not to consider allocation questions in the context of a comparative broadcast hearing.[30]

19. A second petition for leave to intervene has been filed by a group identifying itself as the City of Angels Broadcasting, Inc. (City of Angels).[31] The petition will be denied. City of Angels has not shown how its participation will assist the Commission in the resolution of any outstanding issues. Nor has the petitioner included affidavits from persons with knowledge of the facts set forth in its pleading. Finally, City of Angels failed to show good cause for its late filing. In sum, City of Angels has totally failed to meet the criteria for intervention prescribed in Section 1.223 of our Rules.[32]

20. Also pending before the Commission are three Fidelity Petitions for Leave to Amend,[33] which have been opposed by the Bureau and/or RKO.[34] The three opposed amendments reflect changes in Fidelity's application regarding ownership and business and broadcast interest changes of its stockholders. A fourth petition reports steps Fidelity has undertaken to assure that all future changes to its application will be timely and accurately filed.[35]

21. The subject matter of the three opposed amendments reflect voluntary events that occurred prior to the 30 day time period for reporting changes, and Fidelity has not shown good cause for its late

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[29] Changes to the Television Table of Assignments are accomplished through rulemaking proceedings. *See* Section 1.401, 1.420 and 73.606 of the Commission's Rules. *See also Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954).

[30] *See e.g., David L. Kurtz*, 19 RR 1367 (1960).

[31] Motion for Leave to Intervene and Petition to Reopen Proceedings filed June 13, 1980.

[32] In light of our dismissal of the City of Angels' Motion for Leave to Intervene, we will dismiss as moot that petitioner's Motion for Leave to File an Additional Pleading and its accompanying Reply Comments both filed August 28, 1980.

[33] The dates of these petitions are November 27, 1979, February 22, 1980, and June 9, 1980, respectively.

[34] The Bureau filed oppositions on December 5, 1979, March 4, 1980 and June 17, 1980, respectively, with RKO limiting its objections to the first two petitions. Fidelity filed unauthorized responses to the December 5, 1979 and March 4, 1980 oppositions, which will be dismissed pursuant to Commission Rule, Section 1.294.

[35] Petition for Leave to Amend, filed September 29, 1980. This proposed amendment was filed in response to a recommendation made in the Broadcast Bureau's pleading filed August 19, 1980 pursuant to Commission Order, FCC 80–329, 78 FCC 2d 355, released June 6, 1980.

filings. Consequently, Fidelity has failed to satisfy the prerequisites of Section 73.3522(b)(1).[36] On the other hand, Fidelity is obliged to keep its application current.[37] Moreover, acceptance of these amendments will not prejudice RKO since Fidelity will not gain any comparative advantage.[38] Nor would acceptance of the amendments disrupt this proceeding. Accordingly, the amendments will be accepted,[39] but for the sole purpose of permitting compliance with 47 C.F.R. 1.65 by Fidelity.[40] Fidelity's September 29, 1980 amendment will be accepted for the same reason, to keep its application current, and with the same caveat that no comparative advantage will accrue to Fidelity.

22. A final pleading pending before the Commission is a "Motion to Strike or Dismiss" filed by RKO on October 21, 1976. Briefly, RKO filed a request on September 21, 1976 seeking to spin off RKO General, Inc. from its parent corporation, the General Tire and Rubber Company. When Fidelity opposed the spin-off request, RKO filed the instant motion. In our Decision granting a construction permit to NETV, Inc. for a new television station to operate on Channel 7, Boston, Massachusetts (Docket Nos. 18759–61),[41] we disposed of this underlying spin-off proposal as moot.[42] Accordingly, the Motion to Strike an opposition to that spin-off proposal will similarly be dismissed as moot.

23. ACCORDINGLY, IT IS ORDERED, That the record is reopened and remanded for expedited proceedings in accordance with this Memorandum Opinion and Order under the following issues:

(1) To determine whether in light of its disqualification in Docket Nos. 18759–61, RKO has the requisite qualifications to remain the licensee of Station KHJ-TV, for Los Angeles.

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[36] Section 1.65 of the Commission's Rules imposes a continuing obligation to maintain a current application. Information no longer accurate and complete in all substantial respects must be corrected "as promptly as possible and in any event within 30 days, unless good cause is shown."

[37] Rule 73.3522(b)(2) permits acceptance of post designation amendments upon a good cause showing for late filing.

[38] *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970).

[39] *Cf. International Panorama TV, Inc. (KTON-TV)*, FCC 81M-850, released March 25, 1981 (ALJ).

[40] Acceptance of Fidelity's amendments does not constitute a prejudgment of the effect, if any, of the applicant's failure to amend its application in a timely fashion. This question may be addressed more fully by the Presiding Judge after a determination is made regarding RKO's basic qualifications.

[41] *RKO General, Inc. (WNAC-TV)*, 89 FCC 2d 297 (1982). *See also RKO General, Inc. (WHBQ)*, 82 FCC 2d 291, 297–305 (1980) and *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1, 118 (1980).

[42] *RKO General, Inc. (WNAC-TV)*, 89 FCC 2d at 342. RKO's 1976 spin-off proposal was considered moot because of, *inter alia*, subsequent superseding spin-off requests filed March 13, 1980 and July 3, 1980.

(2) To determine whether RKO General, Inc. intentionally filed false and misleading financial reports with the Commission.

(3) To determine whether RKO misled the Commission or was lacking in candor in providing details of the IRS investigation into RKO's and General Tire's tax deficiencies.

(4) To determine whether KHJ-TV's history and policy mitigates any adverse conclusions reached above.[43]

(5) To determine whether, in light of evidence adduced under the foregoing issues, RKO General, Inc. possesses the requisite qualifications to remain the licensee of KHJ-TV.

(6) To determine what impact, if any, the findings with respect to the foregoing issues may have upon RKO's comparative qualifications in seeking renewal of its license for KHJ-TV.

24. IT IS FURTHER ORDERED, That the Motion to Expedite and to Place KHJ-TV's Profits in Escrow filed November 4, 1982 by Fidelity Television, Inc. IS GRANTED to the extent herein indicated and IS DENIED in all other respects.

25. IT IS FURTHER ORDERED, That the Petition for Extraordinary Relief filed February 27, 1980 by the Committee to Eliminate the UHF Handicap in Television in Los Angeles IS DENIED.

26. IT IS FURTHER ORDERED, That the Motion for Leave to Intervene and Petition to Reopen Proceedings filed June 13, 1980 by the City of Angels Broadcasting, Inc. IS DENIED.

27. IT IS FURTHER ORDER, That the Motion for Leave to File an Additional Pleading filed August 28, 1980 by City of Los Angeles Broadcasting, Inc. IS DISMISSED as moot.

28. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed November 27, 1979, February 22, 1980, June 9, 1980 and September 29, 1980 by Fidelity Television, Inc. ARE GRANTED and the amendments ARE ACCEPTED.

29. IT IS FURTHER ORDERED, That the Motion to Strike filed December 18, 1979 by the Broadcast Bureau IS GRANTED and the Responses filed December 14, 1979 and March 14, 1980 by Fidelity Television, Inc. ARE DISMISSED.

30. IT IS FURTHER ORDERED, That the Motion to Strike or Dismiss filed October 21, 1976 by RKO General, Inc., IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[43] The right of RKO to offer mitigating evidence stems from the Court's recognition that "individual stations have different broadcast histories and policies." *RKO General, Inc. (WNAC-TV)* v. *FCC*, *supra*, 670 F.2d at 237. Because of these differences the Court concluded that KHJ-TV was entitled "to appear directly before the Commission and to argue that they deserve different treatment than RKO's Boston station." *Id.*

Administrative Law Judge, Discretion
Application, Amendments of, Need for
Estoppel
Expedited Action
Party, Joinder of

> Competing applicants made parties to remanded proceeding involving same licensee. Parties to select representative counsel and ALJ to exercise broad discretion in expediting case. Commission will invoke collateral estoppel to preclude relitigation of common issues. During pendency of inquiry into licensee's qualifications, rules authorizing amendments to applications are suspended.
> *–RKO General, Inc. (WHBQ-TV)*

FCC 83–341

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO GENERAL, INC.	
For Renewal of Licenses for Stations:	
WHBQ-TV, Memphis, Tennessee[1]	File No. BRCT-79042LC
WHBQ, Memphis, Tennessee	File No. BR-79042CZ
WOR, New York, New York	File No. BR-177
WRKS(FM), New York, New York	File No. BRH-14
WRKO, Boston, Massachusetts	File No. BR-953
WROR(FM), Boston, Massachusetts	File No. BRH-617
KHJ, Los Angeles, California	File No. BR-22
KRTH(FM), Los Angeles, California	File No. BRH-25
WGMS, Bethesda, Maryland	File No. BR-1403
WGMS-FM, Washington, D.C.	File No. BRH-789
KFRC, San Francisco, California	File No. BR-43

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[1] In view of the developments noted below, the proceeding involving Docket Nos. 80–590 through 80–602 will be terminated by a subsequent order and new docket numbers will be assigned when these applications become ripe for further consideration.

WAXY(FM), Ft. Lauderdale, Florida	File No. BRH-781002WR
WFYR(FM), Chicago, Illinois	File No. BRH-7901A3

Memorandum Opinion and Order

(Adopted: July 14, 1983; Released: July 15, 1983)

By the Commission:

Scope of the Order

1. On June 8, 1983, the Commission released a Memorandum Opinion and Order (FCC 83-274) remanding the KHJ-TV Los Angeles, California proceeding (Docket Nos. 16679-80) to an Administrative Law Judge for further proceedings. At that time we stated our intent to limit the questions on remand to six issues[2] arising from a related Boston proceeding (Docket Nos. 18759-61) and, based on resolution of these issues, to reach a final determination as to RKO's basic and comparative qualifications to remain the licensee of KHJ-TV, Los Angeles, California. In the interest of saving time and avoiding relitigation of common issues it is our further intent to apply the findings and conclusions reached in that proceeding to the 13 other RKO proceedings insofar as they involve similar questions of RKO's basic and comparative qualifications. Accordingly, it is the purpose of this Order to fashion a procedure which will afford all interested parties an opportunity to exercise their rights in the Los Angeles proceeding. At the same time, we intend to restrict the number of counsel actually appearing before the Commission, a consideration occasioned by the filing of over 160 applications which

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[2] These six issues are:

(1) To determine whether in light of its disqualification in Docket Nos. 18759-61, RKO has the requisite qualifications to remain the licensee of Station KHJ-TV, for Los Angeles.

(2) To determine whether RKO General, Inc. intentionally filed false and misleading financial reports with the Commission.

(3) To determine whether RKO misled the Commission or was lacking in candor in providing details of the IRS investigation into RKO's and General Tire's tax deficiencies.

(4) To determine whether KHJ-TV's history and policy mitigates any adverse conclusions reached above.

(5) To determine whether, in light of evidence adduced under the foregoing issues, RKO General, Inc. possesses the requisite qualifications to remain the licensee of KHJ-TV.

(6) To determine what impact, if any, the findings with respect to the foregoing issues may have upon RKO's comparative qualifications in seeking renewal of its license for KHJ-TV.

seek to displace RKO as the licensee of its other 13 broadcast facilities.[3]

Interrelationship between KHJ-TV Proceeding and the Thirteen Other RKO Licensed Stations

2. Before turning to the specific courses of action which we are herein adopting, a brief history of the interrelationship between the Los Angeles proceeding and the thirteen other RKO licensed stations is in order. The Los Angeles case was designated for hearing on June 8, 1966 (FCC 66–503). While that case was pending two other comparative proceedings were commenced in conjunction with RKO's renewal applications for WNAC-TV Boston and WOR-TV, New York City, respectively. Although none of RKO's other remaining thirteen licensed stations were challenged for renewal, the Commission conditionally granted renewals for those stations based on the outcome of the Los Angeles, Boston, and New York proceedings.[4] After releasing its Decision finding RKO unqualified to remain the licensee of Station WNAC-TV, Boston,[5] the Commission elected to reopen the prior conditionally granted renewals.[6] The Commission recognized that the conditions placed on those license renewals were basically the same as those placed on RKO's New York and Los Angeles renewal applications and that the underlying question pertinent to all of RKO's broadcast holdings was the impact of the Boston proceeding findings on RKO's qualifications to remain a Commission licensee. Pursuant to Court Order[7] the Commission

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[3] The majority of these applicants are represented by forty-four different law firms. Twelve applicants are proceeding *pro se*.

[4] As we explained in our order reopening the thirteen other RKO renewal proceedings, *RKO General, Inc. (WHBQ-TV)*, 82 FCC 2d 291, 295 n.14:

> Except for 2 licenses, all of the most recently granted renewals contained the following condition or language to similar effect: "This [renewal] grant is conditioned on, and without prejudice to whatever action, if any, the Commission may deem appropriate as a result of final action in the outcome of the proceedings in Docket Nos. 16679 [Los Angeles], 18759 [Boston] and/or 19991 [New York]." The license of Station WAXY(FM), Fort Lauderdale, Florida, was renewed on January 23, 1979 for the period 1979–82 with a referral to the earlier license dated January 10, 1976. The 1976 license was conditioned on the outcome in Boston; the 1979 application was granted "on the same conditions and in accordance with the same provisions" as the 1976 license, and was valid only when posted with the earlier license. The most recent renewal of Station KFRC, San Francisco, California, was not conditioned due to administrative error. KFRC's earlier grants were conditioned, and nothing occurred during the license terms to change the condition. . . .

[5] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980).

[6] *RKO General, Inc. (WHBQ-TV)*, 82 FCC 2d 291 (1980), *vacated in part and remanded sub nom. New South Media Corporation v. FCC*, 685 F.2d 708 (D.C. Cir. 1982).

[7] *New South Media Corporation, supra.*

directed the filing of applications which would be mutually exclusive with RKO's thirteen reopened renewal applications.[8] One hundred sixty-four competing applications were subsequently filed by the May 12, 1983 cut-off date.

3. The question to be resolved in the Los Angeles case, *i.e.*, the impact of the Boston decision on RKO's qualifications (Issues 1, 2 and 3), is similar to that underlying RKO's thirteen remaining renewal applications. It thus follows that a consolidated proceeding involving all interested parties and focusing on the three issues common to all of RKO's outstanding renewal applications will best conduce to the efficient dispatch of the Commission's business.

Party Status

4. By separate Order[9] we will therefore make all pending applicants parties to the Los Angeles proceeding for the limited purpose of participating in the resolution of questions which are common to RKO's overall basic and comparative qualifications and which arose out of the Boston proceeding.[10] Because we are opening the door to a multitude of additional parties, certain procedures must, however, be adopted to avoid an otherwise unmanageable situation. These procedures fall along several lines.

5. Foremost, we intend to channel the participation of these applicants through representative counsel. This will forestall the presentation of repetitious questions and pleadings while assuring that the collective concerns of these parties will be fully considered during this phase of the proceeding. Hence, the parties are expected to present their arguments and to participate generally in this proceeding through representative counsel.[11] Adoption of this procedure is designed to permit resolution of Issues 1, 2 and 3 in an efficient and timely manner.

6. In this regard we believe that it is appropriate to afford the applicants the opportunity to devise a workable plan to facilitate the use of representative counsel. Given the desire to expedite resolution of this matter, those applicants who intervene will therefore be afforded 30 days from the release date of this order to submit a plan for representative counsel to the Commission for its approval.[12]

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[8] *RKO General, Inc. (WHBQ-TV)*, FCC 83-55, released February 11, 1983.

[9] *See* Order, *RKO General, Inc. (KHJ-TV)*, FCC 83-342, adopted July 14, 1983.

[10] *See* Rule 1.221(d). *See also* Federal Rule of Civil Procedure 19. For those applicants who elect not to file a notice of appearance within the prescribed time limit, we direct attention to that part of Section 1.221(e) which reads: "Any person so named [as a party in interest] who fails to file this written statement [of appearance] within the time specified, shall, unless good cause for such failure is shown, forfeit his hearing rights."

[11] *See generally, Note, Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1499 et seq. (1974).

[12] The procedures we are establishing are not intended to precipitate a change in

Failure of the parties to arrive at a workable solution will necessitate the specification by the Commission of appropriate procedures. This matter appears infinitely more amenable to private, voluntary resolution.[13]

Collateral Estoppel

7. The procedure herein adopted is designed to assure that the common issues in question are fully and fairly litigated in one proceeding.[14] By according all parties their day in court, the doctrine of collateral estoppel[15] will preclude any relitigation of the common designated issues (1, 2 and 3) in subsequent proceedings involving RKO's thirteen other broadcast stations.[16] If resolution of these

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the existing scheduled date for commencement of the Los Angeles hearing. Given the Commission's desire to expedite the proceeding, we in fact urge the ALJ and parties to adhere to the strict time schedule already established.

[13] *See e.g., ASD Answer Service, Inc.*, CC Docket Nos. 82–587 et seq. where the parties voluntarily agreed to the use of representative counsel. To facilitate the applicants' efforts in this regard, the Commission Meeting Room, No. 856, 1919 M St, N.W., Washington, D.C. will be made available at 9:00 a.m. on July 26, 1983 for the purposes of a meeting of all interested parties.

[14] "[T]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by reducing the possibility of inconsistent decisions." *Montana* v. *United States*, 440 U.S. 147, 153–154 (1979), cited in *Arizona* v. *California*, 51 U.S.L.W. 4325, 4329 (1983). *Cf. Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 338, *Teitelbaum Furs, Inc.* v. *Dominion Insurance Co.*, 58 Cal 2d 601, 606–07, 375 P. 2d 439, 441, *cert. denied*, 372 U.S. 966 (1962) and *Note, Collateral Estoppel of Nonparties, supra*, 87 Harv. L. Rev. at 1491 n.39.

[15] Invocation of the doctrine of collateral estoppel bars relitigation of the same issues in subsequent proceedings involving the same parties or their privies. 1B *Moore's Federal Practice*, ¶0.441[2], at 3777 (2d ed. 1974). Davis, relying on the Restatement (Second) of Judgments (1982), explains that the:

> traditional language of "res judicata" and "collateral estoppel" has given way to the new vocabulary of "claim preclusion" and "issue preclusion." The second restatement helpfully explains . . .: The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower issue-that one who has actually litigated an issue should not be allowed to relitigate it-underlies the rule of issue preclusion. 4 Davis, *Administrative Law Treatise*, §21:1, at 48 (2d ed. 1983).

Other than the Los Angeles proceeding, the doctrine of *res judicata* is inapplicable, for we are not adjudicating the question of which of several competing applicants should be granted a license for any one station. Each of these matters constitutes a separate cause of action. *See RKO General, Inc. (WHBQ-TV)*, 82 FCC 2d at 291, 312, 313 (1980). Instead we contemplate relying on the doctrine of collateral estoppel which is considered "a part of the broad doctrine of res judicata . . . which prevents a second litigation of the same issues even in connection with a different claim or cause of action." 4 Davis, *Administrative Law Treatise*, Section 21:2 at 50 (2d ed. 1983).

[16] *Cf. Southwest Airline Co.* v. *Texas International Airlines*, 546 F.2d 84, 95 (5th Cir.

matters does not result in the disqualification of RKO under Issue 5, the question of the impact of the findings made under issues 1, 2, and 3 on RKO's comparative qualifications must also be addressed (Issue 6). If it is determined that a negative comparative demerit should be assessed, this determination is again common to all of RKO's licenses. Accordingly, there will be no need to relitigate that question, of whether a comparative demerit should be assessed, nor the scope of such demerit if a negative assessment is in fact levied against RKO. Instead, the parties will be bound by these determinations, although RKO will be given an opportunity to offer evidence in mitigation in each of the separate comparative proceedings when those cases become ripe for consideration. By the same token, RKO is entitled to offer relevant mitigating evidence in the Los Angeles proceeding pursuant to designated Issue 4, a right guaranteed by the Court when it remanded the KHJ-TV Los Angeles proceeding to the Commission.[17]

Deferring of Predesignation Amendments

8. As previously noted, 164 competing applications have been filed in the captioned proceedings. It is the Commission's normal practice to release a public notice announcing the acceptance for filing of the last-filed mutually exclusive application.[18] This notice serves three purposes: it informs the public of the applications that have been accepted for filing; it sets a time certain in which petitions to deny can be filed against these applications; and it establishes a time frame within which applicants can offer amendments as a matter of right.[19] The rationale for permitting amendments as a matter of right is to permit the applicants to perfect their applications prior to designation, thereby facilitating the Commission's objective of "an early stabilization of the comparative factual situation which must ultimately go to hearing."[20]

9. Once the time for filing amendments as a matter of right has expired, applicants must thereafter demonstrate good cause before a tendered amendment will be accepted. Included in this range of amendments are those filed pursuant to Sections 1.65 and 73.3514 of our rules, 47 C.F.R. §§1.65 and 73.3514. Amendments under Section

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1977). The present state of the law suggests that even nonparties may be able to invoke the doctrine. *See* 4 Davis, *Administrative Law Treatise*, Section 21:1 at 48 (2d ed. 1983), thereby negating the requirements of mutuality that once laid at the cornerstone of the doctrine. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979) and *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (9th Cir. 1942).

[17] *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237 (1981), *cert. denied*, 102 S.Ct. 1974, 2931 (1982). See para. 13, *infra*.

[18] See *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 207–208 (1979).

[19] See Section 73.3522(a)(2) of our Rules, 47 C.F.R. §73.3522(a)(2).

[20] *Revised Processing of Broadcast Applications*, *supra*, at 210, 211.

1.65 are "designed to keep the Commission apprised of all substantial and decisionally significant changes,"[21] while Section 73.3514 requires "applicants to provide all of the information called for in the application form."[22]

10. However, at the present time we are not concerned with the information contained in those applications. Instead, our present concern lies in the expeditious resolution of the issues stemming from the Boston proceeding. Since we are not in a position to focus on the issues that must be specified in these thirteen other proceedings, and since the Commission is not in a posture to make a public interest determination as to which applications should be granted in these thirteen other proceedings, no useful purpose will be served by requiring the applicants who are competing against RKO's other thirteen stations to tender amendments to their proposals while the KHJ-TV proceeding is in its current status. The Commission will not be acting on or processing those applictions and to require amendments would place an unnecessary burden on both the applicants and the agency.

11. Accordingly, to avoid consideration of matters that are not germane to the designated issues, we are hereby suspending the provisions of Section 73.3522(a)(2), which permits applicants to file amendments as a matter of right, and are deferring the requirement that these applicants file amendments under Sections 1.65 and 73.3514 of the Commission's Rules. After the specified issues in the Los Angeles proceeding are resolved, the Mass Media Bureau will issue an appropriate public notice ("B" cut-off list) announcing the time that amendments can be filed as a matter of right and an Order reimplementing the requirements of Sections 1.65 and 73.3514.[23]

12. Along these lines, on July 11, 1983 Magna Media Corporation, Boston Radio Corporation, Potomac Broadcasting Corporation, East Lake Communications, Inc. and Adwave Company filed joint "Comments Concerning RKO Procedures." These commentors, which have filed competing applications for construction permits in New York City, Boston, Massachusetts, Washington, D.C./Bethesda, Maryland, Chicago, Illinois and Ft. Lauderdale, Florida, respectively,

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[21] *Payne of Virginia, Inc.*, 66 FCC 2d 633, 643 n.25 (1977).

[22] *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1490 n.2 (Rev. Bd. 1979).

[23] We recognize that a B cut-off list was issued in the WHBQ-TV, Memphis, Tennessee proceeding on June 1, 1983 (Report No. B-65) and that the time for filing amendments as of right for those applicants expired July 11, 1983. Consistent with the instant Order we will defer processing any amendments filed pursuant to that B cut-off list and will extend to those applicants a second opportunity to file amendments as of right when those proceedings become ripe for consideration. By the same token, we advise all parties that action constituting major changes to their applications, see Sections 73.3572, 73.3573 and 73.3574 of our rules, will result in the assignment of a new file number. Such applicants will be precluded from participating in any further proceedings.

suggest that the Los Angeles proceeding is the appropriate forum to resolve matters of general applicability concerning RKO's basic and comparative qualifications. These applicants urge the Commission, however, to initiate immediately thirteen parallel proceedings involving the remaining RKO renewal applications. Applicants argue that this course of action is compelled by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *New South Media Corp.* v. *FCC*, 685 F.2d 708, 52 RR 2d 1 (D.C. Cir. 1982).

13. We will deny applicants' request to initiate parallel proceedings at this time. The holding in *New South* directed the Commission to fashion a procedure which would permit competing applications to be filed against RKO's conditionally renewed license applications, but left it to the Commission to decide which procedure to adopt, stating that it was not "purporting to direct the particular mode in which the Commission should now proceed, . . ." *New South*, *supra*, at 711. By Order, FCC 83-55, released February 11, 1983, the Commission accordingly adopted a procedure which led to the filing of 164 competing applications by the May 12, 1983 cut-off date.

14. It is our determination that the most orderly and expeditious way to resolve all the questions concerning RKO's qualifications and determine who will be the licensee of the various stations is to proceed as we have outlined above without initiating parallel proceedings. We believe that conducting the 13 proceedings after resolution of the issues in KHJ will allow RKO and the applicants to avoid litigating unnecessary issues and will create improved chances for settlement. We anticipate that this approach will ultimately result in final resolutions of those proceedings being reached more rapidly than would be the case were we to institute parallel proceedings. Thus, the resolution of the 13 proceedings will not have been delayed by the procedure herein adopted.

Scope of Issues and Mitigating Evidence

15. As noted, we are limiting the present inquiry to the impact of the Boston decision, and to the facts developed in the Los Angeles proceeding, on RKO's qualifications to remain the licensee of KHJ-TV. Accordingly, requests for additional issues against RKO will be entertained only if they are based on facts and circumstances specifically growing out of the Boston proceeding.[24] By the same token, since the focus of our inquiry is on RKO's qualifications, petitions to enlarge issues against any other party will not be considered at this time. Such requests will be considered in due course, after the specified issues in the Los Angeles proceeding are first resolved.

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[24] If RKO is found basically qualified under Issues 1, 2 and 3, the parties in the 13 renewal cases may then raise whatever other basic qualifications questions they feel are warranted and supported by the facts in their respective cases.

16. Along these lines we are specifically limiting RKO's showing of mitigation to its stewardship of KHJ-TV. Although RKO has previously adduced evidence on this question, the Court, which has had the Los Angeles proceeding before it on three earlier occasions,[25] has directed the Commission to make new findings with regard to the history and policy of KHJ-TV in Los Angeles.[26] Such evidence will serve two purposes. First, if the evidence adduced under issues 1–3 indicate that RKO is *prima facie* disqualified, evidence of KHJ's history and policies may be considered in mitigation.[27] Second, if RKO is found basically qualified, this further evidence may mitigate any adverse conclusions that might otherwise be drawn against RKO's comparative qualifications.

17. To further expedite the Los Angeles proceeding we urge the Administrative Law Judge to order submission of the parties' direct affirmative cases in writing before commencement of any oral hearing. We also strongly suggest that the parties stipulate to facts and issues not in genuine dispute, to submit affidavits on other aspects of the case whenever possible[28] and to confer on any matter, including procedure, which may aid in the prompt disposition of this case. Along these lines we expect the ALJ to exercise his broad discretion and authority in eliminating any unnecessary procedures and avoiding any unwarranted delays in the conduct of the Los Angeles proceeding. Finally, as we stated in our June 8, 1983 RKO Order, any exceptions which the parties desire to interpose shall be filed directly with the Commission for its consideration.[29]

18. ACCORDINGLY, IT IS HEREBY ORDERED, That the above-described applicants ARE DIRECTED to proceed in accordance with the provisions of this Order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[25] *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974); *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, *rehearing denied*, 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

[26] *RKO General, Inc.* v. *FCC*, 670 F.2d at 237. In view of the limited nature of this inquiry, no useful purpose would be served by allowing the applicants competing for RKO's 13 other stations to participate in the resolution of Issue 4.

[27] *See, e.g., Wagoner Radio Co.*, 12 FCC 2d 978 (Rev. Bd. 1968).

[28] We recognize that the issues pertaining to the filing of RKO's 324 Reports and to RKO's submissions of information on the status of the IRS inquiries involve questions of demeanor and credibility, and hence may not be amenable to the submission of affidavits. We nonetheless urge the ALJ and the parties to avoid cumulative and repetitious testimony and to adopt whatever measures they deem appropriate in streamlining this proceeding without sacrificing the completeness of the record needed to make a final determination on the critical questions in issue.

[29] *RKO General, Inc. (KHJ-TV)*, FCC 83–274, para. 15.

Control, Transfer of, Unauthorized

Mutually exclusive applications designated for hearing. Failure to file an application for transfer of control based on a gradual change of majority of board members of a licensee's parent, nonprofit, non-stock entity will not reflect adversely on licensee where the requirement for such application is unclear and the licensee has otherwise notified the Commission of the changes.
–*Seven Locks B/cing Co.*
MM Docket No. 83–667

FCC 83–309

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SEVEN LOCKS BROADCASTING COMPANY Has: 950 kHz, 1 kW, DA, D For Renewal of License For Station WCTN Potomac-Cabin John, Maryland.	MM Docket No. 83–667 File No. BR-810527UB
CELEBRITY BROADCASTERS, INC. Potomac-Cabin John, Maryland Req: 950 kHz, 1 kW, DA, D For Construction Permit.	MM Docket No. 83–668 File No. BP-810831AT

HEARING DESIGNATION ORDER

(Adopted: June 29, 1983 Released: July 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned, mutually exclusive applications of Seven Locks Broadcasting Company ("Seven Locks") for renewal of its license for station WCTN, Potomac-Cabin John, Maryland, and of Celebrity Broadcasters, Inc. ("Celebrity") for a construction permit on the frequency occupied by WCTN. The applications must be designated for comparative hearing, because they are mutually exclusive. Celebrity also filed a petition to deny Seven Locks' renewal application. Such

petitions are ordinarily considered predesignation motions to specify issues and dismissed as prematurely filed. They should be submitted to the presiding Administrative Law Judge after designation. *Revised Processing of Broadcast Applications*, 72 FCC 2d 202 (1979). In this case, however, we have elected to consider at this point Celebrity's allegations as to an unauthorized transfer of control, because a novel question has been raised that we have not recently had an opportunity to address.[1] [2]

2. Celebrity argues that an issue should be specified against Seven Locks for an alleged unauthorized transfer of control, a violation of Section 310(d) of the Communications Act of 1934, as amended.[3] All of the stock of Seven Locks is owned by Christ Church of Washington ("Church"), a non-profit organization. The Church is run by a seven-person Board of Deacons. Celebrity contends that these Deacons are the same as the board of governors of a non-profit organization and so should be considered by the Commission as the equivalent of equal owners of a for-profit organization. Four of the seven Deacons have been replaced since Seven Locks acquired the station in 1973. This constitutes a transfer of majority control, according to Celebrity, for which a transfer application must be filed and Commission consent obtained. Celebrity also contends that the former pastor of the Church controlled the affairs at the Church; that he was the driving force for the acquisition of the station; and that he was in direct control of the Church and the radio station. That pastor has since resigned his position, and a new pastor has been installed. This, according to Celebrity, resulted in a *de facto* transfer of control, which also required prior Commission approval. Celebrity concludes that a clear violation of a statutory provision has been committed by Seven Locks, and that this "shows a lack of proper qualifications to continue as a Commission licensee." Anticipating Seven Locks' response, Celebrity asserts that an absence of

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[1] Seven Locks' opposition to the petition to deny was filed four days late. Nonetheless, we shall consider its opposition as to the issue of unauthorized transfer of control, because the pleading aids in the disposition of the allegations. Comments filed by Celebrity on June 15, 1983, to Seven Locks' Petition for Leave to Amend of August 30, 1982, and Seven Locks' reply to the comments, raise similar concerns which are pertinent to the unauthorized transfer of control issue.

[2] On August 30 and December 1, 1982, Seven Locks petitioned to amend its application to provide information required by Section 1.65 of the Commission's Rules. Similarly, Celebrity petitioned to amend its application on November 9, 1981. For good cause shown, these amendments are accepted. Nonetheless, no comparative advantage will accrue to either applicant as a result of accepting the amendments.

[3] "No . . . station license, or any rights thereunder, shall be transferred, assigned or disposed of in any manner, . . . directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public, interest, convenience, and necessity will be served thereby. . . ." 47 U.S.C. §310(d).

bad faith cannot mitigate this intentional violation, citing *Central Florida Enterprises, Inc.* v. *FCC.* 598 F.2d 37, 44 RR 2d 345 (D.C. Cir. 1978); *cert. den.* 441 US. 957 (1979).

3. Seven Locks first responds that a board of governors of a non-profit corporation is only equated with a corporation's owners, for want of any other standard, to compare stock and non-stock corporate applicants under various comparative criteria, such as integration of management, past experience, and diversification. It maintains that in no previous case has the same analogy been used for determining when a transfer of control took place or a transfer application was required. It continues that *Pacifica Foundation*, 41 FCC 2d 71 (Rev. Bd. 1973), with very similar facts, specifically held that it was unclear whether it was necessary to file a transfer application in a case where a majority of the board of a non-profit applicant had gradually changed. Seven Locks further argues that, in general, it is inapt to treat a board of governors as the owners of a company.[4] It claims that its own Church has a "congregational" form of government, with a register of members and a continuity of "ownership" and "control," and that its Deacons, whose membership is controlled by the congregation, are better compared to a corporation's officers. It states that the Church's pastor is responsible to the Deacons and to the congregation, and thus does not have the "substantiality of the actual control" necessary to impute actual control.[5] Finally, Seven Locks argues that if it is determined on either grounds that a technical violation has occurred, such a violation is of little consequence and does not reflect adversely on its qualifications, especially in view of its complete disclosure of all relevant facts in its various filings with the Commission. It concludes that this case is even less compelling than the *Pacifica* case above, in which no adverse action was taken.

4. No unauthorized transfer of control issue can be added against Seven Locks on the basis of the evidence presented here. The Commission has never clearly set forth the circumstances which would constitute a transfer of control, requiring the prior consent of the Commission, with regard to non-stock corporate licensees or other licensee entities comprised of a membership body which elects a governing board. We do not believe it appropriate, in the context of the instant case, to set forth a broad policy of general applicability

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[4] Seven Locks contends that such a requirement puts an onerous and unnecessary burden on the Commission and on those institutions which have a high turnover rate in their governing bodies (for example, high schools or universities). Furthermore, the Commission's policies are not necessarily advanced, it argues, as many institutions have their control "diffused within the institution." An institution such as the Church has a continuity of "ownership" and "control" in the body of its congregation, which controls the membership of the Deacons, according to Seven Locks.

[5] *See WHDH, Inc.*, 17 FCC 2d 856 (1969).

which would adequately address the question of a transfer of control covering all non-stock licensees. This is a matter which will be explored independently. For present purposes, it is sufficient to find that the necessity for such a filing was unclear, as it was in *Pacifica Foundation, supra*.[6] There is no evidence of any bad faith or intent to deceive by Seven Locks in this matter; to the contrary, all of its Ownership Reports and its subject application are accurate in denoting the current Deacons.[7] Finally, Celebrity has not presented sufficient evidence that the former pastor of the church exercised such *de facto* control of the radio station as to require the filing of a transfer application upon his retirement from the church. It has offered no specific facts to support its general allegation that the pastor was in direct control of the radio station. Its allegations concerning the pastor's position in the Church, even if substantiated, would not alone demonstrate that the change in pastors vested in a new individual "the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." *WHDH, Inc., supra*.

5. Celebrity has presented no evidence of compliance with the local public notice requirements of Section 73.3580 of our Rules (47 C.F.R. §73.3580) and will be ordered to do so, *infra*.

6. Celebrity and Seven Locks appear to be qualified to operate as proposed and their applications will accordingly be set for a comparative hearing.

7. Accordingly, IT IS ORDERED, That the petition to deny filed by Celebrity Broadcasting Company IS GRANTED to the extend indicated above and DISMISSED in all other respects.

8. IT IS FURTHER ORDERED, That Celebrity Broadcasters, Inc. shall inform the presiding Admnistrative Law Judge within thirty days of the release of this Order as to whether it has complied with the public notice requirements of Section 73.3580(f) of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned

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[6] Since no adverse action would be taken in that case, the Review Board declined to state whether a transfer application was actually required. 41 FCC 2d at 72.

[7] In *Central Florida, supra*, which Celebrity cites, the court did state that "people are held to intend the obvious consequences of their acts." *Id.* at 52. The "obvious consequences" which the court held that the licensee in that case must have intended was the *de facto* relocation of its main studio after a series of gradual shifts of activities from its nominal main studio. It continued in the next two sentences that "[the applicant] is chargeable with knowledge of the [subject] regulation. Thus, we are left with an intentional violation of a Commission Rule." *Id.* For the reasons stated above, Seven Locks cannot be chargeable with such knowledge. Celebrity also argues that because Seven Locks operates a commercial station, it is subject to some higher standard than the applicant for a noncommercial educational station in *Pacifica, supra*. We find no basis upon which to distinguish the two situations.

applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing (either individually or, if feasible and consistent with the Rules, jointly) within the time and the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send, by Certified Mail - Return Receipt Requested, a copy of this Hearing Designation Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Candor
Comparative Hearing
Cross Interest
Ownership Disclosure
Review by Review Board
Television Station, Authorization

> Review Board affirms Initial Decision and grants application with substantial diversification and integration preferences and slight-to-moderate comparative demerit for careless lack of candor in reporting principal's voting interest in another licensee as "non-voting" and failing to report other licensee's application for, and subsequent grant of, television station in region. Cross-interest policy clarified.
> –*Superior B/cing of Calif.*
> BC Docket No. 80–734

FCC 83R–52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Jack O. Koonce and Melvin J. Querio d/b/a SUPERIOR BROADCASTING OF CALIFORNIA Chico, California	BC Docket No. 80–734 File No. BPCT-781221LI
THE FAR WEST BROADCASTING CO., INC. Chico, California	BC Docket No. 80–735 File No. BPCT-790815KP
For Construction Permit for a New Commercial Television Station	

Appearances

Vincent J. Curtis, Jr., and *Richard Hildreth*, on behalf of Superior Broadcasting of California; and *Herbert D. Miller, Jr.*, on behalf of The Far West Broadcasting Co., Inc.

DECISION

(Adopted: July 19, 1983; Released: July 25, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Superior Broadcasting of California (Superior) and The Far West Broadcasting Co., Inc. (Far West) for authority to construct a new UHF commercial television station to operate on Channel 24 at Chico, California. By *Hearing Designation Order*, 45 Fed. Reg. 79904, published December 2, 1980, their applications were designated for consolidated hearing on (1) a limited financial issue against Far West and (2) the standard comparative issue to determine which applicant would better serve the public interest.[1] By *Memorandum Opinion and Order*, FCC 81M-2284, released July 23, 1981, presiding Administrative Law Judge (ALJ) Joseph P. Gonzalez added issues to determine: (1) whether Superior had fully reported the broadcast interests and associations of its principals and the effect thereof on its basic and comparative qualifications; and, (2) whether Superior would provide the required signal strength to the entire community of license and the effect thereof on its comparative qualifications. Subsequently, the ALJ reconsidered the signal strength issue and deleted it on his own motion. *Order*, FCC 81M-3968, released December 16, 1981. By *Memorandum Opinion and Order*, FCC 81M-2509, released August 13, 1981, a public inspection file issue was added against Superior on a comparative basis only. Previously, the ALJ had granted Far West's motion for partial summary decision and favorably resolved the limited financial issue that had been designated against it. *Memorandum Opinion and Order*, FCC 81M-2238, released July 22, 1981.

2. In an *Initial Decision* (*I.D.*), FCC 83D-6, released February 4, 1983, the ALJ granted the Superior application after finding that its derelictions on the reporting issue were minor and did not detract decisionally from its basic qualifications. The *I.D.* further concluded that Superior was comparatively the best applicant because: (a) Superior warranted a substantial diversification preference inasmuch as Far West's 80% stockholder, Kelly Broadcasting Co., is the licensee of Station KRCA-TV, Sacramento, California, which has extensive over-the-air and cable audience penetration in the Chico area, whereas there is no evidence to show that the three television stations and one AM station, whose ownership is partly attributable to Superior, have any audience penetration in the Chico area; (b) Superior, which has 100% full-time integration credit, merits a substantial integration preference over Far West, which has only

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[1] The application of Southwest Television, Ltd. (File No. BPCT-790815KQ), also designated for consolidated comparative hearing, was subsequently dismissed at the applicant's request. *Order*, FCC 81M-271, released January 28, 1981.

20% full-time credit; (c) Superior is entitled to summary decision on the public file issue; and (d) Superior should not be assessed any comparative demerit under the reporting issue because no intent to conceal or deceive was shown and because the matters not timely or accurately reported were, at most, only slightly decisionally significant.

3. The proceeding is now before the Review Board on exceptions filed by Far West and a reply brief filed by Superior. The Board has reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held April 29, 1983, and our examination of the record. We adopt the findings of fact in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the Superior application will best serve the public interest, convenience, and necessity.

4. *Reporting Issue*. The ALJ found that Superior violated Sections 1.65 and 73.3514 of the Rules, 47 CFR §§1.65 and 73.3514,[2] because: (1) it "inaccurately" reported as "non-voting" the 12% voting stock interest in KLOC Broadcasting Co., Inc. owned by Melvin J. Querio, one of two co-equal partners in Superior[3]; (2) it did not report timely the filing in August 1976 by KLOC Broadcasting of an application for a television station at Concord, California; (3) it failed to report the November 24, 1976 filing and subsequent grant on August 8, 1979 of a KLOC Broadcasting application for television Station KCBA-TV, Salinas, California; and (4) it failed to report that Querio served as a director of the licensee of Station KTXL-TV, Sacramento, California, from January 21, 1972 to June 16, 1974, was a director and vice-president of KLOC Broadcasting from July 20, 1965 to July 15, 1974, and had a 52% ownership interest in Station KTRT-AM, Truckee, California, from July 24, 1968 to January 21, 1972. *I.D.*, paras. 25, 38. Additionally, after finding that Superior had no motive or intent to conceal, deceive, or misrepresent; but exhibited only faulty judgment and carelessness and that the above matters were, at most, of slight decisional significance, he concluded that neither disqualification of Superior nor assessment of a comparative demerit was warranted. *I.D.*, paras. 39–43.

5. The gravamen of Far West's exceptions concerns the ALJ's refusal to disqualify Superior or to assess it a comparative demerit for not timely and accurately reporting the present and past

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[2] Section 1.65 requires an applicant to amend its pending application within 30 days whenever the information furnished therein is no longer substantially accurate and complete in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance. Section 73.3514 requires that an application include all information called for by the application form. *See, e.g.*, *Nuance Corp.*, 85 FCC 2d 412, 415–16 (Rev. Bd. 1981).

[3] KLOC Broadcasting is the licensee of Station KLOC-TV, Modesto, California, and KCBA-TV, Salinas, California, is a 10% owner of Station WCPT-TV, Crossville, Tennessee, and was previously the licensee of Station KLOC-AM, Ceres, California. *I.D.*, para. 14.

broadcast interests of Querio. In particular, Far West asserts that: (1) Superior intentionally misled the Commission concerning Querio's simultaneous business relationships with Stations KLOC-TV and KTXL-TV in order to avoid specification of a cross-interest issue against it; (2) Superior's reporting derelictions concerned matters of decisional significance; (3) Querio testified falsely concerning his knowledge of KLOC Broadcasting's filing of its application for Station KCBA-TV, Salinas, and the ALJ erred in denying its motion to reopen the record and add a requested misrepresentation issue; and (4) Superior's reporting derelictions were so frequent and egregious that, regardless of its motive or intent, a substantial comparative demerit, at a minimum, should be assessed against it. We address these matters below.

6. We reject Far West's contention that the desire to avoid specification of a cross-interest issue motivated Superior to camouflage Querio's simultaneous roles at Stations KLOC-TV and KTXL-TV (*see, e.g.*, Far West's Exhs. 8–17) because the record makes clear—and Far West does not contend otherwise—that any such potential cross-interest policy "violation" had ceased to exist *before* the instant Superior application was filed.[4] Consequently, no cross-interest issue could have been specified against Superior. A cross-interest issue is, by nature, a prospective one and is "grounded in concern over 'the *potential* for conflict of interest, unfair competition, and detriment to the public interest' inherent in certain types of business relationships," *Cleveland Television Corp.*, 91 FCC 2d 1129, 1134 (Rev. Bd. 1982) (*quoting Eastern Broadcasting Corp.*, 30 FCC 2d 745, 755 (Rev. Bd. 1971) (emphasis added), *review denied*, FCC 83–235, released May 18, 1983, *appeal pending sub nom. Cleveland Television Corp.* v. *FCC*, No. 83–1659 (D.C. Cir., filed June 15, 1983). It is not a character issue, and no negative qualifying or comparative implications flow from an applicant's possible past brush with the cross-interest policy. Any comparative ramifications arising from an applicant's attributable interests in mass media are properly evaluated under the diversification criterion of the standard comparative issue. *See id.*, 91 FCC 2d at 1133–35 and 1139 n.4. Here, Far West

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[4] To state that a party might "violate" the cross-interest policy is to leave the
misimpression that the policy enunciates some hard-and-fast rule. Actually, the
cross-interest policy is a broader-based corollary to the cross-ownership rules,
which policy evinces concern whenever a party to one application presently
possesses a "meaningful relationship" to another broadcast station in the same
locale so as to create a concern that the stations involved would not be fully
competitive or would have access to each other's confidential business informa-
tion. *See generally Cleveland Television Corp.*, *infra*, 91 FCC 2d 1145–46 (concur-
ring statement) and cases cited therein. Judgments as to the applicability of the
cross-interest policy are made on a case-by-case basis depending on the nature of
the relationship between the subject party and the stations involved. *See, e.g.*,
Morris, Pierce and Pierce, 88 FCC 2d 713 (Rev. Bd. 1981), *review denied*, FCC 83–31,
released January 25, 1983.

concedes that Querio left the employ of Station KTXL-TV before Superior's application was filed with the Commission. Far West Exh. 10, at 14. Therefore, no cross-interest question emanating from that employment remained for the ALJ's (or our) consideration (*see* FCC 81M-2284, *supra*), and no motive to avoid such an issue can be imputed to Superior. To dwell any longer on the problematic question of whether Querio ever had tempted the cross-interest policy would be prodigal.

7. Conversely, we do agree, in part, with Far West's contentions concerning Superior's mischaracterization of Querio's 12% voting interest in KLOC Broadcasting as "non-voting" as well as Superior's failure to report the filing and subsequent grant of the KLOC Broadcasting application for a new television station in Salinas (*see supra* note 3). A "factor of primary significance" in choosing among comparative broadcast applicants is the criterion of diversification of control of the mass media, which "constitutes a primary objective in the licensing scheme." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). Common ownership interests in other broadcast stations are weighed more heavily against an applicant the closer they are geographically to the proposed community of license. *Id.*, at 394–95. Hence, Superior's characterization of Querio's KLOC ownership interest as "non-voting" potentially affected the outcome of the proceeding, especially when the KLOC Broadcasting television licenses in the region (Modesto and Salinas) and its attributable radio interest in Ceres, California (and, to a lesser extent, its 10% interest in a distant Tennessee television station) are considered. *See supra* note 3; *I.D.*, paras. 14, 44. There is a vital difference between the way the Commission considers non-voting stock and the way it considers voting stock. Thus, insofar as they promote diversification of media control, the Commission's rules limiting multiple ownership focus almost exclusively on voting stock, *see, e.g.*, 47 CFR §§73.35, 73.240, 73.636 NOTES 2–7, while non-voting stock is generally of considerably lesser concern. *Cleveland Television, supra*, 91 FCC 2d at 1139. *See also Evening Star Broadcasting Co.*, 67 FCC 2d 318, 324 (1978) ("ownership of preferred stock will not invoke the strictures of the multiple ownership rules absent contingent control rights"). Querio has been involved in broadcasting for many years and is the principal of a Commission licensee; he is presumptively aware of the difference between the Commission's regulatory treatment of voting and non-voting stock. We might even go so far as to infer that it was precisely because of Querio's awareness of the significance of voting stock to our diversification principles that the applicant cast his ownership interest in KLOC Broadcasting as non-voting, but for the fact that

collateral Commission records clearly list Querio's holdings in the licensee (KLOC Broadcasting) in their factual form.[5] Ergo, an intent to categorically misrepresent the actual nature of Querio's broadcast holdings is difficult to find. *Vogel-Ellington Corp., supra* note 5, 41 FCC 2d at 1010–11. The characterization of his stock as non-voting (based on Querio's later oral assertion that he refrains from voting the stock) is therefore viewed essentially as a heedless shading of his interests so as to tint those interests with the most favorable comparative coating. Nonetheless, Superior's mischaracterization of the stock as non-voting, without any explanatory annotation, was demonstrably less than candid; and it concerned a matter of decisional importance. The Commission must rely on the absolute candor of applicants—more so now than ever because our license application forms rely increasingly on bare representations and less on documentation, *see Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381 (1981). In terms of forthrightness in describing the broadcast ownership interests of its principals, Superior was not, and its lack of full disclosure here indicates that its reliability as a licensee expected to demonstrate full and complete candor to the Commission is somewhat less than unqualified. *See generally Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136–38 (Rev. Bd. 1982), *modified* 53 RR 2d 44 (1983). A slight-to-moderate demerit should have been assessed, and we penalize Superior in that degree. *See generally Radio Station WABZ, Inc.*, 90 FCC 2d 818, 825–27 (1982), *appeal pending sub nom. Victor Broadcasting, Inc.* v. *FCC*, No. 82–1964 (D.C. Cir. 1982).

8. Additionally, Superior failed to timely report in this proceeding the filing and subsequent grant of the KLOC Broadcasting television application for Salinas. *I.D.*, paras. 25, 36, 41. Because that station is an attributable regional broadcast interest, Superior's reporting failure here materially relates to the diversification comparison between the applicants. *See supra* para. 7. However, we agree with the ALJ that Superior's failure to report this matter was careless rather than misrepresentational since the Salinas grant to KLOC Broadcasting was an open matter of public record. Querio testified that he had not been aware of when the Salinas application had been filed or granted. Tr. 340–345. Far West claims that Querio misrepresented his lack of awareness concerning the Salinas application (and it also claims that the ALJ erroneously denied its motion to reopen the record to explore this alleged misrepresentation) because

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[5] *See* Far West Exh. 8 (FCC Forms 323 (ownership) filed by KLOC Broadcasting (1974–80)). But, even when accurate information is elsewhere on file at the Commission, applicants are expected to make full and accurate disclosure in separate licensing proceedings. *See generally Vogel-Ellington Corp.*, 41 FCC 2d 1005, 1010 (Rev. Bd. 1973). The Commission's files are large indeed, and some say—well—imperfect. It is the applicant's affirmative duty to bring its other media interests to the Commission's attention and not the responsibility of a competing applicant to ferret them out. *Id.*

on November 8, 1976, and again on December 8, 1977, Querio wrote a letter guaranteeing a portion of the financing for the Salinas television applicant, KLOC Broadcasting. That application was filed on November 24, 1976, and finally granted on August 8, 1979. What emerges from Querio's testimony, however, is that he did not concern himself deeply with the actual filing of the Salinas application, and took no active part in following the application's progress through the multi-year administrative process. Notwithstanding, Querio—as a 50% principal in this proceeding and as an owner of a 12% interest in KLOC's Salinas application—was required to determine what new media interests, including the Salinas station, KLOC Broadcasting might have acquired before forwarding his own list of media interests to Superior for incorporation into the instant application. Querio's lack of intent to flatly deceive the Commission is confirmed, again, by the plain fact that his KLOC Broadcasting interests were already on public file with the Commission. *See Vogel-Ellington Corp., supra*. Still, a slight comparative demerit should have been assessed for the Salinas reporting omissions. *See generally Radio Station WABZ, supra*. In this case, though, any demerit for inaccurate reporting of Querio's broadcast interests is well-encompassed within the slight-to-moderate demerit assessed previously against Superior for reporting inaccuracies, *see supra* para. 7.

9. *Summary*. Superior has a substantial diversification preference[6] and a substantial integration preference[7] over Far West, against which must be weighed a slight-to-moderate comparative demerit for Superior's inaccurate and late reporting of the broadcast interests of its principal, Melvin J. Querio. In our view, this demerit is not of such magnitude as to overshadow the significant comparative preferences Superior enjoys and, thus, Superior remains comparatively advantaged. Hence, according to the criteria of the 1965 comparative *Policy Statement, supra*, we find that a grant of the Superior application will better serve the public interest, convenience, and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the petition for

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[6] No exception has been taken to the ALJ's award of a substantial diversification preference to Superior, and any objection to it by Far West is waived. 47 CFR §1.277(a).

[7] Far West excepts to this preference based on its view that Superior has lacked candor in this proceeding and has been unwilling to comply with the Commission's reporting requirements and, therefore—by implication—its integration is qualitatively poor. Because we have not found any intentional lack of candor or willful noncompliance, we reject this argument; Superior has received a comparative demerit for its reporting deficiencies, but its integration credit remains unscathed.

In addition, we have considered herein all of Far West's exceptions having decisional significance. *See* 47 CFR §1.282(b)(2).

leave to amend filed on April 8, 1983 by The Far West Broadcasting Co., Inc. IS GRANTED, and the amendment IS ACCEPTED; and

11. IT IS FURTHER ORDERED, That the application of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California (File No. BPCT-781221LI) IS GRANTED, and the application of The Far West Broadcasting Co., Inc. (File No. BPCT-790815KP) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-6

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Jack O. Koonce and Melvin J. Querio d/b/a SUPERIOR BROADCASTING OF CALIFORNIA Chico, California	BC Docket No. 80-734 File No. BPCT-781221LI
THE FAR WEST BROADCASTING CO., INC. Chico, California	BC Docket No. 80-735 File No. BPCT-790815KP
For Construction Permit for New Television Station	

Appearances

Vincent J. Curtis, Jr. on behalf of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California; *Herbert D. Miller, Jr.* on behalf of The Far West Broadcasting Co., Inc.; and *Norman Goldstein* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

(Issued: January 25, 1983; Released: February 4, 1983)

Preliminary Statement

1. This proceeding involves the mutually exclusive construction permit applications of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California (Superior) and The Far West Broadcasting Co., Inc. (Far West) for a new commercial television station to operate on Channel 24 in Chico, California.[1]

2. By Hearing Designation Order released December 1, 1980 (Mimeo No. BC 04104), 45 FR 79904, published December 2, 1980, the Commission, by the Chief, Broadcast Bureau, acting pursuant to

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[1] The application of a third party, Southwest Television, Ltd. for the new facility at Chico, California was dismissed with prejudice in a Memorandum Opinion and Order released January 28, 1981 (FCC 81M-271).

delegated authority, designated these applications for hearing in a consolidated proceeding on the following issues:[2]

> 1. To determine, with respect to Far West:
>
>   a) whether applicant has $1,369,032 available to meet its proposed expenditures;
>
>   b) whether, in light of the evidence adduced pursuant to a) above, the applicant is financially qualified.
>
> 2. To determine, on a comparative basis, which of the applications would best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. On January 2, 1981, Far West filed a Motion to Enlarge Issues, requesting the inclusion of the following issues: (1) whether Superior reported all of the broadcast interests and associations of its principals, and if not, the effect on its basic and comparative qualifications; (2) whether Querio violated the Commission's cross-ownership policy by having simultaneous interests in KTXL-TV and KLOC-TV,[3] and whether Superior attempted to conceal this violation, and its effect thereof on its basic and comparative qualifications; (3) whether the grant of Superior's application would result in excessive or increased regional concentration of control, and the effect thereof on Superior's basic and comparative qualifications; and (4) whether Superior would have the signal strength it had proposed, and if not, the effect thereof on its basic and comparative qualifications. In a Memorandum Opinion and Order released July 23, 1981 (FCC 81M-2284), the Presiding Judge granted inclusion of issues (1) and (4), and denied inclusion of issues (2) and (3).

4. In a subsequent Order released December 16, 1981 (FCC 81M-3968), the Presiding Judge indicated that he considered the issue as set forth in (4) above, as no longer relevant to the problem at hand, and it was deleted.

5. On February 12, 1981, Far West filed a Further Motion to Enlarge Issues, petitioning that an issue pertaining to the allegated improper maintenance of KLOC-TV's public inspection file be designated against Superior. Far West also petitioned that a misrepresentation issue be added against Superior. In a Memorandum Opinion and Order released August 13, 1981 (FCC 81M-2509), the Presiding Judge granted inclusion of the first issue, and denied inclusion of the second.

6. The Presiding Judge in a Memorandum Opinion and Order released July 22, 1981 (FCC 81M-2238), granted Far West's Motion

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[2] The issues specifically designated against Southwest Television, Ltd. the dismissed applicant, have been omitted.

[3] Station KLOC-TV is now station KCSO-TV. For purposes of clarity, the station will continue to be referred to as station KLOC-TV.

for Partial Summary Decision filed June 9, 1981, and the limited financial issue set forth in 1. a) and b) above was resolved in Far West's favor.

7. Prehearing conferences were held on February 25, 1981, June 23, 1981, October 27, 1981, November 4, 1981 and December 14, 1981. An admissions session was held on March 19, 1982. Hearing sessions were held on March 23, 24 and 25, 1982. The record was held open until receipt of a Joint Stipulation on March 30, 1982, and was closed by Order of the Presiding Judge released April 2, 1982 (FCC 82M-1044). Proposed Findings of Fact and Conclusions of Law were filed by both applicants and the Broadcast Bureau on May 26, 1982, and replies were filed on June 11, 1982.

Findings of Fact

Superior Broadcasting of California

8. Superior Broadcasting of California is a general partnership between Melvin J. Querio and Jack O. Koonce. Each partner owns a 50 percent interest (Tr. 166, 250). Both men reside in California, and upon grant of Superior's application, they both plan to move to the Chico area. Currently, Mr. Koonce resides in Delano, California and Mr. Querio resides in Modesto, California (Superior Exhibits 1 and 3).

Jack O. Koonce

9. Mr. Koonce will be the Chief Engineer and Assistant Manager to Mr. Querio at the Chico TV station. He will be responsible for the hiring and scheduling of the technical staff, and the daily maintenance of all technical equipment and the FCC files. Mr. Koonce proposes to work full time (40 hours per week) at the Chico TV station (Superior Exhibit 1).

10. Mr. Koonce is presently self-employed as a broadcast technical assistant. He is also an Assistant Minister at St. Dunstan's Episcopal Church, Modesto, California. Mr. Koonce attended the Porterville Community College for two years, and the Episcopal Theological School at Claremont, California. While living in Delano, California, Mr. Koonce has served as past President and Board member of the Delano California Elementary School District; past President of Delano Rotary Club; past Director of the Delano Chamber of Commerce; member of the Quarter Century Broadcaster Club; and Council Member of the Diocese of the San Joaquin Episcopal Church of the U.S.A. He also sells real estate and manages his own rental properties (Superior Exhibit 1).

11. Mr. Koonce is currently President and 100 percent stockholder of Koonce Pacific Corporation, a broadcast consulting firm. Mr. Koonce's past media interests are as follows: (1) 50 percent interest in KXEM Radio, McFarland, California (1971–1974); (2) 100 percent

interest in KXEM (1974–1977); (3) 51 percent interest in KXEM (1977–1978); and (4) 100 percent interest in KWIP Broadcasting, Inc., Merced, California (1976–1978). Mr. Koonce has no current broadcast interests. His past work experience has been as follows: (1) General Manager of station KXEM, McFarland, California; (2) freelance work as a contract technician for a number of radio stations; (3) contract First-Class Operator for station KDNO-FM, Delano, California (1968–1969); and (4) contract engineer for station KRTN, New Mexico (5 mos., 1951). In addition, from March 1, 1977 to December 5, 1977, he was President and Director of North America Media, proposed assignee of station KOBY, Reno, Nevada (application dismissed 1978).[4] He was also an announcer and engineer at radio station KTBR, Modesto, California (1955–1956); and a part-time announcer at KTUR radio, Turlock, California (4 mos., 1952) (Superior Exhibit 1).

12. Mr. Koonce has held a First Class Radio Telephone License for more than 30 years, and an Amateur Radio License for 33 years (Superior Exhibit 1).

Melvin J. Querio

13. Mr. Querio, in the event that Superior's application is granted, will serve as General Manager of the proposed television station, devoting at least 40 hours per week to his duties at the station. He will be in charge of the daily operation of the station, including programming and sales. Mr. Querio presently resides in Modesto, California, but will relocate to Chico or the immediate Chico area if Superior is awarded the certificate. He is currently the General Manager of KLOC-TV, Channel 19, Modesto, California (Superior Exhibit 3). Mr. Querio has taken a temporary leave of absence from KLOC-TV in order to provide assistance in the coordination and sales planning of stations KLRK-TV, Vancouver-Portland, Oregon and KTMX-TV, Denver, Colorado.[5]

14. Mr. Querio owns 12 percent of the voting stock in KLOC Broadcasting Company, Inc.,[6] the licensee of KLOC-TV, Modesto, California and KCBA-TV, Salinas, California and 10 percent owner of station WCPT-TV, Crossville, Tennessee. KLOC Broadcasting was at one time the licensee of KLOC-AM, Ceres, California. In addition, Mr. Querio formerly held a 52 percent interest in KTRT-AM,

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[4] Mr. Koonce did not have an ownership interest in Salinas Radio, Inc. or with North America Media, but acted as a manager under the conditions stipulated in the Management Agreement that was negotiated between Koonce Pacific Corporation and KWIP Broadcasting, Inc., KXEM Radio Company, Salinas Radio, Inc. and Ron T. Smith and Nancy E. Smith.

[5] Amendment to Superior's application filed on January 10, 1983.

[6] KLOC Broadcasting Company, Inc. is now Sainte Broadcasting Corporation. For purposes of clarity, however, it will continue to be referred to as KLOC Broadcasting.

Truckee, California (1968–1972). His past broadcast experience is as follows: (1) Transmitter Engineer, Sales Department, and Announcing at station KECC, Pittsburg, California (1953); (2) Sales, station KVON, Martinez, California (1953); Floor Director and Production Supervisor for station KOVR (1954–1965); (4) Operations Manager, KTXL-TV, Sacramento, California (1968–1978), and a member of KTXL Board of Directors (1972–1974); (5) General Manager, KCIK-TV, El Paso, Texas (1978–1980); and (6) General Manager, KLOC-TV, Modesto, California (1980 to present).

Far West Broadcasting Co., Inc.

15. Far West Broadcasting Co., Inc., a California corporation, has two stockholders, David E. Caldwell (20 percent owner) and Kelly Broadcasting Co. (80 percent owner) (Far West Exhibit No. 2).

16. In the event that Far West's application is granted, David Caldwell will serve as full-time general manager of the station, overseeing the daily operations of the station. As of the date of the hearing, Mr. Caldwell lived in Chester, California, approximately 55 miles from Chico, but within the service area of Far West's proposed station.[7] He does not propose to move to Chico, but intends to commute daily in his private plane (Far West Exhibit No. 1; Tr. 490).

17. Mr. Caldwell is currently the 100 percent stockholder, an officer and director of Communications By Design, Inc. He has owned this company, which designs and produces independent programming (including sports and educational programming), since 1971. Communications By Design is presently negotiating the development of a closed circuit satellite television network for the Veterans Administration and the Indian Health Service for medical education, diagnostic and therapeutic purposes. Until November 30, 1981, Communications By Design was the licensee of radio stations KBLF-AM and KSNR-FM in Red Bluff, California, and Mr. Caldwell was the general manager of these radio stations. In 1981, stations KBLF-AM and KSNR-FM were assigned to Wireless Associates (Far West Exhibit No. 1). Mr. Caldwell has never been a general manager of a television station, nor has he ever been an employee of a television station (Tr. 477).

Kelly Broadcasting Co.

18. Kelly Broadcasting Co., the 80 percent owner of Far West is composed of five partners: Jon S. Kelly and Robert E. Kelly, both of whom own 331;3 percent each of the corporation; Nina N. Kelly (Trustee of the Nina N. Kelly Trust No. 2) which owns 231;3 percent; Robert E. Kelly and Jon S. Kelly (Trustees, Suzanne Kelly Adams Trust) which owns 71;2 percent; and Robert E. Kelly and Jon S. Kelly

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[7] By an amendment filed August 18, 1982, the Presiding Judge has been advised that Mr. Caldwell has moved to Quincy, California.

(Trustees of the Carolyn and Walter Adams Trust) which owns $2^1/_2$ percent (Far West Exhibit No. 2).

19. Kelly Broadcasting is the 100 percent owner of KCRA-TV licensed to Sacramento, California. KCRA-TV has extensive audience penetration into Butte County (where Chico is located), as well as the proximate counties of Lake, Sutter, Yuba Nevada, Sierra and Plumas. It is also available on numerous cable television systems serving Butte County (Superior Exhibits 4 and 5).

20. The principal owners of Kelly Broadcasting Co., Robert E. Kelly and Jon S. Kelly, are also equal partners in Kelly Television Co. Kelly Television Co. is the licensee of KCPQ-TV in Tacoma, Washington (Far West Exhibit No. 2).

21. None of the members of Kelly Broadcasting Co. or Kelly Television Co. proposes to perform any duties associated with the management of the proposed television station.

Special Issues

Public File Issue

22. As noted above, the Presiding Judge in a Memorandum Opinion and Order released August 13, 1981 (FCC 81M-2509), designated a public file issue against Superior. The burden of going forward on the issue was placed on Far West, and the burden of proof on Superior.

23. Far West has failed to demonstrate that Melvin Querio had any responsibility for the maintenance of KLOC-TV's public file at the time William Krum, Far West's agent, asked to inspect the file. The undisputed evidence of record indicates that from April 1980, when Mr. Querio returned to KLOC-TV as general manager, until some time after Mr. Krum's visit, Chester Smith, the 51 percent owner of KLOC-TV, had the responsibility for properly maintaining the public file (Tr. 298–300). Furthermore, Mr. Querio testified that during that period of time he did not review the public file, or in any way have any effect upon the usual maintenance of the file; and that he did not instruct anyone during that period as to proper maintenance procedures (Tr. 299). The Presiding Judge concludes, therefore, that Far West has failed to demonstrate that Mr. Querio had any responsibility for maintaining KLOC-TV's public file at the time of Mr. Krum's visit; and that the responsibility for the improper maintenance of the file cannot therefore be ascribed to Mr. Querio. In view of Far West's failure to submit any evidence to support its contention that Mr. Querio was responsible for the fact that KLOC-TV's public file was incomplete at the time of Mr. Krum's visit, summary decision of the public file issue in Superior's favor is warranted, and it is so ordered.

24. Far West's additional contention that Querio is at fault for failing to instruct the KLOC-TV staff as to the proper maintenance

of the public inspection file, after he assumed responsibility for the file, is without merit. There is no indication in the record that KLOC-TV's public file has been improperly maintained at any time since Mr. Krum's visit. In the absence of such a showing, Mr. Querio can hardly be found to have been negligent for failing to instruct the KLOC-TV staff in the proper maintenance of the file.

Failure to Report Issue

25. Far West alleges that the following broadcast interests and/or associations of Melvin J. Querio and Jack O. Koonce were either not timely, fully or accurately reported: Melvin J. Querio's ownership of 12 percent of the voting stock of KLOC Broadcasting; KLOC Broadcasting's November 24, 1976 application for a construction permit for a television station in Salinas, California, and the grant of the application on August 8, 1979; Melvin Querio's position as director of Camelia City Telecasters, Inc., the licensee of station KTXL-TV, Sacramento, California from January 21, 1972 to July 16, 1974, and his position as director and vice president of KLOC Broadcasting, the licensee of KLOC-TV, Modesto, California from July 20, 1965 to July 15, 1974; KLOC Broadcasting's August 1976 application for authority to construct a new television station in Concord, California, dismissed on December 15, 1976; Querio's 52 percent interest in the licensee of station KTRT-AM, Truckee, California from July 24, 1968 to January 21, 1972; and Jack O. Koonce's association with stations KXES, Salinas, California and KOBY-AM, Reno, Nevada.

26. Messrs. Querio and Koonce were introduced by Chester Smith, approximately one to three months before the Superior partnership was formed (Tr. 166–167, 251–252), and the two partners met on two occasions to discuss partnership business (Tr. 169, 252). Mr. Koonce was given the responsibility for completing the application for the Chico license, with Querio supplying information with respect to his past broadcast experience and interests (Tr. 170, 253). Querio indicated that he provided Koonce with the information dealing with his broadcast interests as set forth in Table II of Superior's application, but failed to mention certain other past broadcast interests and associations as well as positions of authority held with KLOC-TV and KTXL-TV, because he had either forgotten them or he considered them to be irrelevant (Tr. 254–259). Koonce testified that he did not include a specific reference in Superior's application to his past management association with station KXES in the belief that the application's reference to the Koonce Pacific Corporation was sufficient, since his association with station KXES was based on the management agreement between station KXES and the Koonce Pacific Corporation (Tr. 176, 231). As to his past association with KOBY-AM, Koonce testified that he did not specifically refer to KOBY-AM, because his association with that

particular station was conditioned on the assignment of the license for the station which was never effectuated (Tr. 176–177).

27. During an extensive pleading cycle beginning with Far West's first Petition to Enlarge Issues, filed on January 2, 1981, Far West made a series of allegations that Superior had not properly advised the Commission of all of its principals' past and present media interests and/or associations. Specifically, Far West in its initial petition charged Superior with failing to report Querio's interest in the application of KLOC Broadcasting and the grant of the license for a new television station in Salinas, California, and Koonce's past relationship with station KXES, Salinas, California and station KOBY-AM, Reno, Nevada. In addition, Far West in the same petition charged Superior with a possible cross-interest policy violation, since Querio had served as operations manager at KTXL-TV, Sacramento, California while holding a 12 percent "non-voting stock" interest in the licensee of station KLOC-TV, Modesto, California. It also noted that the Commission's ownership records did not indicate that Querio's KLOC Broadcasting stock was "non-voting" as described in Superior's application (Far West Exhibit No. 8, pp. 1–7). Superior responded by conceding that it had failed to timely report the Salinas application and grant,[8] and by indicating, in response to Far West's contention concerning the nature of Querio's KLOC stock, that Querio had never voted his stock in KLOC Broadcasting. With respect to Far West's claim that Koonce had not reported his past association with station KXES and station KOBY-AM, Superior indicated that these associations had terminated prior to the filing of Superior's application, and it noted the application's reference to the Koonce Pacific Corporation which formed the basis for these associations. It responded to Far West's cross-interest allegation by stating that the station contours for KTXL-TV and KLOC-TV cited by Far West as demonstrating an overlap were not in effect at the time Querio was manager at KTXL-TV and a stockholder in KLOC Broadcasting, and that there was no overlap and therefore no cross-interest problem during the time that Querio served as operations manager of KTXL-TV. Superior added that, in any case, Querio was "only a minority stockholder of KLOC Broadcasting and not an officer or director" (Far West Exhibit No. 9, p. 5).

28. Querio testified that he received a copy of the motion referred to above (Tr. 287), and understood at the time that Far West was alleging that he had not truthfully reported to the Commission the full extent of his various broadcast interests and associations (Tr. 408), and he indicated that he understood Far West's cross-interest allegation to mean that there was a problem with his having held an

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[8] On February 2, 1981 Superior filed an amendment which reported that the Commission had granted the KLOC application for Salinas on August 8, 1979.

ownership interest in KLOC Broadcasting while working for KTXL-TV (Tr. 408–409). He added, however, that at the time he could not understand why Far West was alleging a cross-interest problem since in his opinion the stations in question were not competitive, since they served different markets (Tr. 354). Querio remembers discussing the pleading with counsel for Superior, but cannot recall whether they discussed his other roles at KLOC-TV and KTXL-TV (Tr. 355, 363). Their discussions, according to Querio, focused rather on the nature and the programming of these stations, and not on his role at the stations (Tr. 409–410); and that during these discussions, his positions as director of KTXL-TV and as officer and director at KLOC-TV simply did not come to mind because he considered them to be irrelevant, since they were positions in name only (Tr. 269, 289).

29. In its reply to Superior's opposition statement filed February 12, 1981, Far West made the further charge that Superior had failed to report that Querio, in addition to being a 12 percent stockholder, had been vice president and director of station KLOC-TV between 1965–1974 and, it alleged that Superior had demonstrated a lack of candor when it replied in its opposition pleading that Querio had not been an officer or director of KLOC-TV. On February 12, 1981, Far West filed a further motion to enlarge which sought the designation of a misrepresentation issue against Superior on the basis that it had misrepresented the true nature of Querio's connection with KLOC-TV.[9]

30. Querio testified that he discussed Far West's further allegations with counsel, and at the time was aware of his responsibility to report fully past and present media interests. Nevertheless, Querio indicated that his past role as director at KTXL-TV between 1972 and 1974 did not come to mind (Tr. 290–291); and that it was not until he had lunch with a friend, Jack Matranga, in late February or early March 1981, that he remembered that he had also been a director at KTXL-TV (Tr. 378–379).[10]

31. At the hearing, Messrs. Koonce and Querio were shown Superior Broadcasting Company of Texas, Inc.'s amendment filed March 23, 1981 which reported Querio's directorship at KTXL-TV (BC Docket No. 81-225, BPCT-800129KE). Neither Koonce nor Querio had any explanation as to why an amendment to the Chico

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[9] The Presiding Judge in a Memorandum Opinion and Order released on August 13, 1981 (FCC 81M-2509), denied the petition on the basis that the failure to disclose issue previously designated against Superior (Memorandum Opinion and Order released on July 23, 1981 (FCC 81M-2284) would include an examination of whether the failure to disclose constituted a misrepresentation.

[10] On April 9, 1981, Superior filed a petition for leave to amend and associated amendment signed by Querio which reported that Querio had been a director of Camelia City Telecasters, Inc., licensee of KTXL-TV, Sacramento, California from January 21, 1972 to July 16, 1974 (Far West Exhibit No. 6).

application was not filed at the same time as the Superior Broadcasting of Texas amendment (Tr. 238, 296). As noted in footnote ten, Superior's amendment reporting Querio's directorship of the licensee of KTXL-TV was not reported until April 9, 1981.

32. Far West argues that, at the very least, Superior has demonstrated a lack of a good faith effort in providing complete and accurate information with respect to its principals' media interests and associations as required by FCC Form 301. It argues, in support of this contention, that the record demonstrates that neither Mr. Querio nor Mr. Koonce made any effort to find out what information was required by FCC Form 301, and that Mr. Koonce made no attempt to verify the completeness or accuracy of the information supplied by Querio.

33. Far West submits, however, that the evidence of record with respect to this issue, warrants Superior's disqualification. It contends that Superior deliberately attempted to minimize a cross-interest problem by withholding pertinent information; and that it failed to timely report, or correctly set forth the nature and extent of Querio's present and past media interests, in a deliberate attempt to gain a comparative advantage. Far West considers it inconceivable that the allegations made in its various pleadings did not refresh Querio's memory as to his past broadcast interests and associations or prompt a discussion of these matters between counsel and Querio which would have resulted in Superior reporting these interests and associations earlier. It submits therefore, that the only credible explanation for Superior's failure to come forward with the information in a timely fashion is that Superior made a conscious decision to proceed by misstatement, omission and concealment.

34. Superior admits that it failed to report certain information with respect to Querio's past media interests in a timely fashion; however, it attributes its failure to do so to Querio's mistaken impression that only current broadcast interests were relevant. It refers, in support of its position to Querio's testimony to the effect that he considered his positions as the president and director at KLOC-TV and director at KTXL-TV as meaningless and ancient history, and to Querio's further statement that he described his KLOC Broadcasting stock as "non-voting" as a carry-over from his earlier agreement not to vote his KLOC-TV stock while employed at KTXL-TV. As further explanation for Querio's characterization of his KLOC stock as "non-voting", Superior refers to Querio's testimony that he cannot remember ever voting his stock, and to his description of KLOC Broadcasting as essentially a one man operation, run by Chester Smith, KLOC Broadcasting's majority stockholder.

35. Superior takes issue with Far West's contention that Querio deliberately withheld information with respect to his position at KLOC-TV and KTXL-TV because of Far West's cross-interest

allegations. It notes that Querio's position as operations manager at KTXL-TV and his stock interest in KLOC Broadcasting were reported to the Commission, and that this was sufficient to raise a cross-interest question. It submits, therefore, that Superior would have had no reason to withhold additional information with respect to other positions held by Querio. Furthermore, it states that Querio's testimony indicates that he was not concerned with these cross-interest allegations since he viewed these stations as serving different broadcast markets with programming geared to different audiences, and for the additional reason that he knew each station was aware of his position with the other station.

36. Superior explains its failure to report the filing of the Salinas application by stating that at the time the application was filed, Querio had been away from KLOC-TV for approximately 10 years and was unaware of its filing. Although Querio was back at KLOC-TV when KLOC Broadcasting received the license for the Salinas station and knew of the grant, Superior notes Querio's testimony to the effect that at the time he did not "focus" on the grant and, therefore, failed to report it timely.

Discussion and Conclusions

Failure to Report Issue

37. Although Superior's application contained a reference to the Koonce Pacific Corporation, it did not specifically indicate that a management agreement existed between Koonce Pacific Corporation and stations KXES and KOBY-AM, pursuant to which Koonce agreed to assume a management role with the stations. The Presiding Judge is of the opinion, however, that the reference to the management company contained in Superior's application was sufficiently responsive to Section II of FCC Form 301 in view of the tentative nature of these associations; and that Koonce's failure to refer specifically to his past association with stations KXES and KOBY-AM did not constitute a violation of Section 73.3514 of the Commission's Rules. As noted above, Koonce's association with station KXES terminated before the station went on the air, and his association with KOBY-AM was premised on Commission approval of an assignment application which was withdrawn before the Commission had the opportunity to act on the request. The Presiding Judge concludes therefore that Superior's failure to report in detail on Koonce's past association with station KXES and with KOBY-AM does not warrant disqualification or the assessment of a comparative demerit.

38. In the case of Querio's past and present broadcast interests and associations, certain matters of potentially decisional significance were either initially not accurately reported or were not timely disclosed. As noted above, Querio's KLOC Broadcasting stock

was inaccurately described in Superior's application as "non-voting", and Superior failed to timely report the filing of an application for a television station in Concord, California, and the application and grant of KLOC Broadcasting's application for a television license in Salinas, California. In addition, Superior failed to report fully on Querio's past associations with stations KTXL-TV and KLOC-TV as well as his past interest in station KTRT-AM, Truckee, California which ended in January 1972. By failing to timely report the full extent of Querio's past and present broadcast interests and associations, Superior violated Commission Rules 1.65 and 73.3514. The question remaining for consideration here is whether these violations warrant disqualification or the assessment of a comparative demerit against Superior.

39. Far West argues that Superior deliberately sought to conceal the true nature of Querio's past associations with KLOC-TV and KTXL-TV in an attempt to minimize an apparent cross-interest problem, and that this attempt to mislead or conceal warrants disqualification. The Presiding Judge notes, initially, that Superior reported voluntarily in its application that Querio had served as operations manager at KTXL-TV, while at the same time holding 12 percent of the stock in KLOC Broadcasting, the licensee of KLOC-TV; and that Querio's ownership interest in KLOC-TV, while serving as operations manager at KTXL-TV is sufficient to raise a cross-interest question. Withholding the additional information that Querio also held, simultaneously, the positions of director with both KLOC Broadcasting and Camelia City Telecasters, Inc., the licensee of KTXL-TV, as well as vice president of KLOC Broadcasting would, therefore, have served no purpose. Accordingly, the Presiding Judge concludes that the evidence of record fails to show that Superior had any motive to conceal or misrepresent the nature and full extent of Querio's past associations with these stations.

40. Furthermore, the Presiding Judge finds that Querio's testimony, which the Presiding Judge found credible, supports the conclusion that his failure to report the extent of his past broadcast interests and associations as well as the true nature of his ownership interest in KLOC Broadcasting was not due to a desire to conceal and mislead, or to gain a comparative advantage, but was simply due to a mistaken impression of what information was required or relevant. Querio's testimony to the effect that he considered his unreported positions at KTXL-TV and KLOC-TV to be insignificant is supported by the fact that he resigned these positions unquestioningly. Similarly, his description of his KLOC stock as "non-voting", although not accurate, is indicative of his attitude towards his voting rights which he considered meaningless in view of the fact that he had agreed not to vote the stock, cannot remember ever voting the stock, and viewed KLOC Broadcasting as essentially a one man operation run by its majority stockholder.

41. By failing to fully and accurately report Querio's past and present broadcast interests, Superior violated Sections 1.65 and 73.3514 of the Commission's Rules. The Presiding Judge finds, however, that the facts which were not timely reported are of little or no decisional significance. Querio's 52 percent interest in the licensee of station KTRT-AM, Truckee, California which ended in 1972, and KLOC Broadcasting's application for a Concord, California television station which was withdrawn, are of no decisional significance. Querio's minority interest, i.e., 12 percent of the voting stock in KLOC Broadcasting, the licensee of a television station located in Salinas, California, approximately 200 miles from Chico, is of only very slight decisional significance. Similarly, the fact that his stock interest in KLOC Broadcasting is voting rather than non-voting is of only very slight decisional significance in view of Querio's minority status. Querio's past positions as vice president and director of KLOC Broadcasting and director of Camelia City Telecasters, Inc., the licensee of station KTXL-TV, Sacramento, California are of no decisional significance.

42. The Presiding Judge concludes that there has been no showing of an intent to conceal or deceive on the part of Messrs. Querio or Koonce; and that Superior's failure to timely and accurately report information with respect to its principals' broadcast interests and associations was due to faulty judgment. In view of this finding and the finding that the matters not timely or accurately reported are, at the very most, of only slight decisional significance, the Presiding Judge concludes that neither disqualification of Superior, nor the assessment of a comparative demerit against Superior are warranted. See *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982); *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, released December 8, 1982.

43. The Bureau urges the Presiding Judge to assess a substantial comparative demerit against Superior on the basis that Superior's failure to timely and accurately report the past broadcast interests and associations of its principals does not bode well for Superior's ability and/or willingness to comply with the Commission's Rules and Regulations in the future. In this instance, however, the information which was omitted or misstated is, at the very most, of only slight decisional significance, and Superior's failure to report the information fully and accurately has been found to have been due to an honest misunderstanding of the Commission's reporting requirements. The Presiding Judge believes that there is no reason to feel that in the future Superior will not make every effort to inform itself of the pertinent rules and regulations of the Commission and operate the station in conformity with these rules and regulations. The Bureau's request will be denied.

Comparative Issues

Diversification of Ownership

44. As noted above, Superior is owned in equal shares by Messrs. Koonce and Querio. Superior and Mr. Koonce have no media interests; however, Mr. Querio owns 12 percent of the voting stock in KLOC Broadcasting, the licensee of station KCBA-TV, Salinas, California, station KLOC-TV, Modesto, California, and station KLOC-AM, Ceres, California.[11] In addition, KLOC Broadcasting owns a 10 percent interest in WCPT-TV, Crossville, Tennessee.

45. Far West has no media interests. Kelly Broadcasting which owns 80 percent of Far West, owns 100 percent of KCRA-TV, Sacramento, California, and two of Kelly Broadcasting's principals are equal owners of Kelly Television Co., the licensee of KCPX-TV, Tacoma, Washington. Mr. Caldwell, who owns the remaining 20 percent of Far West, at present has no other media interests.[12]

46. The Presiding Judge considers KLOC Broadcasting's 10 percent interest in station WCPT-TV, Crossville, Tennessee to be of no decisional significance, in view of the station's considerable distance from Chico and Querio's extremely limited interest. The Presiding Judge further finds Querio's interest in KLOC-TV and the Salinas permit to be of only slight decisional significance in view of Querio's minority stock interest in KLOC Broadcasting, the licensee and permittee of these stations, and the absence of any evidence indicating that these stations have any audience penetration in the Chico area.

47. In contrast, Far West's majority and controlling stockholder, Kelly Broadcasting Co., is the 100 percent owner of station KCRA-TV, Sacramento, California, which has extensive over-the-air and cable audience penetration in the Chico area. In view thereof, the Presiding Judge finds that Kelly Broadcasting's interest in station KCRA-TV, Sacramento, California, is significant, and entitles Superior to a substantial diversification preference over Far West, since the controlling principal of Far West already has a voice in the Chico

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[11] KLOC Broadcasting divested itself of KLOC-AM, Ceres, California on April 6, 1981, four months after the designation of the above-entitled matter for hearing. Accordingly, for comparative purposes, KLOC Broadcasting is still considered to be the licensee of KLOC-AM, Ceres, California.

[12] Far West's unopposed amendment reporting the sale of KBLF-AM and KSNR-FM by Mr. Caldwell's company, Communications By Design, Inc. was accepted on December 31, 1981 (FCC 81M-4132). Since Far West represented in its application filed August 15, 1979 that the stations would be sold, they are not attributable to Far West in this proceeding. See *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978).

area. See *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976).

Integration of Ownership

48. Superior proposes to have both equal partners work full time at the proposed station. Mr. Querio will be general manager and Mr. Koonce will be the chief engineer and assistant manager. Both positions are of the required degree of responsibility to warrant integration credit, and Superior, therefore, is entitled to a 100 percent quantitative integration credit. Far West proposes to integrate full time as general manager its 20 percent owner David E. Caldwell. Far West is therefore entitled to a 20 percent quantitative integration credit. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

49. In view of the 80 percent difference between the quantitative integration credits of the two applicants, the Presiding Judge does not consider it necessary to reach a conclusion as to whether either applicant is entitled to a qualitative enhancement of its integration credit, since it is well established that qualitative enhancements cannot overcome a clear quantitative difference. See *Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (Rev. Bd. 1979); and *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982).

50. Accordingly, the Presiding Judge finds that Superior is entitled to a substantial diversification credit as well as a substantial integration preference over Far West; and that in view thereof, it is the Presiding Judge's conclusion that Superior's proposal will provide the best practicable service to the public, and Superior will therefore receive the permit for the new television station on Channel 24 in Chico, California.

Rulings

51. IT IS ORDERED that the unopposed Motion for Leave to Amend filed by Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California on January 10, 1983 IS GRANTED, and the amendment IS ACCEPTED.

52. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California (BC Docket No. 80–734, File No. BPCT-781221LI) for a construction permit to operate a new television station on Channel 24 in Chico, California IS GRANTED; and the application of Far West Broadcasting Co., Inc. (BC Docket No.

80–735, File No. BPCT-790815KP) IS DENIED.[13]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[13] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Application, Dismissal of

Review Board affirms ALJ's dismissal of application where applicant proposed a major change to its application within the meaning of Section 73.3572(a)(1).
–Trefoil Broadcasting Co., Inc.
MM Docket No. 83-61

FCC 83R-54

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
TREFOIL BROADCASTING COMPANY, INC. Sacramento, California	MM Docket No. 83-61 File No. BPCT-820614KG
Louis F. Garcia, et al d/b/a SACRAMENTO TELEVISION ASSOCIATES, LTD. Sacramento, California	MM Docket No. 83-62 File No. BPCT-820816KG
CAPITAL HISPANIC BROADCASTERS, INC. Sacramento, California	MM Docket No. 83-63 File No. BPCT-820824KF
DO DECCA ECKTRON CORPORATION Sacramento, California	MM Docket No. 83-64 File No. BPCT-820824KG
ROYCE INTERNATIONAL BROADCASTING COMPANY Citrus Heights, California	MM Docket No. 83-65 File No. BPCT-820824KH
DELTA BROADCASTING COMPANY, INC. Sacramento, California	MM Docket No. 83-67 File No. BPCT-820824KK
PONCE-NICASIO BROADCASTING, A LIMITED PARTNERSHIP Sacramento, California	MM Docket No. 83-68 File No. BPCT-820824KN

EL DORADO TELEVISION COMPANY Sacramento, California	MM Docket No. 83-69 File No. BPCT-820824KP
ALDEN COMMUNICATIONS CORP. Sacramento, California	MM Docket No. 83-70 File No. BPCT-820824KV
SACRAMENTO ENTERTAINMENT TELEVISION CORPORATION Sacramento, California	MM Docket No. 83-71 File No. BPCT-820824KW
CHANNEL 29 INVESTORS, A LIMITED PARTNERSHIP Sacramento, California	MM Docket No. 83-72 File No. BPCT-820824KX
For Construction Permit:	

MEMORANDUM OPINION AND ORDER

(Adopted: August 18, 1983; Released: August 23, 1983.)

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ABSENT.

1. On June 22, 1983, Royce International Broadcasting Company appealed from the presiding Administrative Law Judge's Memorandum Opinion and Order (FCC 83M-1951), released June 15, 1983, which denied two petitions for leave to amend filed by Royce and granted a competing applicant's motion to dismiss Royce's application with prejudice. For the reasons set out below the Board will affirm the ALJ's action.

2. *Background.* Royce's original application failed to contain complete engineering information regarding its antenna site. Royce later filed an incomplete pre-designation amendment on October 20, 1982 in which it specified a new antenna site. Certain technical information called for by the application was again omitted from the amendment. The Hearing Designation Order noted that the Commission staff could not evaluate the applicant's technical proposal in the absence of the required data and directed Royce to submit such information to the presiding Administrative Law Judge (ALJ) by March 24, 1983. Hearing Designation Order, 48 Fed. Reg. 7496, published February 22, 1983. Royce, which was then proceeding *pro se*, timely submitted the engineering information but misdirected it to the Mass Media Bureau. Following the retention of counsel, Royce filed the amendment and a petition for leave to amend with the ALJ on April 21, 1983.

3. On May 2, 1983, Ponce-Nicasio Broadcasting, one of ten

competing applicants, filed a motion to dismiss Royce's application, contending that Royce's April 21 amendment proposed a major change to its application within the meaning of Section 73.3572(a)(1) of the Commission's Rules since it enlarged its Grade B contour by more than 50%, and that Royce's application must therefore be removed from the hearing docket and returned to the processing line for the assignment of a new file number as required by Section 73.3572(b) of the Rules.[1] Royce, in opposition, claimed that it had overstated the size of its Grade B contour in its April 21 amendment by 866 square miles and that the actual gain in Grade B area over that originally proposed was only 45.26%, which is less than that required to constitute a major amendment. Royce filed a second amendment May 20, 1983 to provide the correct information. Based on the data contained in Royce's opposition, Ponce-Nicasio in its reply submitted the affidavits of two engineers which pointed out errors in Royce's calculations of the area encompassed by the original Grade B contour and noted that the coverage change exceeded 50% even using the figures supplied for the new Grade B area by Royce in its opposition. One of the affidavits also stated that the reasons given by Royce for the overstated figures did not explain the differences in the sizes of its Grade B contour shown in the April 21 and May 20 amendments. Royce's sole owner, Edward Stolz, prepared the engineering section for the application as filed and for the April 21 amendment. A consulting engineer was retained when Royce filed its opposition to the motion to dismiss and the May 20 amendment. The Mass Media Bureau filed comments on June 3, 1983, agreeing with Ponce-Nicasio's engineering analysis and supporting dismissal of Royce's application from the hearing.

4. *ALJ's Ruling and Appeal.* The ALJ granted the motion to dismiss, denied both petitions for leave to amend, and dismissed Royce's application with prejudice. In so doing, he found that the proposed changes would result in a major amendment of Royce's technical proposal, that its excuse for late filing was unacceptable, and that the applicant has not supplied good cause for making the changes it now presents. FCC 83M-1951, *supra*, paras. 9–12. Both the denial of its petitions for leave to amend and the dismissal of its application are challenged by Royce in its appeal. It asserts that good cause existed for acceptance of the amendments and that the ALJ could not dismiss its application without a full hearing since the affidavits are in conflict as to whether a major change occurred. Additionally, by dismissing its application, Royce claims, the ALJ contravened the Commission's policies favoring a choice between

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[1] Section 73.3572(b) provides that a new file number will be assigned to an application for a new station when it is amended so as to effect a major change, which includes any engineering changes resulting in a gain or loss of 50% or more of the area within the Grade B contour of the station. See also Section 73.3572(a)(1).

applicants (*see Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 29, 52 RR 2d 63, 65 (Rev. Bd. 1982)) or communities under Section 307(b) of the Communication Act (*see Mobile Broadcasting Service, Inc.*, 91 FCC 2d 1209, 52 RR 2d 670 (1982)). In any event, Royce argues, the ALJ should have at least permitted it the opportunity to withdraw its pre-designation amendment before dismissing its application, citing *Grace Missionary Baptist Church*, 80 FCC 2d 330, 337, 48 RR 2d 129, 135 (1980).

5. *Disposition*. The Board will deny the appeal. Royce's initial contention that good cause existed for acceptance of the amendments is not persuasive. Although as a general rule, the acceptability of a post designation amendment depends upon whether good cause has been demonstrated (see Section 73.3522(b); and *California Broadcasting Corp.*, 90 FCC 2d 800, 808, 51 RR 2d 1539, 1545 (1982)), that principle is not really pertinent here since the crucial amendment specifying the new site was filed prior to designation and was thus governed by Section 73.3572, which requires the return of an application to the processing line whenever a major change has occurred. See n. 1, above. Moreover, the post designation submissions were primarily clarifications of the pre-designation amendment. Thus the central question before us is the propriety of the ALJ's dismissal of Royce's application, whether or not he accepted its amendments. We believe the ALJ was correct in reaching his result.

6. First, we are unpersuaded by Royce's argument that the ALJ could not dismiss its application without holding a trial type hearing. The question of the acceptability of Royce's application could have been dealt with by the processing line without a hearing, if Royce had disclosed all the facts at the time of the pre-designation amendment. That the facts were not fully known was due solely to Royce's neglect in supplying all of the pertinent data. In this regard, we agree with the ALJ that Royce's clarifying information filed April 21 and May 20 demonstrated on its face that a major change in its application had occurred. Thus, although Royce's Grade B contour was reduced somewhat by its May amendment from that represented in the April amendment, nevertheless, the responsive affidavits of Ponce-Nicasio's two engineers showed that Royce's calculations of the original Grade B contour were incorrect and that a major change had occurred even using the reduced Grade B contour figures. While Royce argues that it could not respond to these affidavits since they were contained in a reply pleading, it never sought leave from the ALJ to respond and does not now on appeal seek to challenge the affidavits either. Moreover, the Mass Media Bureau, with the benefit of its own engineering expertise, reviewed the Ponce-Nicasio engineering analysis and concurred in its findings. The Bureau also pointed out that had all the facts been supplied by Royce at the pre-designation stage, the original October 20, 1982 amendment (as clarified on April 21 and May 20, 1983)

would not have been acceptable. In light of the above, we cannot fault the ALJ's conclusion that the applicant effected a major change in its application.

7. Nor do we discern any merit in Royce's contentions that dismissal of its application contravenes the Commission's policies favoring a choice between applicants, or, between communities under Section 307(b). The Commission's policy favors a comparative choice only among those applicants who have established their basic qualifications to be licensees. *See Midwest St. Louis, Inc.*, 79 FCC 2d 519, 531, 48 RR 2d 95, 105 (1980). This Royce has not done. Furthermore, the public would not be deprived of a choice in this case because there are ten other applicants who are competing for the facility. And with respect to 307(b), Royce's reliance on *Mobile Broadcasting Service Inc., supra*, is misplaced. That case only stands for the proposition that where the choice-of-communities objective of Section 307(b) would be impeded by the dismissal of an application through a settlement agreement, a further opportunity should be afforded for other persons to apply for that other community. *See* Section 73.3525(c)(1) of the Rules. It does not prevent the dismissal of any application. Even if there were such a rule or policy in nonsettlement Section 307(b) cases, and we are aware of none nor has Royce cited such a rule or policy, it would not prevent the return of Royce's application.

8. Finally, we disagree with Royce that under *Grace Missionary Baptist Church, supra*, the ALJ was required to afford it an opportunity to withdraw its pre-designation amendment before dismissing its application. In *Grace*, an applicant was given an opportunity to withdraw an amendment that would have resulted in the dismissal of its application because the amendment appeared to be governed by inconsistent Commission guidance. The Commission cited *Bamford* v. *F.C.C.*, 535 F.2d 78, 82 (D.C. Cir. 1976) for the proposition that "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected" and concluded that the potential for confusion was a sufficient basis for not dismissing the application. The Commission also noted that the disputed amendment had been misplaced and that had it not been, the Bureau would also have permitted an opportunity for withdrawal. Here, however, there was no confusion with respect to the Commission's standards and no misplaced amendment. Rather, any confusion resulted from Royce's own derelictions. Furthermore, Royce's request to withdraw its amendment comes too late because it has been on notice from the time of designation that its proposal for a new site required more information before it could be evaluated. At that time, Royce could have sought to withdraw its October 20, 1982 amendment. It did not. Instead it opted to pursue the new site and continued to do so even after it had been confronted by Ponce-Nicasio. In any event, even if Royce were permitted to withdraw its

amendment now, we would still not have assurance of its technical qualifications since the information regarding the site proposed in its original application was also incomplete. See para. 2, above.

9. In sum, we affirm the dismissal of Royce's application. To do otherwise and to allow Royce to continue in this proceeding would be to condone its pre-designation neglect and post designation fumblings, which cloaked a major change in its application to the comparative detriment of the other parties. This is the third time in five months that we have had to consider serious application deficiencies involving Mr. Stolz, the sole owner of Royce, that appear to result from a lack of attentiveness to his filings with the Commission, unfamiliarity with our rules and policies, refusal to obtain (or benefit from) adequate legal and engineering advice, and possibly worse. *See George E. Cameron Jr. Communications*, 53 RR 2d 917 (Rev. Bd. 1983), *Shoblom Broadcasting, Inc.*, 53 RR 2d 1203 (Rev. Bd. 1983). This agency need not and can not indulge an applicant who continually fails to submit basic information in an orderly fashion, especially where, as here, ten other applicants are waiting for a hearing to decide which one is entitled to the one available channel and the public is waiting for service.

10. ACCORDINGLY, IT IS ORDERED, That the appeal filed June 22, 1983 by Royce International Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

Contour, Overlap
Remand

Proceeding remanded because factual basis upon which ALJ relied in granting applications and terminating proceeding was incorrect.
–*Trio Broadcasters, Inc.*
BC Docket No. 82–701

FCC 83R–48

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of TRIO BROADCASTERS, INC. WMOO, Fairhope, Alabama	BC Docket No. 82–701 File No. BP-810309AN
ED WINTON WWLF, Kenneth City, Florida	BC Docket No. 82–702 File No. BP-810622AE
HOLT-ROBINSON OF MISSISSIPPI, INC. Ridgeland, Mississippi	BC Docket No. 82–703 File No. BP-810622AB
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: July 5, 1983; Released: July 8, 1983)

BY THE REVIEW BOARD:

1. This proceeding involves the applications of: (a) Trio Broadcasters, Inc. (Trio), licensee of AM station WMOO, Mobile, Alabama, which seeks authority, *inter alia*, to relocate WMOO's city of license to Fairhope, Alabama; (b) Ed Winton (Winton), licensee of AM station WWLF, St. Petersburg, Florida, which seeks permission, *inter alia*, to move WWLF's city of license to Kenneth City, Florida; and (c) Holt-Robinson of Mississippi, Inc. (Holt-Robinson), which seeks authority to construct a new AM station in Ridgeland, Mississippi. The applications, which were deemed to be mutually exclusive since Trio's proposed signal strength contours overlap with those of both Holt-Robinson and Winton in violation of Section 73.37

of the Commission's Rules, 47 CFR 73.37, were designated for consolidated hearing on, *inter alia*, Section 307(b) and contingent comparative issues. Hearing Designation Order, Mimeo No. 039, released October 6, 1982. Harte-Hanks Radio, Inc. (Harte-Hanks), licensee of station WRBQ(FM), Tampa, Florida, which filed a petition to dismiss or deny Winton's application, was made a party to the proceeding.

2. Prior to the commencement of hearing, on November 30, 1982, each of the applicants filed an amendment to the engineering portion of its application purportedly designed to eliminate the electrical conflicts and mutual exclusivity among the three proposals. Thereafter, each applicant filed a separate request for severance of its application from the consolidated comparative hearing, deletion of the issues, and grant of its application. Finally, on December 9, 1982, the three applicants filed a joint request for approval of agreement which contemplated the above engineering amendments and provided that each applicant operate its facility to remove interference among the proposed stations. In a Memorandum Opinion and Order released on March 24, 1983 (FCC 83M-941), presiding Administrative Law Judge Tierney (ALJ) approved the proposed agreement, accepted the respective amendments, severed each application from this proceeding, deleted the issues as moot, and granted all three applications.

3. This proceeding is now before the Review Board on an appeal from the ALJ's Memorandum Opinion and Order filed by Harte-Hanks on April 25, 1983.[1] So far as is pertinent here, Harte-Hanks contends that the tendered amendments to the applications of Winton and Trio fail to establish that the overlap of their respective 0.5 and 0.025 mV/m signal contours, which is prohibited by Section 73.37(a) of the Commission's Rules, has been eliminated. Trio, in an opposition to the appeal, does not address the question of whether there is overlap but argues instead that it is proceeding under Section 73.37(b), which permits the grant of an application notwithstanding such overlap where, *inter alia*, the applicant is or would be the first AM broadcast station in a community such as Fairhope. Harte-Hanks points out in its reply brief, however, that Fairhope already has an AM station licensed to it and that Section 73.37(b) is therefore inapposite. It urges the Board to remand the case for a comparative hearing between Trio and Winton. The Board also has before it a motion for oral argument filed by Harte-Hanks on May 23, 1983, and an unopposed motion filed by Holt-Robinson on May 18, 1983, urging the Board to dismiss Harte-Hanks' appeal insofar as it relates to Holt-Robinson. The Mass Media Bureau, in an opposition

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[1] Harte-Hanks' appeal, while dated April 25, was actually received by the Commission's Secretary on April 26, one day late. However, Harte-Hanks has filed a motion for acceptance of appeal and has shown good cause; we will therefore grant its motion and accept its appeal.

to the motion for oral argument, concedes that remand of the case is necessary since its prior belief that Section 73.37(b) was controlling, based on a representation by one of the parties that Fairhope had no local station, is not accurate. The Bureau points out that objectionable interference under Section 73.37(a) will exist among the stations and that the applications cannot all be granted.

4. We concur with Harte-Hanks and the Mass Media Bureau that the ALJ's Memorandum Opinion and Order must be vacated and the case remanded to him for further proceedings. It is clear from the pleadings and a review of the November 30 amendments that the factual basis upon which the ALJ relied in granting the applications was incorrect (see Memorandum Opinion and Order, paras. 4, 10); *i.e.*, that Section 73.37(b) was controlling, that the mutual exclusivity of the applications had been eliminated, and that the Section 307(b) and comparative issues were therefore mooted. The engineering statements of Holt-Robinson and Winton contained in the amendments reflect that both applicants' 0.5 and 0.025 mV/m contours continue to overlap with those of Trio in violation of Section 73.37(a), which, since Trio would not be the first AM facility licensed to Fairhope, therefore applies. Since the applications are still mutually exclusive and not all can be granted, remand of the proceeding is necessary.

5. We will also deny Holt-Robinson's motion requesting that we affirm the ALJ's severance and grant of its application. Although no one has addressed this matter and Harte-Hanks simply urges remand of Winton and Trio's applications for comparative hearing, severance and grant of Holt-Robinson's application would, under a strict reading of Section 73.37(a), have the effect of precluding Trio from obtaining a grant even if it were comparatively superior to Winton, since Trio's 0.5 and 0.025 mV/m contours overlap with those of Holt-Robinson, and Trio cannot meet the exception under Section 73.37(b). Severance and grant of Holt-Robinson's application, therefore, would make the remand a charade. However, the converse is not true: Holt-Robinson's application could apparently be granted notwithstanding the above overlap with Trio, if Trio's application were already granted, since Holt-Robinson's proposal to be the first AM station in Ridgeland, Mississippi apparently meets the exception of Section 73.37(b). Thus, the number of the applications that can be granted here appears to depend on the sequence of the grants, an anomalous situation perhaps not contemplated by Section 73.37. In any event, it is preferable to permit the ALJ to consider the question of severance of Holt-Robinson's application based on further pleadings from the parties. We note in passing that the pleadings of all parties both before the ALJ and the Board left much to be desired. Accordingly, in light of the esoteric nature of the rules in question and the confusion that already exists concerning the engineering showing necessary to eliminate the mutual exclusivity of the

proposals, the Board recommends that the ALJ consider meeting with the parties before the commencement of evidentiary hearings to explore precisely what the controlling engineering and legal standards are and how they may be met by the applicants. *Cf. GSM Media Corp.*, FCC 83R-29, 53 RR 2d 1207 (Rev. Bd. 1983).

6. ACCORDINGLY, IT IS ORDERED, That the motion for acceptance of late-filed appeal and the motion for leave to file supplement to motion for acceptance of late-filed appeal, filed April 26 and May 24, 1983, respectively, by Harte-Hanks Radio, Inc. ARE GRANTED; and

7. IT IS FURTHER ORDERED, That the motion to schedule oral argument, filed May 23, 1983, by Harte-Hanks Radio, Inc. and the motion for dismissal of appeal, severance and grant, filed May 18, 1983 by Holt-Robinson of Mississippi, Inc. ARE DENIED; and

8. IT IS FURTHER ORDERED, That the appeal filed April 25, 1983 by Harte-Hanks Radio, Inc. IS GRANTED, that Memorandum Opinion and Order, FCC 83M-941, released March 24, 1983, IS VACATED, and that this matter is REMANDED for further proceedings in accordance with this opinion.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

Disclosure, Candid
Misconduct
Past Performance
Programming, Specialized
Renewal, Applicant vs. New Applicant

> Review Board affirms grant of challenger's application in a comparative FM renewal proceeding. Incumbent is not awarded a renewal expectancy and receives a substantial comparative demerit on past misconduct. Losing competing applicant achieves slight specialized program format preference for first nighttime Spanish programming and slight reporting demerit for uncandid application answer.
> –*United Broadcasting Company, Inc.*
> BC Docket No. 80–479

FCC 83R–55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
UNITED BROADCASTING COMPANY, INC. Washington, D.C.	BC Docket No. 80–479 File No. BRH-589
For Renewal of License of Station WOOK(FM), Washington, D.C.	
DISTRICT BROADCASTING COMPANY Washington, D.C.	BC Docket No. 80–480 File No. BPH-790831AY
HISPANIC BROADCASTING CORPORATION Washington, D.C.	BC Docket No. 80–481 File No. BPH-780901AB
For Construction Permit	

Appearances

Thomas Schattenfield, *David Tillotson*, and *Robert S. Koppel*, on behalf of United Broadcasting Company, Inc.; *Lewis I. Cohen*, *Morton L. Berfield*, and *Roy W. Boyce*, on behalf of District Broadcasting Company; *Lawrence J. Bernard, Jr.*, on behalf of Hispanic Broadcasting Corporation; and *Charles E. Dziedzic*, *Norman Goldstein*, and *Stephen Yelverton*, on behalf of The Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: July 29, 1983; Released: August 24, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the application of United Broadcasting Company, Inc. (United) for renewal of license of Station WOOK(FM), Washington, D.C., and the mutually exclusive applications of District Broadcasting Company (District) and Hispanic Broadcasting Corporation (Hispanic) for authority to construct a new FM broadcast station in Washington, D.C. on the frequency now occupied by WOOK(FM). By Memorandum Opinion and Order, 81 FCC 2d 227, 48 RR 2d 429 (1980), the Commission designated these applications for hearing on the standard comparative issue only, cautioning, however, that it was reserving jurisdiction to consider what effect past misconduct at certain of United's other stations should have on that applicant's basic and/or comparative qualifications in this proceeding. 81 FCC 2d at 229, 48 RR 2d at 431. The Commission also stated that evidence could be adduced under the standard comparative issue concerning need for the Spanish-language programming format proposed by Hispanic upon a threshold showing to the Administrative Law Judge that the format would be specialized and unique. 81 FCC 2d at 231, 48 RR 2d at 432.

2. In a subsequent Memorandum Opinion and Order, the Commission considered the question of United's misconduct at other stations, and, focusing on its denial of license renewals for United's Stations WOOK(AM), Washington, D.C., and WFAB, Miami, Florida in prior Decisions,[1] it specified an issue to determine the effect of the findings and conclusions in those cases on United's basic and/or comparative qualifications in this proceeding. 86 FCC 2d 452, 49 RR 2d 597 (1981). Presiding Administrative Law Judge Frederic J. Coufal (ALJ) also specified an issue against United to determine the effect on its qualifications of later misconduct, involving two contests broadcast by WOOK(FM) during 1977–78 (which resulted in the imposition of a $6,000 forfeiture against United),[2] and an issue against Hispanic involving a potential Section 73.3514 reporting violation. See, respectively, Memorandum Opinion and Order, FCC

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[1] *United Television Co. (WOOK(AM))*, 55 FCC 2d 416, 34 RR 2d 1465 (1975), *recon. denied*, 59 FCC 2d 663 (1976), *aff'd sub nom. United Broadcasting Co. v. FCC*, 569 F. 2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978); *United Broadcasting of Florida (WFAB)*, 55 FCC 2d 832, 35 RR 2d 119 (1975), *recon. denied*, 60 FCC 2d 816 (1976).

[2] Notice of Apparent Liability, FCC 78–838, November 30, 1968.

81M-1614, released May 26, 1981; Memorandum Opinion and Order, FCC 81M-746, released March 13, 1981.

3. In an Initial Decision (I.D.), FCC 82D-73, released November 9, 1982, the ALJ found all three applicants basically qualified and granted District's application under the standard comparative issue. In so doing, he concluded initially that United's past broadcast record, generally the most significant criterion in comparative renewal proceedings, was minimal and that United was therefore not entitled to a renewal expectancy. I.D., paras. 113–114. This conclusion was based, in part, on a substantial demerit given United for its previous misconduct at WOOK(AM) and WFAB, and, in part, on a finding that WOOK(FM)'s performance was substantial only after United realized that renewal of its licenses was in jeopardy. *Id.*, para. 114. District's proposal was found to be comparatively superior to United's on the diversification and integration criteria and to Hispanic on the integration criterion. The ALJ also awarded District minor credit for its proposed auxiliary power supply. Hispanic was not given any preference for its proposed Spanish-language programming format, nor was it assessed any demerit under the reporting issue.

4. This proceeding is now before the Review Board on exceptions filed by United and Hispanic and protective exceptions filed by District. Reply briefs were filed by all three applicants and the Mass Media Bureau. The Board has reviewed the I. D. in light of the exceptions and briefs, the oral argument held May 6, 1983, and our examination of the record. We adopt the findings of fact in the Initial Decision, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of District's application will best serve the public interest, convenience, and necessity.

5. *Background; Relevant Renewal Period.* Richard Eaton was the founder of United and, until his death on June 1, 1981, was its sole stockholder, president, treasurer, and chief executive officer. The station now bearing the call sign WOOK(FM)[3] was first licensed to United on February 5, 1951; however, it was last renewed in 1966. The Commission deferred WOOK(FM)'s 1969 renewal application because of operational problems occurring at some of United's other stations, and United therefore filed supplemental renewal applications every three years beginning in 1972 and ending in 1978. The instant proceeding was initiated on September 30, 1980, before WOOK(FM)'s 1981 supplemental application was due.

6. At hearing, the ALJ rejected United's view that the only license period relevant to this proceeding is WOOK(FM)'s latest renewal period, 1975–1978. Tr. 467–476. Instead, he held that

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[3] Prior to December 24, 1976, the station was identified as WFAN(FM) and broadcast in the Spanish language. On that date it switched to a Black format and became WOOK(FM). To avoid confusion we will use the call sign WOOK(FM), even when referring to the station's pre-December 1976 broadcast record.

WOOK(FM)'s performance over the entire period from 1966 through 1978 would be considered. United excepts to this conclusion (although it argues that its performance was substantial in 1966–1975, as well as in 1975–1978). We agree with the ALJ that the relevant renewal period for this proceeding is 1966–1978. It is well established that renewal applicants must literally run on their records. *See Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966). And it is a bedrock principle that a license may not be renewed until a determination is made that a grant of renewal would serve the public interest, convenience and necessity. 47 U.S.C. 307(d), 309(a). Thus, since the Commission's last renewal determination for WOOK(FM) was made in 1966, it appears not only reasonable but by operation of law that WOOK(FM)'s entire operating record since then is relevant and open to scrutiny here. *See Intercontinental Radio, Inc.*, 90 FCC 2d 935 (Rev. Bd. 1982).[4] As to United's argument that it is unfair to require it to present evidence concerning programming broadcast 15 years earlier because of the difficulty of compiling such evidence, the licensee has been on notice since 1969 that its application was being held in abeyance and could (and should) have taken appropriate precautionary steps to ensure that the relevant documentation was retained. All that is required is that an applicant make a reasonable, good faith effort to establish its past broadcast record. *Cf. International Radio, Inc., supra*, Nor is the precedent cited by United, *WHCN, Inc.*, 31 FCC 2d 811, 20 RR 2d 894 (Rev. Bd. 1970); *WPIX, Inc.*, 22 RR 2d 1043 (ALJ 1971); *RKO General, Inc.*, 35 FCC 2d 100, 24 RR 2d 411 (1972); and *Hampshire County Broadcasting Co., Inc.*, 50 RR 2d 626 (ALJ 1981), in support of its contention, apposite. None of those cases involved a licensee whose renewal application was deferred beyond the regular license period, and *Hampshire County* did not involve a renewal applicant at all. Rather, *WHCN, RKO General*, and *WPIX* all stand for the proposition that post-renewal term upgrading will not be considered when evaluating a licensee's past performance.

7. *Qualifying Issues Against United: (1) Misconduct at WOOK(AM) and WFAB and (2) Misconduct at WOOK(FM)*. Before we may comparatively analyze the three applications in this proceeding, we must first determine whether United is basically qualified to be the licensee of WOOK(FM), in light of its previous misconduct at WOOK(AM), WFAB, and WOOK(FM). See paragraph 2, *supra*. In considering these matters, the Commission and the ALJ instructed that the doctrine of collateral estoppel would apply, to

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[4] We discern no significance in United's assertion that it is Commission practice to review each supplemental application to ascertain whether the licensee is operating in the public interest. Assuming that such a review occurred here, it would undoubtedly have been limited to matters concerning the licensee's basic qualifications, and, in any event, would not foreclose our obligation to determine whether United's record entitles it to renewal of license.

prevent the relitigation of any adverse findings from the other proceedings, but that United would be permitted to introduce mitigating evidence. 86 FCC 2d at 459, 49 RR 2d at 603; Order, FCC 81M-2067, released July 7, 1981.

8. A brief summary of the adverse findings in the three previous proceedings is appropriate. In the WOOK(AM) comparative renewal case (55 FCC 2d 416, 34 RR 2d 1465 (1975)), the Commission disqualified United after finding: (a) that various ministers had used WOOK(AM) from 1966 through mid-1969 to broadcast lottery information via scriptural citations that in reality were thinly disguised "numbers game" tips (a form of gambling violative of both 18 U.S.C. 1304 and local law) in return for monetary donations; (b) that WOOK(AM) had continued to violate the Commission's technical rules until the end of 1969, despite a 1966 forfeiture of $7,500 for rule violations and a representation that its future operations would be in compliance with the technical rules—a basis for its previous renewal; and (c) that WOOK(AM) engaged in false and misleading advertising. The Commission concluded with respect to the illegal lottery that United's conduct displayed a callous disregard for its listening audience and that United (and its principal Richard Eaton) were remiss in their supervision of WOOK(AM)'s religious broadcasts (55 FCC 2d at 422, 34 RR 2d at 1473). In the WFAB noncomparative proceeding (55 FCC 2d 832, 35 RR 2d 119 (1975)), the Commission held that the public interest would not be served by renewal of United's license because WFAB'S local management had by its careless and negligent practices directly facilitated a scheme of extensive fraudulent billing, in violation of Section 73.1205 of the Commission's Rules, by a local retail appliance dealer during the period of January 1971 through May 1972. Moreover, although the Commission concluded that the evidence fell short of establishing that any United employee or principal consciously participated in the fraudulent billing scheme, it nevertheless disqualified the licensee for its indifference to Commission policies and extensive record of negligent supervision and control that allowed the scheme to occur. The Commission held that the totality of United's conduct was tantamount to an intentional disregard of the Commission's rules. 55 FCC 2d at 838, 35 RR 2d at 127.

9. The third proceeding involved WOOK(FM) itself and two contests that it aired in 1977–1978. In a Notice of Apparent Liability issued to United on November 30, 1978, the Commission alleged that certain of United's announcements and actions concerning the two contests violated Section 73.1216 of the Rules governing licensee-conducted contests and imposed a $6000 forfeiture against the station, which was uncontested. The violations regarding the "Black Book Contest," broadcast from December 1977 through January 1978, included: (a) failure to fully and accurately disclose all material contest terms, *i. e.*, WOOK(FM) did not disclose the nature and value

of the actual prizes to be awarded; (b) a false and misleading announcement that winners in the "Black Book Contest" became qualified for all station contests conducted in 1978; and (c) failure to conduct the contest substantially as announced. As to the "Thousand Dollar Dial Contest," aired during January and February 1978, a station announcement that listeners in the Washington, D.C. "area" might be called was considered false and misleading since the contestants were chosen at random from District of Columbia and Maryland telephone directories only and listeners from the Virginia suburbs of Washington were precluded from participating in the contest. District Exh. 20.

10. At the instant hearing, United offered evidence in mitigation of all of the above misconduct. This evidence included, *inter alia*, the establishment of a central billing procedure in 1973 whereby bills to advertisers on all United stations would be issued from the central office based on station logs which showed advertisements actually run; the institution of an educational program in the late 1970's to teach employees to recognize the elements of a lottery; and the development and implementation of procedures in 1978 relative to contests. I.D., para. 47. Moreover, in 1978, United's consulting engineers began to make unannounced periodic technical inspections of its various stations. I.D., para. 46.

11. In the I.D., the ALJ took into account United's mitigating evidence, but he gave it reduced weight, pointing out that the mitigating efforts only began when United knew its licenses were in jeopardy. I.D., paras. 105, 114. He also stated that the contest violations at WOOK(FM) detracted from United's improvement efforts and indicated a continuing failure by United to clean up its operations as late as 1977 and early 1978. I.D., para. 106. Nonetheless, noting that Richard Eaton was United's sole stockholder and relying on the "implications" of *Friendly Broadcasting Co.*, 90 FCC 2d 225, 51 RR 2d 1006 (1982) (where, following Eaton's death, the Commission summarily renewed two other United licenses in a noncomparative proceeding without considering the ALJ's findings of disqualifying misconduct), the ALJ concluded that United could not be disqualified in this proceeding for its misconduct at another station. I.D., para. 111. He stated that the effect of Eaton's death on United's comparative qualifications was a different matter, however, and that Eaton's departure from the managerial scene could not be used to upgrade United's comparative case. I.D., paras. 111, 112. Finding that United did not offer evidence that Eaton was solely responsible for the WFAB, WOOK(AM), and WOOK(FM) misconduct (I.D., para. 110), the ALJ assessed a substantial comparative demerit against United for its unwillingness or inability to control Stations WOOK(AM) and WFAB. I.D., para. 114. The WOOK(FM) forfeiture matter did not add to the demerit because the ALJ considered it of minor significance. *Id.*

12. In its exceptions, District contends at the outset that *Friendly Broadcasting Co., supra*, does not stand for the proposition that Eaton's death exonerates United from misconduct at WOOK(AM) and WFAB, and it argues that it was error for the ALJ to rely on that case as support for not disqualifying United. District further contends that United should have been disqualified, based on its prior misconduct at WOOK(AM) and WFAB, because individuals previously holding responsible positions in United at the time of the misconduct continue to be involved in WOOK(FM). Finally, it asserts that insufficient weight was given to the WOOK(FM) contest violations and argues that these violations should be additional grounds for disqualification. United, on the other hand, concurs with the ALJ's holding that it is basically qualified but contends that the ALJ erred in assessing a comparative demerit against it. It argues that its misconduct at WFAB and WOOK(AM) is remote in time and thus lacks probative value; that such misconduct has never occurred at WOOK(FM); that it has instituted successful remedial measures that must be given full credit; that the contest violations at WOOK(FM) are decisionally insignificant since they were minor, inadvertent, and of a technical nature; and that the effect of Eaton's death must be considered since he ran what amounted to a one-man operation.

13. We affirm the ALJ's ultimate conclusion that United should not be disqualified here and reject District's exceptions to the contrary. We agree with District, however, that the ALJ's reliance on *Friendly Broadcasting Co., supra*, as a basis for not disqualifying United is misplaced. In note 16 of *Friendly* (90 FCC 2d at 228, 51 RR 2d at 1009), the Commission unequivocally stated that its finding of nondisqualification was confined strictly to that proceeding, and made its renewal grants subject to such action as it might deem appropriate in light of the ultimate findings in the WOOK(FM) proceeding. Moreover, the very Commission order that specified the WOOK(AM) and WFAB misconduct issue here expressly contemplated the possibility of Eaton's future absence (albeit via an application for involuntary transfer of control due to illness), and emphasized that "a serious question would still remain about the soundness and reliability of the licensee's operations and, thus, about United's basic qualifications." 86 FCC 2d at 458 n. 24, 49 RR 2d at 603 n. 24. Accordingly, our conclusion that United is basically qualified does not rest on *Friendly* or on Eaton's death.

14. It is well established that disqualification of a licensee for misconduct at one station does not necessarily mean that the licensee is totally unfit to retain any existing license. That depends on the nature of the particular misconduct. *See Faulkner Radio, Inc.*, 88 FCC 2d 612, 50 RR 2d 814 (1981); *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981) ("individual stations have different broadcast histories and policies"). The pertinent question here is

whether United's record predicts that it is able, and can be relied upon fully, to perform the obligations of a Commission licensee in the operation of WOOK(FM). *See* 86 FCC 2d at 458, 49 RR 2d at 603; *Faulkner, supra*. Thus, we find it significant (as we explain *infra*) that the misconduct at WOOK(AM) and WFAB was the result of a serious lack of supervision over operations by United's local management, rather than the personal participation by Richard Eaton in deliberate wrongdoing. Further, although serious misconduct of the magnitude found at WOOK(AM) and WFAB does not appear to have occurred at WOOK(FM), the FM station's operating record is marred somewhat by the 1977–78 contest violations which, although requiring some sanction, again reflect mostly inattentiveness. However, the ALJ held that these matters were not the result of deliberate misconduct at WOOK(FM) or sufficiently extensive to be disqualifying, and we agree.

15. On the other hand, we also conclude (as did the ALJ) that the impact of United's misconduct at WOOK(AM) and WFAB on its *comparative* qualifications is a different matter and that United deserves a substantial comparative demerit for its record of management misconduct. United's contention that no demerit is warranted because the misconduct is now remote in time is without merit. Although United is correct that the recency of misconduct is frequently a relevant factor in evaluating the impact of that misconduct on an applicant's qualifications, *RKO General, Inc.*, 78 FCC 2d 1, 27, 47 RR 2d 921, 942 (1980), that general principle is not controlling here because the misconduct at both stations was the specific reason that WOOK(FM)'s renewal application, filed in 1969, was deferred by the Commission. Under these circumstances, we are obliged to consider United's record of performance over the entire period from 1966 through 1978, even though part of that period is now "remote" in time. See paragraph 6, *supra*. Similarly, while United's post-misconduct remedial efforts may militate, in part, against disqualification of the licensee (see paragraph 14, *supra*), those belated efforts cannot, for comparative purposes, obliterate the demerit otherwise warranted for the serious misconduct that took place prior to and during the pendency of its renewal application before the Commission. A contrary policy would permit licensees to operate in a deficient manner, secure in the knowledge that subsequent remedial efforts would guarantee renewal if a challenge to their licenses should ever be mounted. This is not permitted. *See Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1422, 44 RR 2d 747, 781 (1978).

16. Finally, United's contention that no demerit is justified in light of Richard Eaton's death is rejected. Although United offered evidence to show that Mr. Eaton exercised a substantial degree of sway over all of United's stations, it did not on the record here establish that its current principals and managers had no responsi-

bility for its previous misconduct; it merely asserts in its brief (at 52) that these individuals were not "tied in any way" with the misconduct.[5] However, the findings of fact in the WOOK(AM) and WFAB proceedings appear on their face to counter United's latest assertion. A few examples will suffice. First, in the WOOK(AM) case, the Commission did not find that Richard Eaton was personally implicated in the fraudulent schemes or that he intentionally violated rules; rather, the cause was laid primarily to unsupervised local management. *See* 55 FCC 2d at 419–25. Second, United's E. Carlton Myers and Clifton Holland were the highest management officials when the 1969 violations at WOOK(AM) occurred. 55 FCC 2d at 435, 460 (Initial Decision). Indeed, Myers, the former general manager of WOOK(AM) and current general manager of WOOK(FM), was found to have had substantial responsibility over the religious broadcasts on WOOK(AM) that contained the illegal numbers tips. *Id.* at 449. Similarly, Holland, previously WOOK(AM)'s operations manager (*id.* at 460) and now WOOK(FM)'s public affairs director, had primary responsibility for reviewing advertising to ensure that it was not misleading (*id.* at 457), conduct, in part, for which WOOK(AM) was denied license renewal. Finally, Myers and Holland were in charge of ensuring that WOOK(AM)'s power changed on time at sunrise and sunset (*id.* at 478), and the 1969 technical violations at WOOK(AM) included several instances of failure to change power in a timely manner. *Id.* at 429, exception No. 26. Notwithstanding, United proffered no evidence here concerning these individuals that would exonerate them of responsibility for the serious misconduct that occurred at WOOK(AM) while they held the highest managerial roles.[6]

17. In other words, while United now argues that Richard Eaton was *solely and personally* responsible for all of United's previous misconduct, and that WOOK(FM)'s current management (in its previous incarnations) was blameless, the record and prior Commission findings indicate otherwise. In fact, in the WOOK(AM) and WFAB cases, United argued—with some apparent success—that United's misdeeds occurred without the knowledge or intent of

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[5] By Memorandum Opinion and Order, FCC 81M-3103, released September 30, 1981, the ALJ permitted United to adduce evidence concerning the death of Richard Eaton, the persons to whom his United stock would be transferred, and the pertinent background of each such transferee. While evidence on "new staffing, future operational plans, and similar matters" was ruled out because of concern about voluntary upgrading of United's management proposal, *id.* at para. 12, United was not prevented from explicating the current management's previous roles, if any, at United and at WOOK(AM) and WFAB. And it was permitted to offer evidence in mitigation. See paragraph 7, *supra*.

[6] Other current United principals were also involved in the United organization, but not at WOOK(AM) or WFAB, at the time of the disqualifying misconduct at those stations. *See* 55 FCC 2d at 434; United Exh. 7.

Richard Eaton, and that the responsibility, if any, lay with ineffective or careless local managers. *See, e.g.*, 55 FCC 2d at 419–25, 55 FCC 2d at 836–41. In view thereof, a substantial comparative demerit must be assessed here in evaluating United's renewal qualifications for WOOK(FM). While we are satisfied that the mitigating factors discussed in paragraph 14, *supra*, are adequate to forefend absolute disqualification, the past deficiencies of key officials in WOOK(FM)'s present management do diminish its future reliability. Where, as here, the Commission has characterized United's previous misconduct as "serious, repetitive, far-flung, and exclusively within its broadcast operations," 86 FCC 2d at 458, 49 RR 2d at 602, and has questioned whether United was "either deliberately flouting FCC rules or is irremediably incompetent," *id.*, it was incumbent upon United to dispel the Commission's stated doubts concerning WOOK(FM)'s potential reliability as a licensee. *Id.* It has not. This case is thus clearly distinguishable from *Faulkner Radio, Inc.*, *supra*, in which the licensee successfully demonstrated that "all misconduct resulted directly from the actions of *one individual* . . . who is no longer associated with [it]." 88 FCC 2d at 617, 50 RR 2d at 818 (emphasis added). Even there the Commission conditioned renewal of Faulkner's licenses (in a noncomparative proceeding) on the total exclusion of the previous malfeasor from *any* role in *any* of its stations. In the instant case, conversely, a substantial comparative demerit is the warranted effect of United's previous misconduct, particularly when that misconduct took place under the managerial aegis of several of the selfsame officials who now hold positions of high supervisory responsibility at WOOK(FM).[7] *See generally Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 52 RR 2d 1617 (Rev. Bd. 1983) (substantial comparative demerit in FM proceeding where applicant official partially responsible for misconduct at "sister" AM station). United's "total indifference" (55 FCC 2d at 838) to billing irregularities at WFAB and its "gross disregard of Commission policy" (*id.*) are likewise an inextricable part of United's stewardship, and must be considered negative predictors on the scale of comparative fitness.

18. *Past Performance*. At hearing, United offered no direct case concerning its pre-1975 broadcast record—which consisted of Spanish-language programming—arguing that the only relevant license period was 1975–1978 and that evidence relating to earlier programming was difficult to locate. I.D., para. 97. The record evidence for the pre-1975 period is therefore scant, consisting essentially of

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[7] While *Gross Telecasting, Inc.*, 92 FCC 2d 204, 52 RR 2d 851 (Rev. Bd. 1982), is cited to us as requiring license renewal even where all principals involved in previous misconduct have not severed their connections with the licensee, that case was a noncomparative proceeding and, as here, the licensee was not disqualified because of the previous misconduct. There, as here, the departure of a key management figure was considered as a mitigating factor, but the Commission had no occasion to consider whether a comparative demerit was warranted because of the past misconduct and a lack of complete change in top management.

WOOK(FM)'s composite week percentages of news, public affairs, and all other non-entertainment programming excerpted from its renewal and supplemental renewal applications, and statements by Hispanic's witnesses that the abandonment of Spanish-language programming on WOOK(FM) after 1976 was a "tragic blow" to the Washington Hispanic community. I.D., paras. 16–20, 37. There is no record evidence that would permit a comparison of WOOK(FM)'s programming performance from 1966 to 1975 with that of other stations in the area, except for the limited statistical information concerning the 1978 renewal applications taken from the Arbitron Company's "Metro Survey Area" report. I.D., para. 98.

19. In the I.D., the ALJ rejected United's argument that only the 1975–1978 period was relevant and attempted to evaluate United's broadcast record from 1966 to 1978. He compared the Arbitron 1978 figures for non-entertainment programming against United's 1969, 1972, 1975, and 1978 percentages to determine United's ranking in the market. Based on the relatively low ranking of United's non-entertainment programming other than news and a meagerness of local news coverage during the time WOOK(FM) broadcast Spanish-language programming, the ALJ found that United's pre-1975 broadcast record was minimal. I.D., paras. 98–99, 114. With respect to WOOK(FM)'s post-1975 broadcast performance, the ALJ stated that the station's record was compiled after United lost its licenses for WOOK(AM) and WFAB, see note 1, *supra*, and was therefore entitled to diminished weight on the theory that it showed only the reaction of a station to the prospect of the non-renewal of its license. I.D., paras. 103, 114. He observed, however, that WOOK(FM)'s post-1975 performance would have been considered substantial, because of dramatic improvements in its news programming, if that performance had come before United had fears for its licenses. I.D., paras. 101, 114. Based on United's minimal pre-1975 performance, the diminishment of its post-1975 broadcast record, and the substantial demerit for United's previous misconduct, the ALJ concluded that United's total broadcast performance during 1966–1978 was "no better than minimal." I.D., para. 114.

20. United contends in its exceptions that WOOK(FM)'s overall past performance was substantial and that it was therefore entitled to a renewal expectancy and a substantial comparative preference. Specifically, it argues that the only relevant period to evaluate its programming performance is the 1975–78 period; that its 1975–78 performance should not have been accorded diminished weight; that WOOK(FM)'s 1966–75 programming is not relevant to this proceeding; and that its 1966–75 broadcast record was substantial, in any event. We have already addressed and rejected United's argument on the relevant renewal period for this proceeding in paragraph 6, *supra*. However, we do agree with United that it was improper to accord diminished weight to WOOK(FM)'s 1975–78 performance.

The ALJ chose 1975, the year of the Commission's decisions denying renewal of WOOK(AM) and WFAB, as the cut-off point after which United was not entitled to full weight for its broadcast record—the rationale being that improvements taking place after a licensee is in fear of the nonrenewal of its license are valueless. We conclude that this was error. Arguably, the ALJ could just as easily have chosen any of a number of other dates in this proceeding as the point at which United first had a legitimate and reasonable concern that its license for WOOK(FM) was in jeopardy—for example, 1969, when WOOK(FM)'s application was deferred; 1973, when WFAB's application was designated for hearing and WOOK(AM)'s renewal application was denied in an Initial Decision; 1974, when WFAB's renewal application was denied in an Initial Decision; or 1977, when the WOOK(AM) Decision became final. A better approach, in our view, is to place the cut-off date for program performance evaluation at the traditional processing notice point, viz., when a competing application or petition to deny is filed. *See RKO General, Inc.*, 35 FCC 2d 100, 24 RR 2d 411 (1972). *See also Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 712–713, 51 RR 2d 389, 396 (Rev. Bd. 1982) ("In general, then, and in the future, we believe that programming evidence accruing *after the filing of a competitive application* is *post litem motam* and thus entitled to reduced weight." Emphasis added, footnote omitted). Prior to this date, there are no competitors who may be prejudiced by upgrading, and adhering to a date certain will serve to eliminate in the future the kind of dispute which arose in this case.[8] Thus, since competing applications in this proceeding were not filed until August 31, 1978, full weight should have been given to WOOK(FM)'s 1975–1978 performance.

21. Nevertheless, we are unable to conclude that United's past broadcast performance, considering the entire 1966–1978 period, is sufficient to warrant a renewal expectancy and the comparative preference that accompanies it. In making this judgment and affirming the ALJ's conclusion, we are guided by the standards set out by the Commission in *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 49 RR 2d 1138 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982). An incumbent's "legitimate renewal expectancy" attaches only when his past performance has been "meritorious" or "substantial"; "minimal service" is merely adequate—sufficient to permit renewal if there are no competing applications, but not enough to yield a renewal expectancy or a

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[8] *Lamar Life Broadcasting Co.*, 24 FCC 2d 618, 19 RR 2d 851 (1970), cited by the Mass Media Bureau in support of the ALJ's ruling, is inapposite. The licensee in that proceeding had been found previously by the United States Court of Appeals for the District of Columbia Circuit to be a licensee in name only and not entitled to the status of a renewal applicant. The Commission therefore ruled in its designation order that the licensee would not be permitted to gain a preference for its past broadcast record since that would not be competition on even terms. No similar restriction was placed on WOOK(FM).

comparative preference in the face of a challenge. *Simon Geller*, 90 FCC 2d 250, 270 and n. 99, 51 RR 2d 1019, 1037 and n. 99 (1982). In the instant case, we note first that there is insufficient record evidence to establish that WOOK(FM)'s overall performance during 1966–1978 was meritorious, because it has only provided meaningful information for the 1975–1978 period. While we tend to agree with United that its most recent license period (prior to the filing of competing applications) is the most probative in terms of predictive value, this limited showing of proficiency cannot carry WOOK(FM)'s burden of showing meritorious service over the entire 12-year period that we deem relevant, even if we were to hold with the ALJ that United's 1975–1978 performance was substantial. *See Intercontinental Radio, Inc., supra*. This point is underscored by the ALJ's conclusion that WOOK(FM)'s 1966–1975 record was only minimal.

22. Second, we agree with the ALJ that the overall performance evaluation that constitutes the renewal expectancy analysis encompasses licensee conduct as well as program performance, for both factors have important predictive value and must be weighed simultaneously. *Cf. Central Florida Enterprises, Inc., supra*; *Simon Geller, supra*. We have already concluded that United's previous misconduct and the continuing relationship of WOOK(FM)'s present management (and its future reliability) warrant a substantial comparative demerit against United. See paragraph 17, *supra*. Even if we were to conclude that the evidentiary record provided a sufficient basis for finding that WOOK(FM)'s overall programming performance during 1966–1978 was substantial, which we do *not*, that conclusion would be offset by United's past conduct, primarily at WOOK(AM). The renewal expectancy is based on a threefold concern that an incumbent's "proven performance" and "acceptable service" should not be supplanted by an inferior one; that licensees should be encouraged to ensure "quality service"; and that routine comparisons of incumbents and challengers (without adequate recognition of past performance excellence) could lead to a "haphazard restructuring of the broadcast industry." *Cowles Broadcasting, Inc., supra*, 86 FCC 2d at 1013, 49 RR 2d at 1156. When these three bases are attenuated in a particular case, the renewal expectancy is commensurately weakened. *See Central Florida, supra*, at 510 n. 40. This is such a case. United's past performance has not been adequately proven, and what has been proven is significantly marred by serious past misconduct and concerns about future reliability. Thus, we decline to award a renewal expectancy to WOOK(FM) and now proceed to examine the remaining issues in this case "just like an ordinary comparative proceeding where all applicants are competing for a new station." *Simon Geller, supra*, 90 FCC 2d at 270, 51 RR 2d at 1037.

23. *Specialized Programming*. All three applicants propose a specialized program format: Hispanic proposes a Spanish-language

format while United and District propose Black-oriented formats. However, Hispanic is the only applicant that sought a comparative advantage arising out of its proposed format. By Order, 49 RR 2d 248 (1981), the ALJ found that Hispanic had made the requisite threshold showing that its proposed format was specialized and unique and permitted it to adduce evidence respecting a need for the format. That evidence is summarized in paragraphs 75–96 of the I.D.

24. Hispanic's proposed service area includes more than 93,000 persons of Hispanic origin, which is approximately 3% of the population. I.D., paras. 75–76. Hispanic proposes to operate from 5:00 A.M. to 2:30 A.M. Monday through Saturday and from 6:00 A.M. to 1:00 P.M. on Sundays. I.D., para. 90. Over 60% of Hispanics in the Maryland suburbs of Washington use no English at home although all Hispanics surveyed spoke some English. I.D., para. 79. Moreover, approximately 25% of Hispanics in Washington are said to have no knowledge of spoken or written English. I.D., para. 80. There are six area radio stations that provide Spanish-language programming to some degree. I.D., paras. 86, 88. One of them, WMDO, a daytime-only AM station licensed to Wheaton, Maryland, broadcasts solely in Spanish. I.D., para. 88. It provides a primary signal over 96.4% of Washington and substantial portions of some of the principal Maryland and Virginia suburbs during much of the day. I.D., para. 89. During the two hours after sunrise and two hours before sunset, the station's coverage is reduced to 61% of Washington, a smaller area of the Maryland counties, and no coverage of Virginia. *Id.* The ALJ concluded that there was "meaningful" Spanish-language broadcasting in the area, based primarily on the broadcasts of WMDO, and ruled that Hispanic was not entitled to a programming preference. I.D., para. 119.

25. Hispanic argues that the ALJ erred in finding that it was not entitled to a substantial preference for its proposed format, citing *American International Development, Inc.*, 86 FCC 2d 808, 49 RR 2d 1029 (1981), where a significant preference was awarded to an applicant that proposed a first nighttime Spanish-language radio service. Hispanic urges that there is a need for both daytime and nighttime Spanish-language programming to serve the entire Washington area and that it proposes to meet that need. Additionally, Hispanic contends that the ALJ erred in not awarding it a decisionally dispositive preference for the overall quality of its programming.

26. We conclude that Hispanic is entitled to a slight preference for its specialized format. The Commission's most recent guidelines in this area are set forth in *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 465, 45 RR 2d 689, 694 (1979), where the Commission held that preferences for specialized formats would not be awarded if the proposed programming was present in the community in a substantial amount. *See also Flint Family Radio*, 69 FCC 2d 38, 41

RR 2d 1155 (Rev. Bd. 1977). Applying that standard here, we disagree with Hispanic that daytime Spanish-language programming is not available in a substantial amount in the Washington, D.C. area. *Cf. Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 50 RR 2d 1251 (Rev. Bd. 1982). In addition to WMDO (which provides daylong Spanish-language entertainment, local, regional, and national news, and public affairs programming), WPFW-FM, WFAX, WJMD, and WHUR broadcast various amounts of Spanish-language programming throughout the week. I.D., para. 86.[9] Thus, it is apparent that Hispanic's claim to a preference based on the daytime portion of its proposal is without merit. On the other hand, Hispanic is certainly entitled to some preference for its proposal to provide a Spanish-language nighttime service that is currently lacking. That preference is diminished, however, because the programming issue is cast in comparative terms and involves the relative need for a Spanish-language format versus the proposed Black-oriented formats, rather than general market formats. See FCC 81M-776, *supra*. United currently provides a Black-oriented format on the FM frequency being sought, and the percentage of Black population in the service area far exceeds the percentage of Hispanic population (3.0%). Moreover, the number of Black-oriented stations in the Washington area can hardly be considered abundant in relation to the large Black population in the District of Columbia.[10] Nonetheless, some credit is warranted to Hispanic, since there is no aural Spanish-language programming at night. Neither *American International Development, Inc., supra*, nor *Broadcast Communications, Inc.*, 93 FCC 2d 1162, 53 RR 2d 805 (Rev. Bd. 1983), provides support, however, for the substantial programming preference that Hispanic seeks. Both cases involve the relative need for Spanish-language formats versus general market formats, and, unlike the Black-oriented formats here, the latter were abundant in both proceedings. Hispanic will be given a slight preference for its specialized format.[11]

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[9] The ALJ's findings as to the amount of Spanish-language programming available also included TV stations. Such findings have not been considered here since the proposed facility is an FM broadcast station. In *Cameron*, and *American*, *supra*, the Commission did not appear to weight the presence of television stations in the area and we therefore do not propose to go beyond the Commission's analysis in this case. On the other hand, AM and FM facilities have long been treated as one aural service and are both included here. *See Broadcast Station Assignment Standards*, 39 FCC 2d 645, 26 RR 2d 1189 (1973).

[10] There are three commercial radio stations and one noncommercial FM station with Black formats. Hispanic Exh. 30. The record is not clear, however, as to the number of stations carrying some Black programming.

[11] District's contention that this matter should not have been explored is rejected. Implicit in our award of a slight preference to Hispanic is the recognition that the ALJ correctly permitted the inquiry based on Hispanic's threshold showing. District would also diminish the weight of the testimony of Hispanic's witnesses regarding the number of Hispanics who cannot speak English. We disagree. Although such information inherently involves a great deal of subjectivity,

Hispanic's additional request for a decisionally dispositive preference for the overall quality of its programming is denied as being beyond the scope of the inquiry contemplated by the Commission and authorized by the ALJ, which pertains to the need for a particular format, rather than the quality of individual programs. See 49 RR 2d 248.

27. *Reporting Issue*. By Memorandum Opinion and Order, FCC 81M-476, *supra*, the ALJ specified a Section 73.3514 issue against Hispanic based on its failure to report in its application that one of its principals had been convicted of a crime. Section 73.3514 of the Rules requires that an application shall include all information called for, and paragraph 8(d), Section II, of the application form (FCC Form 301) asks whether ". . . any party to the application has been found guilty of . . . any felony or any other crime . . ." Hispanic responded to paragraph 8(d) in the negative, notwithstanding that Fernando Casillas, a Hispanic principal when the application was filed, had formerly pled guilty to violating 18 U.S.C. §209, a misdeanor, by giving money to a government employee in return for a larger share of government business. United Exh. 80.

28. Upon receipt of an obsolete questionnaire from Hispanic's communications counsel in 1978, asking whether Casillas had been convicted of a felony or lesser crime involving moral turpitude, [12] Casillas contacted his personal attorney for advice whether his prior conviction required an affirmative answer to the question. I.D., para. 71. Casillas was informed that he could answer "no" to the questionnaire since the violation was not a felony nor, in counsel's view, did it involve moral turpitude. *Id.*[13] Accordingly he completed the questionnaire with a "no" response. None of the other principals was aware of the guilty plea, and paragraph 8(d) of the application was filed with a negative answer. Subsequently, Casillas voluntarily resigned from Hispanic. Hispanic Exh. 7. The ALJ found that the conviction should have been reported by the applicant, rejected arguments by United and District that Hispanic's principals were derelict, except in a minor way, in their duty to supervise the preparation of the application, and concluded that the matter was

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Hispanic has demonstrated that a sizable percentage of Hispanics in the Washington area have difficulty with the English language. See, *e.g.*, Hispanic Exh. 19.

[12] The questionnaire was obsolete because paragraph 8(d) of the application form had previously been broadened to inquire into "any" crime other than a felony, without regard to whether such a crime involved moral turpitude. See paragraph 27, *supra*

[13] In contending that the violation did not involve moral turpitude, Casillas' attorney rationalized that 18 U.S.C. §209 merely prohibits the payment of gratuities to government employees and that acceptance of Casillas' guilty plea did not involve a finding that Casillas had participated in any fraudulent activity or that he made any payments to a government official with the intent to defraud the government or obtain preferential treatment. Hispanic Exh. 12.

decisionally insignificant. I.D., para. 116. Both United and District except to the ALJ's conclusion and urge the Board to impose a substantial demerit against Hispanic. District also repeats its previous contention that Hispanic was grossly indifferent to the accuracy of its application, having relied solely on counsel to prepare it.

29. It is clear from the ALJ's conclusions and from the exceptions that Hispanic's failure to report Casillas' conviction was tried essentially as an ineptness issue, without emphasizing the traditional "accuracy" issue concerns of full disclosure, materiality, and intent to deceive. *Cf. Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 50 RR 2d 1321 (Rev. Bd. 1981), *modified*, 53 RR 2d 44 (1983). Thus, the ALJ found a very minor dereliction of duty to *supervise*, I.D., para. 116, but made no findings or conclusions concerning the candor/misrepresentation aspects of the issue.[14] In remedying this omission, we conclude that Hispanic must be assessed a slight comparative demerit for its reporting failure.

30. Although we agree with the ALJ that Hispanic should not be faulted for relying on counsel to help prepare its application, the applicant is ultimately responsible for the factual and biographical matter contained therein. *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 16 RR 2d 946 (1969). Thus, while Hispanic's counsel clearly erred in mailing Casillas an obsolete questionnaire, we do not believe that Casillas displayed the appropriate forthrightness in answering the (wrong) question placed before him with the single word "no". The underlying purpose of the query relating to past criminal conduct was obvious and the response, even if "technically correct" in the misjudgment of counsel, was materially deficient in the degree of forthcomingness expected of an applicant. Having pled guilty to a serious crime, Casillas' unqualified response in the negative was clearly misleading. As the court noted:

> The Commission must rely heavily on the *completeness* and accuracy of the submissions made to it, and its applicants in turn have an *affirmative duty* to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known.

RKO General, Inc., supra, 670 F.2d at 232 (emphasis added). Moreover, "advice of counsel cannot excuse a clear breach of duty [to fully inform Commission of adverse facts]" (*id.* at 231), and the "legal argument" of counsel "cannot excuse the calculated omission" (*id.*) of a candid recitation of Casillas' criminal history. Hence, while Casillas' reliance on counsel in this matter may be mitigating, it cannot be wholly exculpating, lest we encourage applicants to furnish deceptively incomplete information and to fall back blamelessly on counsel in any ensuing crunch. *See generally George E. Cameron, Jr. Communications*, 53 RR 2d 917, 926 (Rev. Bd. 1983). Casillas and his counsel were obviously aware of the significance of an applicant's criminal history, and the artless evasion evident here is culpable. *Cf. Coastal Bend Family Television, Inc.*, __ FCC 2d __ , 54 RR 2d 367, 374 (Rev. Bd. 1983), Paradoxically, had Casillas candidly answered the "wrong" paragraph 8(d) question, a complete and accurate response to revised paragraph 8(d) would have appeared on Hispanic's application.

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[14] However, in designating the issue, the ALJ observed: "It is difficult to credit anyone believing, or advising, that the bribery of a public officer does not involve moral turpitude." FCC 81M-746, *supra*, at para. 8.

31. In faulting Casillas' understatement, however, in addition to noting the slight mitigating role of advice of counsel, we also note that Hispanic's other principals were apparently unaware of Casillas' conviction and his lack of candor (I.D., para. 73); Casillas was only a 5% stockholder and was not proposed to be integrated into the station's operation (I.D., paras. 61–62 and note 15); and Casillas resigned from Hispanic shortly after these matters came to light (Hispanic Exh. 9; FCC 81M-746, *supra*). These factors further mitigate the potential decisional significance of Casillas' misconduct and result in the assessment of only a slight demerit. *See Nuance Corp.*, 85 FCC 2d 412, 49 RR 2d 147 (Rev.Bd. 1981). Although the court has held that the Commission must examine the effect of "character" questions relating even to a minor stockholder, *see TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973) (cases remanded, *inter alia*, to assess impact on applicant of activities of 1.54% principal who was no longer actively involved), we have recently indicated our view that the isolated lack of candor of an individual principal should be regarded generally in some reasonable proportion to that principal's ownership share. *Horne Industries, Inc.*, __ FCC 2d __ , 54 RR 2d 249, 259 n.45 (Rev. Bd. 1983). Hispanic's slight comparative demerit here would seem to be an appropriate penalty for Casillas' lack of candor (as well as any residual taint associated with his personal criminal history).

32. *Integration of Ownership and Management*. District is comprised of four 25% stockholders, one of whom, Dr. Herman F. Stamp, proposes to work full time as the station's managing director. He currently is self-employed as a practicing dentist in the District of Columbia and holds various positions at Howard University. If District is successful in obtaining a grant of its application, Dr. Stamp avers that he will devote no more than six hours per week to dental consultant services and will give up his other vocational activities. I.D., paras. 50, 52. Dr. Stamp, who is Black, is a life-long resident of the District and active in civic affairs. I.D., paras. 50, 51. He has no broadcast experience. The other three District stockholders, who are also Black and residents of Washington, D.C., each propose to devote four hours per week to participating at board meetings. I.D., paras. 57–60. Hispanic is composed of seven stockholders, all of whom are Hispanic. The applicant will hire a general

manager and professional staff to operate the station on a daily basis, but six of its seven stockholders intend to devote a few hours per month to the station in a supervisory role, working on the management and financial committees. I.D., para. 62. They all live in the Washington area. United claims no integration credit.

33. The ALJ concluded that District was entitled to 25% full-time quantitative integration credit for Dr. Stamp, compared to none for Hispanic or United. He gave District minor residual enhancement credit for the minimal participation of its other principals but ruled that their proposals, as well as the minimal participation of the Hispanic principals, were not entitled to any quantitative integration credit because they were far less than 20 hours per week, citing *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd. 1979). United excepts to the ALJ's award of any significant integration credit to District, claiming that substantial questions exist as to Dr. Stamp's commitment to devote 40 hours per week to the station. Specifically, United argues that Dr. Stamp is 60 years old, has been a dentist for 35 years, teaches dentistry, has no broadcast experience, has vaguely defined duties, was not proposed to be integrated in District's original application, and was not involved in preparing the application. Hispanic faults the ALJ for not specially crediting its 100% minority ownership.

34. We conclude that the ALJ correctly found that District was entitled to 25% full-time integration credit. United's exception that Dr. Stamp will not effectuate his commitment consists wholly of surmise and speculation and therefore does not provide adequate reason to upset the ALJ's conclusion. Dr. Stamp's age is irrelevant, absent a showing that his health will not allow him to meet his commitment, as are his present vocational activities which he proposes to curtail to ensure that he can devote 40 hours per week to the station. Moreover, broadcast experience is solely an enhancing element, and its absence does not detract from District's integration proposal. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 848; 50 RR 2d 1117, 1131 (Rev. Bd. 1981); *Webster-Baker Broadcasting Corp.*, 88 FCC 2d 944, 951–2, 50 RR 2d 1143–48 (Rev. Bd. 1982). Nor do we discern how Dr. Stamp's noninvolvement in preparing the application detracts from his commitment to work 40 hours per week at the station in the future. In addition, contrary to United's argument, Dr. Stamp's proposed functions were specifically described in considerable detail at the hearing. *See I.D.*, paras. 54–55. Finally, as noted by the ALJ (para. 125), District proposed Dr. Stamp as managing director before the comparative cut-off date, and the fact that his name was absent from the application, as originally filed, is of no legal moment. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 817, 51 RR 2d 409, 421 (Rev. Bd. 1982).[15]

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[15] Although not formally excepting to the integration credit for Dr. Stamp, Hispanic

35. Hispanic's exception that the ALJ erred in not considering its minority ownership is also without merit. The ALJ properly concluded that those principals of Hispanic and District who plan to devote only minimal managerial attention to the station are not entitled to quantitative integration credit. *See Midwest Broadcasting Co., supra*, 70 FCC 2d at 1495, 45 RR 2d at 7 (20 hours per week held as cut-off point below which no credit will be given for part-time integration proposals). Both applicants, however, do receive some slight residual credit for their minimal participation. *Id.* at 1496 n. 14, 45 RR 2d at 9 n. 14; *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1911 (1965); *Webster-Baker, supra*, 88 FCC 2d at 953, 50 RR 2d at 1149. In any event, the slight residual credits to which both District and Hispanic are entitled fully offset one another, since both applicants are 100% minority owned. *See New Continental Broadcasting Co., supra*, 88 FCC 2d at 846, 50 RR 2d at 1130 (Board will not be lured down path of pitting minority against minority). With respect to Hispanic's argument that its minority ownership should be weighed as a separate comparative criterion, we note that the Commission has expressly ruled otherwise. *WPIX, Inc.*, 68 FCC 2d 381, 411–12, 43 RR 2d 278, 316 (1978). *See also Las Misiones De Bejar Television Co.*, 93 FCC 2d 191, 53 RR 2d 119, (Rev. Bd. 1983) *New Continental Broadcasting Co.*, 89 FCC 2d 631, 636, 51 RR 2d 266, 270 (Rev. Bd. 1982). We conclude that District is entitled to a moderate comparative preference under the integration criterion. *See Nuance Corp., supra.*

36. *Diversification of Control of the Media of Mass Communications.* The ALJ ranked United last under this criterion, noting that the applicant must be given a demerit for its interests in other broadcast stations, particularly in nearby Rockville and Baltimore, Maryland. I.D., para. 115. Hispanic and District were ranked equal since neither they nor their principals have any ownership interest in any medium of mass communications. I.D., para. 130. Hispanic, however, contends at length that it is entitled to a substantial preference over District under the diversification criterion. It argues that while there is no evidence that District's application will add a diverse and antagonistic source of information to those already available in Washington, grant of Hispanic's application will significantly diversify existing media ownership by bringing the first Hispanic-controlled, Spanish-language broadcast station to the area.

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nonetheless appears to fault the ruling on the ground that Dr. Stamp's duties at the station were not determined until after the time for comparative upgrading had elapsed. Hispanic Br. at 37. We find no error in the ALJ's ruling. As indicated above, the applicant proposed Dr. Stamp's integration in a timely fashion. The subsequent formalization of the duties of his position does not detract from his quantitative integration credit since those duties are not at variance with his proposed role. *See WHW Enterprises, Inc., supra.*

We disagree. This theory concerning the meaning of diversity has been previously rejected by the Board in *Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 47 RR 2d 1307 (Rev. Bd. 1980). There we noted that the essence of the Commission's policy on diversification of control of the mass media is that diversity of programming can best be achieved by promoting *structural* diversity of ownership and control of broadcast facilities. 78 FCC 2d at 1022, 47 RR 2d at 1312. *See also TV 9, Inc.* v. *FCC, supra* (active minority involvement creates presumption that diversity of viewpoints will be enhanced). This structural approach permits the Commission to promote program diversity without entering the quagmire of evaluating the qualitative content of potential programs.[16] Thus, since neither District nor Hispanic has any attributable ownership of other media, we will apply traditional concepts and affirm the ALJ's conclusion that neither applicant is entitled to a preference over the other. Both, however, are entitled to a preference over United, which has not excepted to this conclusion.

37. *Auxiliary Power*. District proposes to install an auxiliary power source to assure continued operation of the station in the event of a power outage. Neither of the other two applicants proposes this. District is therefore entitled to a very slight preference for proposing to use auxiliary power. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966).

38. *Petitions to Enlarge Issues*. District excepts to the ALJ's failure to add two issues it requested on November 15, 1980, and July 10, 1981, respectively: an employment practices issue against United, and an ineptness issue against Hispanic. District's exceptions are without merit. We have reviewed the ALJ's decisions denying the requested issues (FCC 81M-1614, *supra*, and FCC 81M-3104, released September 30, 1981) and conclude that they adequately and persuasively set forth sufficient reasons why the requested issues were denied. The exceptions before us raise no new matters of substance which the ALJ did not consider or additional allegations which would warrant a different result. Moreover, even if a substantial question had been raised, remand would serve no useful purpose since District has prevailed in any event.

39. *Miscellaneous Matters*. One further matter requires comment. On April 25, 1983, United filed a motion to reopen the record and to enlarge issues seeking Section 1.65 and violation of labor law issues against Hispanic. The Mass Media Bureau, on the merits, supports addition of both issues, but contends that United's motion

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[16] *Simon Geller, supra*, 90 FCC 2d at 272, 52 RR 2d at 1038–39, cited by Hispanic is inapposite. There the licensee provided virtually no informational programming and thus was found not to qualify as a "diverse and antagonistic source" of information in the community. Here, there is no contention that District will not provide any informational programming.

should be denied as being of no decisional significance unless the Board determines that Hispanic is the preferred applicant. We concur with the Bureau that remand of this proceeding is unnecessary in light of our conclusion that District is the preferred applicant. See paragraph 40, *infra*. Without reaching the merits of United's argument, its motion will be dismissed as moot.

40. *Final Comparative Evaluation*. All exceptions having decisional significance have been considered by the Board. We have awarded District a moderate integration preference and a very slight auxiliary power preference. Hispanic receives a slight preference for its specialized program format and a slight demerit for its reporting violation. Both District and Hispanic receive a diversification preference over United. United is entitled to no preferences and no renewal expectancy because it failed to prove that its past broadcast record during the renewal period under examination was meritorious. See paragraphs 21–22, *supra*. When the preferences awarded to District and Hispanic are weighed, the comparative balance tips dispositively in District's favor. District enjoys integration and auxiliary power preferences over Hispanic and integration, auxiliary power, and diversification preferences over United. Hispanic's slight preference for specialized programming does not match in magnitude or importance District's moderate integration preference, *see Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 53 RR 2d 953, 963 (Rev. Bd. 1983), and Hispanic's position is further weakened by its reporting demerit. United, with no preferences whatever and a substantial comparative demerit (see paragraph 17, *supra*), is a distant third. We thus affirm the ALJ's determination that a grant of District's application will best serve the public interest, convenience and necessity.

41. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by United Broadcasting Company, Inc. on January 28 and March 1, 1983, ARE GRANTED, and the amendments ARE ACCEPTED;

42. IT IS FURTHER ORDERED, That the motions for leave to file addendum to brief filed by Hispanic Broadcasting Corporation on March 7 and 31, 1983, ARE GRANTED, and the addenda ARE ACCEPTED; and that the motion to reopen the record and to enlarge issues filed by United Broadcasting Company on April 25, 1983 IS DISMISSED as moot;

43. IT IS FURTHER ORDERED, That the application of District Broadcasting Company (File No. BPH-780831AY) for a construction permit to establish a new FM broadcast station at Washington, D.C., IS GRANTED, and the applications of United Broadcasting Company, Inc. (File No. BRH-589) and Hispanic Broadcasting Corporation (File No. BPH-780901AB) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 82D-73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
UNITED BROADCASTING COMPANY, INC. Washington, D.C.	BC Docket No. 80-479 File No. BRH-589
For Renewal of License of Station WOOK(FM), Washington, D.C.	
DISTRICT BROADCASTING COMPANY Washington, D.C.	BC Docket No. 80-480 File No. BPH-780831AY
HISPANIC BROADCASTING CORPORATION Washington, D.C.	BC Docket No. 80-481 File No. BPH-780901AB
For Construction Permits	

Appearances

Thomas Schattenfield and *Harry Cole* on behalf of United Broadcasting Company, Inc.; *Lewis I. Cohen* and *Roy W. Boyce* on behalf of District Broadcasting Company; *Lawrence J. Bernard, Jr.* and *Chester F. Naumowicz* on behalf of Hispanic Broadcasting Corporation; and *Daniel Sarno* and *Charles Dziedzic* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

(Issued November 1, 1982; Released November 9, 1982)

Prelininary Statement

1. This proceeding involves the application of United Broadcasting Company, Inc. (United) for renewal of its license for station WOOK(FM), Washington, D.C.[1] and the applications of District Broadcasting Company (District) and Hispanic Broadcasting Corporation (Hispanic) for construction permits for a new FM station in Washington, D.C., filed August 31, 1978 and September 1, 1978,

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[1] The Commission has not acted on an United application for renewal of its license for this station since the application filed in 1966. United has filed an application every three years beginning in 1969 and ending with 1978.

respectively. All applicants propose the use of the same frequency so the applications are mutually exclusive.

2. On September 30, 1980 the Commission released *Memorandum Opinion and Order* (FCC 80-529, 81 FCC 2d 227) designating the three applications for hearing on the following issues:

> (a) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (b) To determine, in light of the evidence adduced pursuant to the above issue, which of the applications should be granted.

3. On April 30, 1981 the Commission released *Memorandum Opinion and Order* (FCC 81-208) adding the following issue:

> To determine whether, in light of the Commission's findings and conclusions in *United Broadcasting of Florida, Inc.*, 55 FCC 2d 832 (1975), *recon. denied*, 60 FCC 2d 816 (1976) and *United Television Co.*, 55 FCC 2d 416 (1975), *recon. denied*, 59 FCC 2d 663 (1975), *aff'd sub nom. United Broadcasting Co.* v. *FCC*, 565 F.2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978), United Broadcasting Company has the basic and/or comparative qualifications to be the licensee of Station WOOK(FM).

The burden of proceeding with the introduction of evidence and the burden of proof with respect to this issue were placed upon United.

4. The following issue was added in *Memorandum Opinion and Order* (FCC 81M-746) released March 13, 1981:

> To determine whether Hispanic Broadcasting Corporation failed to report in its application any conviction of Fernando Casillas of a crime, and if so, the effect of such failure on Hispanic's comparative qualifications to be a Commission licensee.

5. In *Order* (FCC 81M-776) released March 17, 1981, it was directed that Hispanic "may adduce, under the general comparative issue, evidence respecting a need for its proposed format."[2]

6. *Memorandum Opinion and Order* (FCC 81M-1614) released May 26, 1981 added the following issue:

> To determine with respect to United Broadcasting Company, Inc. the effect of the misconduct found in the Commission's Notice of Apparent Liability of November 30, 1978, FCC 78-838, on United Broadcasting Company, Inc.'s absolute and/or comparative qualifications to be a Commission licensee.

7. *Memorandum Opinion and Order* (FCC 81M-3103) released September 30, 1981 directed that:

> Evidence may be adduced under the issues heretofore designated with respect to:
>
> (1) the death of Richard Eaton;
>
> (2) the person or persons to whom Richard Eaton's stock in United will be transferred under the terms of his will or the laws of intestate succession as may be applicable; and

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[2] Spanish language.

(3) the pertinent background of each such transferee.

8. Conferences and evidentiary hearing sessions were held on various dates during the period November 18, 1980 through September 9, 1981. Proposed findings were filed January 11, 1982 and reply findings were filed January 27, 1982. The record was closed on March 4, 1982 (FCC 82M-0721).[3]

Findings of Fact

United and WOOK(FM)

9. The station now bearing the call sign WOOK(FM) was licensed to United on February 5, 1951 to operate on 95.9 MHz. In April of 1952 a license was issued authorizing the operation of the station on 100.3 MHz (United Ex. 67, p. 1). Prior to December of 1976, the station was identified as WFAN(FM); at that time the call sign was changed to WOOK(FM). WOOK was a call sign formerly used by another United AM station (District Ex. 11, p. 1).

10. Richard Eaton was the founder of United and, until his death on June 1, 1981, was its sole stockholder, president, treasurer, and chief executive officer; he was one of its directors (United Ex. 79, p. 1). The other directors, prior to Richard Eaton's death, were: Daniel Richard Eaton and Pierre Daniel Eaton, sons of Richard Eaton (United Exs. 2 and 4, p. 1); Elsa Eaton, widow of Richard Eaton (United Ex. 3); Gerald Joseph Hroblak (United Ex. 7); and Joseph George Schweighardt, Jr. (United Ex. 9). The officers other than Richard Eaton were Elsa Eaton, vice president (United Ex. 3); Clifton D. Holland, vice president (United Ex. 6); Gerald Joseph Hroblak, vice president, secretary, and controller (United Ex. 7); E. Carlton Myers, Jr., vice president (United Ex. 8); and Martha Stewart Byers, assistant secretary (United Ex. 1).

11. The general manager of WOOK(FM), at Richard Eaton's death, was E. Carlton Myers. He testified that he had served in that capacity since 1964 (United Ex. 8) but it appears that this was either a part-time or intermittent position (District Exs. 6, 8, and 9 which are United renewal applications). Gerald Hroblak apparently has no WOOK(FM) title, but acts in a management capacity in negotiating network contacts, accounting, and programming (United Ex. 7, p. 2). Clifton D. Holland, since December 1976, has been public affairs director (United Ex. 6; Tr. 694–701). Martha Stewart Byers does the WOOK(FM) routine bookkeeping as well as bookkeeping for all other United stations (United Ex. 1).

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[3] Pages of the record will be cited as "Tr. ___ "; United's exhibits will be cited as "United Ex. ___ , p. ___ "; District's exhibits will be cited as "District Ex. ___ , p. ___ "; Hispanic's exhibits will be cited as "Hispanic Ex. ___ , p. ___ "; exhibits introduced jointly by all three applicants will be cited as "Joint Ex. ___ , p. ___ "; exhibits introduced jointly by United and District will be cited as "United/District Joint Ex. ___ , p. ___ ."

12. Richard Eaton's will was admitted to probate on June 8, 1981; on that date Suburban Trust Company and Dennison L. Mitchell were issued letters of administration (United Ex. 92, Attachments A and B). The will provides that the 311 outstanding shares of United stock are to be divided as follows: Gerald Hroblak—9 shares; William Parris—3 shares; Joseph Schweighardt—3 shares; Samuel Phillips, Jr.—3 shares (these shares are not to be distributed if the particular legatee is not a United employee at Richard Eaton's death and for five years thereafter); Suburban Trust Company and Dennison L. Mitchell as trustees—that part of the remaining 293 shares not redeemed by United for the purpose of paying taxes, funeral expenses, and administrative expenses (United Ex. 92, Attachments A and B).

13. The trust created by the will (which includes the residuary shares of United stock and other property) names 21 beneficiaries including Richard Eaton's wife, his former wife, sons Pierre and Daniel, eight daughters, eight grandchildren, and Gerald Hroblak. The trustees are authorized to pay from the income or principal of the trust such amounts as they deem appropriate to the beneficiaries. After the death of the former wife and the passage of ten years from the date of Richard Eaton's death, the trust is to be distributed to the remaining beneficiaries when each attains a stated age. The will gives the personal representatives and the trustees the power to sell United stock and to carry on the business of United. It recommends that Gerald Hroblak be the chief operating officer of United and other corporations (United Ex. 92, Attachment A).

14. STC is a publicly held Maryland bank with a trust department having experience in acting as personal representative and trustee and as such in the management of small businesses (United Ex. 92, pp. 7–9). Dennison Lewis Mitchell is a CPA and lawyer. Mitchell and his firm have represented Richard Eaton and United since 1950 (United Ex. 90).

15. On July 3, 1981, Gerald Hroblak was elected president, treasurer, and chairman of the board of United; Gary L. Gross was elected vice president; William Parris was elected vice president and secretary; Parris was also made a director.

Programming of WFAN(FM) and WOOK(FM)

16. Prior to December 24, 1976, the station broadcast in the Spanish language (District Ex. 11). The various renewal applications provide information as to programming during the periods covered by those applications. In the 1969 renewal application (District Ex. 6), the station's composite week (1966–1969) showed 21 minutes of public affairs programming, representing 0.3% of the total week.

The 1972 application (District Ex. 8) reflects public affairs programming for the 1969–1972 period as 30 minutes or 0.046%.[4] While little, if any of the 1966–1969 public affairs programming involved local affairs, the 1972 application shows that 25 minutes of the composite week 1969–1972 involved local affairs (District Ex. 8, p. 34). The 1975 application (District Ex. 9) indicates 1 hour, 30 minutes of public affairs programming (1%) during the composite week none of which was locally created.[5] The 1978 application (United Ex. 66) shows for the (1975–1978) composite week, 97 minutes of public affairs programming (1.08%) of which 57 minutes were locally produced. During this period (December 1976), the station switched from a Spanish to a Black format and the programs which were locally produced for a Spanish audience were dropped. An amended programming proposal was filed in January 1977 showing an intent to broadcast 194 minutes (2%) of public affairs programming (Ex. 16 to United Ex. 66) which was to include 2 hours, 30 minutes of local public affairs programming (Ex. 22 to United Ex. 66).

17. The 1969 application shows that for the composite week 8 hours and 49 minutes (8.2%) were devoted to news; in the 1972 application 8 hours and 15 minutes (7.48%) were so devoted; and in the 1975 application 19 hours, 38 minutes (16.0%) were shown. The 1969 application reveals that the station then utilized a Spanish-language wire service which provided news of particular interest to Spanish-speaking persons and that the news presented was about all national and inter-national news although the announcers acted as local news staff and the station broadcast some local news gathered by a sister station. The 1972 application continued a similar pattern relating to news except that there was instituted a new two-hour program beginning at 6 a.m. on Monday through Friday which included some local news (District Ex. 9, pp. 43–45). The expanded news programming reflected in the composite in the 1975 application showed 5-minute hourly broadcasts of news and that 95% of the news broadcast related to national and international events relating to Latin American countries.

18. Ivan Quinonas testified that he was employed by the station from the 1960s until the format change (Tr. 1732, 1765). He was advised by Richard Eaton that there was no money to provide more local news coverage (Tr. 1740, 1744, 1755). The station lost money in 1970, 1971, 1972, and 1975 with the losses ranging from $5,495 to $21,264. The years 1973, 1974, and 1976 were profitable with the annual net income running from $11,914 to $15,823 (United Exs. 77 and 87).

19. Copies of the logs for the periods covered by the 1969, 1972,

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[4] An apparent error; probably should be 0.46%

[5] There is a discrepancy between pages 11 and 43 of the application with respect to whether the total is 1 hour and 13 minutes or 1 hour and 30 minutes.

and 1975 applications were not included in the exhibits (District Exs. 6, 8, and 9) so that it is difficult to tell much about the balance of the station's programming during those years. It does appear that the composite week covered in the 1969 application included 5 hours, 53 minutes (5.4%) for "all other programs, exclusive of entertainment and sports." It is also possible to ascertain that the station had some religious programming both locally produced and otherwise, a children's program in Spanish, a poetry program of both local and nonlocal origin, a program titled *Philosophy for Living*, and a locally produced sports show emphasizing Latin American sports.

20. In the 1972 application, the composite week included 9 hours, 10 minutes of "other" programming (8.49%) with components similar to those mentioned in the previous paragraph. In the 1975 application "other" programming was 5 hours, 45 minutes (5%). The components remained similar. The "other" programming reported in the 1978 application was 5 hours, 15 minutes (3.5%) (Ex. 16 to United Ex. 66).

The December 1976 Format Change

21. On December 24, 1976 the format of WFAN(FM) was changed from Spanish language to Black-oriented, the number of weekly broadcast hours was increased from 123 to 162, and the call sign became WOOK(FM). At the same time, the format of sister station WOOK(AM) was changed from Black-oriented to Spanish language programming and WOOK(AM) became WFAN(AM) (District Ex. 11, p. 1).

22. E. Carlton Myers testified that he suggested the format change to Richard Eaton in early 1975 because he felt that FM radio was emerging as a dominant medium over AM and Black listeners were moving to the suburbs where the nighttime signal of United's AM station was inadequate (Tr. 639–644). Myers believed that the Washington, D.C., Spanish-speaking population was mostly located in the Adams-Morgan area of Washington, which could be served by the AM signal. A series of meetings on the proposal were held with Myers, Richard Eaton, and other United people (Tr. 666–667, 644–647). The decision to change formats was made by Richard Eaton (Tr. 648, 1759). Myers and Hroblak denied that concern about possible adverse FCC action with respect to WOOK(AM) and WFAN(AM) motivated the changes (Tr. 644–650, 873–876).

READEX FICHE best copy available

WOOK(FM) News Programming - December 24, 1976—August 31, 1978[6]

23. At sometime during this period the station created a news staff of three full-time persons and one news director[7] (United Ex. 63, p. 73). One of the news staff was in the field daily and covered local events. The station had a newsroom with appropriate equipment, once had an affiliation with National Black Network and later with Sheridan Broadcast Network, and used Associated Press wire service (United Ex. 63, p. 74).

24. The regularly scheduled news broadcasts for the period from January 1, 1977 through August 31, 1978 were the following. From January 1 until February 22, 1978 there were 3-minute newscasts broadcast Monday through Saturday 26 times per day from 1:20 a.m. to 5:50 p.m. In addition, from February 7 through February 22, 1978 newscasts were broadcast from 6:00 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. Monday through Saturday. From February 23, 1978 until August 31, 1978 3-minute newscasts were broadcast Monday through Saturday 22 times per day beginning at 1:20 a.m. and ending at 5:50 p.m. In addition, from February 23, 1978 until July 16, 1978 newscasts were broadcast from 5:50 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. Monday through Saturday; and from July 17, 1978 until August 31, 1978 newscasts were broadcast from 5:45 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. Monday through Friday, and from 5:50 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. on Saturdays. The only regularly scheduled news program for Sunday, *Information Digest* was broadcast from 10:00 a.m. to 11:30 a.m. from February 6, 1977 to January 1, 1978; from 2:00 a.m. to 3:30 a.m. and from 10:00 a.m. to 11:30 a.m. from January 8 to July 31, 1978; and from 2:00 a.m. to 3:30 a.m. and from 6:00 a.m. to 7:30 a.m. from August 6 to August 31, 1978 (United Ex. 63, pp. 76–77).

25. Information Digest is roughly one-third locally produced by the station; the balance is Associated Press or Sheridan Broadcast Network in origin (United Ex. 63, p. 94).

26. The station also carried specially prepared news broadcasts concerning special events. In the period January 1, 1977—August 31, 1978 those broadcasts included election day coverage for the Washington area, a special report on the Supreme Court's *Bakke* decision, extended coverage of a long and newsworthy murder trial in Prince George's County, Maryland, Black History Month events, and nine over events of local interest (United Ex. 63, pp. 82–93).

27. The station, beginning in 1977, has broadcast *Commentline* on Monday through Saturday at 6:00 a.m. and 8:45 a.m. This is a

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[6] The first date marks the format change; the second, the filing of the first competing application.

[7] The exhibit is not specific as to when the staff became as here described.

five-minute program during which listeners are asked to call in and comment on matters such as young runaways, drugs in the armed forces, treatment of patients in hospitals, mixed sexes in high school athletics, the electoral college, child molesters, etc. (United Ex. 63, pp. 109–204). A 3 $^1/_2$-minute report is given by the District Mayor's office at about 6:25 a.m. on each Tuesday (United Ex. 63, p. 205). A physical exercise program is conducted for 1 minute at 5:55 a.m. and for 2 minutes at 6:43 a.m. The frequency of the program is not stated (United Ex. 63, p. 205). A 1 $^1/_2$-minute report on job opportunities given by the D.C. Department of Employment Sources is broadcast daily with the news at 6:35 a.m. and 8:47 a.m. (United Ex. 63, pp. 205–206). From sometime in 1976 through the summer of 1980 a daily 1-minute program on how to save in the home was broadcast at about 5:45 a.m. by the District of Columbia Consumer Affairs Department (United Ex. 63, p. 206).

Relative Position of WOOK(FM) Nonentertainment Programming Among Washington, D.C. Area Radio Stations[8]

28. *Arbitron Radio Audience Estimates in the Arbitron Market of Washington, D.C.*, October/November 1980, defines the Washington, D.C. "Metro Survey Area" as Washington, D.C., Montgomery, Prince George's, and Charles Counties in Maryland, and Fairfax, Loudoun, Prince William, and Arlington Counties in Virginia. A total of 40 commercial AM and FM stations are licensed to communities within the Washington, D.C. Metro Survey Area (*id.*, p. 4). The programming analyses contained in the 1978 renewal applications of the Metro Survey Area stations for which records were available revealed that of 35 stations WOOK(FM) ranked sixth among Washington, D.C. stations and eighth overall with respect to total amount of news actually broadcast during the composite week analyzed. WOOK(FM) ranked fifth among Washington, D.C. stations, and tenth overall, with respect to the percentage of time dedicated to news programming during that composite week. Two of the four Washington, D.C. stations exceeding WOOK(FM)'s performance had formats featuring predominantly nonentertainment programming (*id.*, pp. 7–8).

29. Of 35 stations for which records were available, WOOK(FM) ranked seventh among Washington, D.C. stations and sixteenth overall with respect to the percentage of time dedicated to all nonentertainment programming during the composite week analyzed. Of the six Washington, D.C. stations whose performance exceeded WOOK(FM)'s three had specialized formats featuring predominantly nonentertainment programming. WOOK(FM) ranked ninth among Washington, D.C. stations and fifteenth overall

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[8] Information set forth in this section is taken from United Ex. 76. Unless otherwise indicated, page references in parentheses refer to that exhibit.

with respect to the total amount of all nonentertainment programming actually broadcast during the composite week analyzed for 1978 renewal applications. Of the eight Washington, D.C. stations whose performance exceeded WOOK(FM)'s, three had specialized formats featuring predominantly nonentertainment programming (*id.*, pp. 9–10).

30. United prepared a program audit for the month of April 1978 because the composite week designated for the 1978 renewal application included dates both before and after the December 1976 WOOK(FM) format switch. The audit revealed that the percentages of all of the station's broadcast time during the month of April 1978 devoted to nonentertainment programming were as follows:

News	10.7%
Public Affairs	2.4%
Other	3.1%
Total	16.2%

31. In comparison to the percentages of such programming performed in the 1978 composite week by the 35 Washington, D.C. area stations for which records were available, WOOK(FM)'s April 1978 figures exceeded all but three other Washington, D.C. stations and three suburban stations with respect to news programming. Two of the three Washington, D.C. stations had nonentertainment formats. Similarly, WOOK(FM)'s April 1978 performance exceeded all but six Washington, D.C. stations and five suburban stations with respect to overall nonentertainment programming. Five of the stations which exceeded WOOK(FM) in this regard had formats featuring predominantly nonentertainment programming (Ex. 22 to United Ex. 66).

WOOK(FM) Community Involvement[9]

32. The following is a listing of WOOK(FM) community-related activities:

(a) From 1971 until 1979 a free class for training in radio broadcasting was held every Saturday. Two members of the current WOOK(FM) news department received their start from those classes (*id.*, p. 1).

(b) In 1977 the station assisted the Salvation Army in its Christmas-time drive to collect toys for needy children by providing announcements and other assistance in the project (*id.*).

(c) In 1977 the station co-sponsored the city-wide Community Mardi Gras Day in cooperation with the 14th Street Project Area Committee, Inc. The committee is appointed by the mayor to oversee projects undertaken to rebuild and revitalize the 14th Street corridor. WOOK(FM) assisted in recruiting help, donating awards, and planning stages of the event (*id.*, pp. 1–2).

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[9] Information set forth in this section is taken from United Ex. 64. Unless otherwise indicated, page references in parentheses refer to that exhibit.

(d) In 1977 station WOOK(FM), in cooperation with several D.C. schools, conducted a high school attendance contest. The class achieving the best record won prizes provided by the station (*id.*, p. 2).

(e) In 1977 members of the sales and on-air staffs of the station spoke with several classes at Woodson High School on topics ranging from radio station formats to the importance of voice tone quality, and to radio advertising (*id.*, p. 2).

(f) WOOK(FM) donated 70 fight tickets to the Metropolitan Police Boys' and Girls' Clubs (*id.*, p. 3).

(g) At Christmas-time 1977, the station assisted the Temporaries Food for Christmas Collection effort through the broadcast of promotional information. The drive benefits local individuals who suffer personal disasters (*id.*, pp. 4–5).

(h) The station co-sponsored, promoted, and provided entertainment in connection with a Teen Benefit Disco co-sponsored by the D.C. Branch of the YWCA in June 1978 (*id.*, p. 7).

Community Witnesses

33. United offered the testimony of a number of community witnesses relative to WOOK(FM)'s community service. H.R. Crawford, a member of the District of Columbia City Council representing Ward 7, testified that WOOK(FM) "is one of the few remaining stations" catering to a group including some of his constituents (Tr. 1520). Charles Allison, a retired army officer now employed by the Federal Government said he was a "long-time listener" to the station and enjoyed *Commentline*. He also stated that WOOK(FM) offered good community service because it presents "the Black perspective without omitting general and important news stories" (*id.*). Warren Bartley, a counselor in a juvenile detention center, testified that the station provides useful information to the community and is aware of community needs. He singled out coverage of the juvenile justice system and the Oakhill Juvenile Detention Center, where Bartley is employed (United Ex. 44). Wallacetine Talafaro-Curtis, a program coordinator for a local alcoholism program, described the positive response she encountered with respect to her appearances in WOOK(FM) nonentertainment programming and praised the station's news service. She uses the employment information feature (United Ex. 46). Dr. Joan Hillsman, an educator in the D.C. public school system, testified that the station reaches a large number of the city's youth and provides them with a positive sense of cultural identity. She stated that she has incorporated the station's programming into her lessons (United Ex. 50). Jerome Jones, a director and former executive director of RAP, Inc., a community-based drug treatment and counseling organization, testified that WOOK(FM) has provided support for his organization's work in a number of respects and is above relative to the nature and extent of the cooperation it offers to RAP, Inc. (United Ex. 52). Joy Jones, an information and outreach specialist for Wider Opportunities for Women, testified about the greater degree of cooperation extended to

her by WOOK(FM) and the greater level of response she encounters to WOOK(FM) programming, in comparison to other stations with which she has worked, including WHUR, WOL, WMAL, WKYS, and WPGC (United Ex. 53; Tr. 769). Jasper Lawhon, a retired federal employee, testified that WOOK(FM) appeals to a broad spectrum of Blacks and is sensitive to issues that concern Blacks. It is an effective source of news and information that listeners otherwise would not get (United Ex. 56). Curtis J. Massey, an associate director for Youth Services and Advocacy at the Southeast Neighborhood House, Incorporated, testified that he is a long-time listener and a representative of an organization which has benefited from WOOK(FM)'s assistance. He said it provides excellent service to the Washington, D.C. community through its programming and its cooperation in community activities (United Ex. 57). Vickie Satern, president of an employment agency, testified that in assisting her efforts to publicize a CETA funded job program, WOOK(FM) demonstrated dedication to community service well beyond that of other stations in the area. She also ascribed much of the success of her program to WOOK(FM) (United Ex. 58). Reverend Annie Woodridge, the founder of a local community center, testified that WOOK(FM) has done an outstanding job and has brought happiness to people (United Ex. 61).

Efforts by United to Provide Spanish-Language Programming to the Washington, D.C. Area[10]

34. On April 22, 1978 when WFAN(AM) [formerly WOOK(AM)] went off the air it was providing a full-time Spanish-language radio service. Richard Eaton was experienced in Spanish-language programming, having operated WFAN(FM) as a Spanish-language station from the late 1950s through 1976. He also operated Spanish-language stations in New York, New York, San Gabriel, California, and Miami, Florida (United Ex. 77). United searched for but found no licensee willing to supply substantial blocks of programming time, including primetime or drive-time for Spanish-language programming. Station WEAM(AM), Arlington, Virginia, did contract with United for the broadcast over WEAM's facilities of Spanish-language programming from 11:00 p.m. - 6:00 a.m. Monday through Saturday.[11] United supplied and paid for the announcer and sales staff for the Spanish programming, participated in programming, and divided equally all sales revenues in excess of certain stated costs with WEAM. The arrangement, a money loser for United, was terminated by WEAM.

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[10] Information set forth in this section is taken from United Ex. 78 unless otherwise noted.

[11] Josephine Ades, a Hispanic witness, testified that a group with which she was working in 1978 was successful in having the WEAM all-night show broadcast in Spanish (Tr. 2250).

35. Following the termination of the arrangement with station WEAM, United principals were unable to find blocks of time available for Spanish-language programming. United also held unfruitful discussions with a local Hispanic group which approached Eaton for financial help in purchasing a station (United Ex. 77, pp. 1–3; Tr. 3243).

36. On May 29, 1979 United entered into an agreement with Combined Community Communications, Inc. (Combined) under the terms of which Combined utilizes the subcarrier FM multiplex facilities of station WOOK(FM) to transmit programs and related services to the Spanish community. The service is to be provided between 6:00 a.m. and midnight. According to its president, Combined provides programming 7 days per week, with a total of 91 hours weekly. The programming, which consists of national and international news, public service announcements, religious material, sports and entertainment, is entirely in Spanish. United negotiated over a period of approximately one year with Pacifica Foundation about funding Spanish-language programming over noncommercial educational station WPFW(FM), Washington, D. C. Nothing resulted as the station was unable to provide the amount of programming which Eaton felt would be necessary.

Testimony of Hispanic Principals Relative to WFAN(FM) Service

37. Angel Roubin testified that he was "a regular listener to the Spanish-language programming of radio station WFAN for many years" and that virtually all Hispanics in the area "relied on WFAN for entertainment, information of local interest to the Hispanic community, and for international news from Hispanic countries" (Hispanic Ex. 3, pp. 2–4). Lourdes Raquel Miranda testified that she had long been a regular listener to the Spanish-language broadcasts of WFAN(FM) and WFAN(AM) and that their loss was tragic (Hispanic Ex. 4, pp. 9–10). Michael A. Erice testified that he had for many years been a regular listener to the Spanish-language programming of radio station WFAN, that he prepared and delivered a weekly 15-minute news program on the station during 1967–1968, that he utilized WFAN(FM) in the promotion of a movie theater in which he had an interest between 1962–1970 (Hispanic Ex. 5, pp. 3–6). Raquel Marquez Frankel testified that she believed the loss of the Spanish-language programming was a "tragic blow to Washington area Hispanics" (Hispanic Ex. 7, pp. 5–6). Adelina Pena Callahan testified to the same effect (Hispanic Ex. 8, p. 3).

Notice of Apparent Liability

38. On November 30, 1978 the Commission issued a Notice of Apparent Liability to United in connection with two contests, one of which, the *Black Book Contest*, was broadcast on WOOK(FM) during the period December 19, 1977 through January 29, 1978; the other,

Thousand Dollar Dial Contest, was broadcast on WOOK(FM) during the period January 20, 1978 through February 9, 1978. A forfeiture in the amount of $6,000 was assessed for three violations of the Commission's contest policies (District Ex. 20). United paid the fine with a check on the back of which was printed "Payment subject to terms & conditions set forth in letter to Federal Communications Commission of 1/19/79 which is being submitted with this check" (United Ex. 91, Attachment G). The referenced letter, from counsel for United, set forth United's position that the matters considered by the Commission in assessing the forfeiture were not violations and that: "Payment of the $6,000 fine as assessed should not be construed as either an admission by the licensee of the validity of the Commission's action or of the amount of the assessment." It also stated: "United Broadcasting recognizes that it has various avenues of appeal and challenge open to it. However, it is felt that payment of the fine, without admission of culpability, in the long run will save both the licensee and the Commission extensive amounts of time and money" (United Ex. 91, Attachment F).

Black Book Contest

39. The *Black Book Contest* instructed listeners to provide the station with their names and telephone numbers and those of three friends. Station personnel were to telephone names from those provided and, if the person called was then listening to WOOK(FM), the listener and the individual who had provided the listener's name would win a prize. The prizes to be awarded were not described.[12] The announcements indicated that winners would qualify to win in any WOOK(FM) contest conducted in 1978, when, according to the broadcast announcements relative to *Thousand Dollar Dial Contest*, that information was false (District Ex. 20).

40. The *Black Book Contest* was designed by William Parris, a United employee then serving as a programming consultant for WOOK(FM) (Tr. 3593–3594, 3609). He had experience in the design of broadcast contests (United Ex. 28; Tr. 3583). In the fall of 1977, he submitted a description of *Black Book Contest* to counsel for United who reviewed it primarily to determine whether any lottery was involved (Tr. 3634–3636; United Ex. 91, p. 1).

Thousand Dollar Dial Contest

41. The announcements broadcast for the *Thousand Dollar Dial Contest* stated that the station would telephone persons and if the person called was then listening he/she would win $1,000. One announcement repeatedly stated that calls would be placed to listeners in the Washington area, while United, in a letter to the

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[12] WOOK(FM) said that winners were told what the prize was when they were called.

FCC, said that contestants were chosen from District of Columbia and Maryland telephone directories. Thus listeners in the Virginia suburbs of Washington could not participate.

42. *Thousand Dollar Dial Contest* was designed by United employee Parris (Tr. 3608–3609). He testified that it was his idea to use the Washington Metro Telephone Directory, although he does not know why WOOK(FM) staff used anything but the single directory captioned "Washington Metro Telephone Directory" (Tr. 3622–3623). United's Exhibit 93 contains copies of the covers of Washington, D. C. telephone directories from May 1976, May 1977, May 1978, and May 1979; each bears the legend "Washington Metropolitan Area." Whether the books contain Virginia numbers does not appear. United witness Parris testified that books with that legend contained Virginia numbers in the early 1970s (Tr. 3625).

The WOOK(AM) and WFAB(AM) Renewal Proceedings

43. The issue requires inquiry into the effect of the findings and conclusions by the Commission in two cases involving the failure to renew two United related licenses. That order also imposes the rule of collateral estoppel which bars the relitigation of "the questions surrounding (United's) operation of" WOOK(AM) and WFAB(AM). In that circumstance it is unnecessary to set out here much of what the Commission said in those cases. In order, however, to put in perspective mitigation efforts by United, the delinquencies found to exist by the Commission in United's operations of those stations will be briefly stated.

44. In the WFAB case[13] the Commission concluded that during the period January 1971-May 1972:

> . . . a violation of Section 73.1205 of our Rules had occurred because the licensee had failed to exercise reasonable diligence to see that its employees did not issue documents containing false information or misreprenting the nature or content of advertising broadcast on the station. We determined that the billing practices of WFAB's local management directly facilitated a fraudulent scheme perpetrated by a local retail appliance dealer, and that these practices of the local WFAB management were the direct result of the licensee's abandonment of control and supervision with respect to station billing practices.

The WFAB license was not renewed.

45. In the WOOK(AM) case,[14] the renewal application was denied because United was found unqualified. That conclusion was based on findings: (a) that various ministers used WOOK to broadcast offers of scripture citations which were really numbers game tips in return for donations; (b) that ministers used WOOK to broadcast offers of "roots," "baths," etc. with promises of financial

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[13] *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832; reconsideration denied 60 FCC 2d 816.

[14] *United Television Co., Inc.*, 55 FCC 2d 416.

blessings and solutions to personal problems which were false and misleading and that United failed to take reasonable measures to prevent such use of its facilities; (c) that in spite of having notice from the Federal Trade Commission that it was investigating the veracity of the advertisements of Empeco, a WOOK advertiser, United failed to conduct any inquiry respecting the ads; (d) that "advertising carried for Richard Eaton's book . . . did not conform to guidelines established by the Federal Trade Commission for determining the regular selling price for items offered at discount"; (e) that United repeatedly violated Commission technical rules for which a $7,500 forfeiture was assessed. Even so "in reliance on representations that its future operations would be in compliance with the technical rules, United's license was renewed, [citation omitted]. Notwithstanding the forfeiture and its representations, the violations continued. A subsequent inspection on September 3, 1969, disclosed 19 violations of the Commission's rules [fn. omitted]." The Commission further found: "that United's past representations were of no value, that no reliance can be placed on its present promises of future compliance, and that there are no mitigating factors."

Evidence Offered by United in Mitigation

46. In the mid-1970s Richard Eaton began delegating some of his authority to a number of persons. Gerald Hroblak, assistant controller of United until 1972, became controller in 1972, a director in 1974, and secretary in 1976. William Parris, who was in charge of United's Baltimore stations, was made national program director in 1978. In October 1977, Gary Gross was hired as director of operations to develop and implement policies and procedures for United stations relative to compliance with Commission rules and policies. Gross makes regular visits to all of United stations and maintains contact with station personnel. United retained Arent, Fox, Kintner, Plotkin and Kahn (Arent Fox) as its communications counsel in December 1976. They consulted with United's headquarters personnel; station personnel were encouraged to confer with them if questions arose about which an attorney's advice might be helpful. In 1977 or early 1978, United's consulting engineers began to make unannounced periodic technical inspections of its various stations.

47. In 1973 United established a central billing procedure whereby the bills to advertisers on all United stations were issued by a headquarters office. The bills were based on station logs which showed advertisements actually run (United Ex. 79, pp. 7–10). In the late-1970s United began an educational program respecting the elements of a lottery directed to its various station employees. This was conducted by attorneys retained by United and by the United employee Gross. In addition Gross has provided written and oral direction to the local stations (*id.*, p. 10). In 1978 Gross and Arent Fox began developing and implementing procedures relative to

contests. The procedures were issued in writing in August 1978 and require that a station which wants to run a contest submit detailed information thereon to Gross or to counsel. If the contest proposal survives review it is required to be run without script changes. Employees may be, and have been reprimanded or temporarily suspended for failure to comply with these policies (*id.*, pp. 11–14). Gross and counsel are also available to local station personnel to answer inquiries respecting advertising (*id.*, pp. 15–16). Though it is not clear when the policy was adopted, United prohibits the receipt by an employee of anything of value in connection with the broadcast of any matter. Employees are required to sign an affidavit each quarter that they have complied with the policy. Visits to stations by record promoters are carefully controlled and logged. Gifts of records in excess of those needed for broadcast are not accepted (*id.*, pp. 16–17). United management persons holding first-class radio-telephone licenses check the stations for technical compliance and offer instruction (*id.*, pp. 17–18).

District Broadcasting Company

48. District is a corporation organized for the purpose of seeking the FM license here considered. It has authorized issuing 20,000 shares of stock to the following individuals, all of whom are Black; they hold the specified corporate offices and directorships:

> R. Kenneth Mundy, president, director 25% subscriber; Ridgely C. Bennett, vice president, director, 25% subscriber; Herman F. Stamps, secretary, director, 25% subscriber; Francis L. Smith, treasurer, director, 25% subscriber.

49. District's application contains a provision for a standby generator to serve as a source of power during an emergency so as to maintain broadcast service (District Ex. 1, p. 1). Neither District nor any of its officers, directors or shareholders have any ownership interest in any medium of mass communication (District Ex. 2, p. 7; Ex. 3, p. 2; Ex. 4, p. 3; Ex. 5, p. 2).

Biographies and Proposals of District Shareholders

Herman F. Stamps

50. Dr. Stamps was born in Washington, D. C., on January 20, 1924. He has resided in the District all of his life except for the time he served in the Army and some time spent in school. He graduated from Howard University with a Bachelor of Science degree in 1945 and from the College of Dentistry in 1948. Except for the period 1956–1965, Dr. Stamps has taught dentistry at Howard. He has also held various administrative positions in the College of Dentistry and has been coordinator: facilities, systems and planning since 1970 (District Ex. 2, p. 1). Stamps is also self-employed as a practicing dentist in the District of Columbia (Tr. 973; District Ex. 2, p. 1).

51. Stamps has been active in District of Columbia civic affairs;

he has been committee chairman, Armstrong Neighborhood Federal Credit Union, 1960; committee chairman, officer and director, Washington Urban League, 1957–1966; director, "We Salute" Youth Enrichment Program, 1963–1970; committee chairman, Health and Welfare Council, 1967–1969. He was a candidate for Board of Education, Washington, D.C., in 1967 (District Ex. 2, pp. 4–5).

52. If District is successful in this proceeding, Stamps will become its full-time (40 hours) station managing director. He will devote no more than six hours each week to consultant services, will no longer maintain a private dental office, and will resign his current full-time position as coordinator: facilities, systems and planning at Howard University (District Ex. 2, pp. 1–5).

53. When the District application was filed it showed no staff position for Stamps (Tr. 981) nor did it propose any other District principal for involvement in the day-to-day management of the station (Tr. 1132–1133). The applicant's proposed positions did not include a managing director (Tr. 1257–1259). On March 14, 1979 District filed an amendment which indicated that Stamps would be full-time managing director (Tr. 1008–1010). Sometime after September 1, 1978 District counsel advised the group that Hispanic had filed its application and that it contained an integration proposal. District's counsel discussed with District principals the standards pursuant to which the Commission decides comparative renewal cases and explained the Commission's integration criterion (Tr. 1130–1133, 1230–1242). A decision that Stamps would be managing director was made at a meeting which District's counsel attended; he was "overjoyed" at the idea (Tr. 1089). The group knew that Stamps' involvement would be a plus for their application (Tr. 1247–1248). When the District amendment reflecting Stamps' role as managing director was filed the District group "had not gone into detail on the exact functions of the Managing Director and did not fully discuss the functions of Dr. Stamps until early 1981" (Tr. 1216, 1252).

54. District indicates Stamps' functions will be: "(1) to direct the formulation, interpretation, and communication of corporate policies and objectives; (2) to develop and maintain a sound plan of organization and provide for management development which will assure the continuing effective management of the company; (3) to direct [District's] long-range strategic planning and determine in conjunction with the Board of Directors the allocation of corporate resources in a manner which will provide maximum public service and optimum long-term return on investment for stockholders; (4) to be the Chief Executive Officer and Financial Officer of [District]; (5) to prepare and submit to the Board of Directors recommended budgets; (6) to act as [District's] principal spokesman and liaison with the community and groups the station will be serving; (7) to be responsible for directing continuing ascertainment of the needs and interests of the communities served by [District's] station; (8) to

approve and sign, subject to the approval of the Board of Directors, agreements with employee groups and labor unions; (9) to approve personnel policies" (District Ex. 2, p. 6; Tr. 1022–1023).

55. District's staff proposal includes a general manager. However, as the managing director, Stamps will take over a number of administrative duties which one might assume would otherwise have been handled by the general manager, e.g., personnel, physical plant, budgeting, and liaison with the board (Tr. 1033–1036, 1149–1150, 1162–1168, 1218, 1221, 1258–1259). Prior to the time Stamps was proposed as the managing director, it was the general manager who would have performed these functions (Tr. 1150–1151). The general manager will report to Stamps (Tr. 1036).

56. Since 1970 Stamps has been the coordinator: facilities, systems and planning for the Howard University College of Dentistry (District Ex. 2, p. 1). He testified that his responsibilities included assuring compliance with Occupational Safety and Health Administration (OSHA) regulations (Tr. 977–979). OSHA inspected the Howard University College of Dentistry between August 31, 1978 and September 7, 1978 (United Ex. 70). As a result of that inspection, OSHA alleged that the college had committed more than 60 OSHA violations (United Ex. 70; Tr. 1048). Stamps said that the OSHA allegations were not matters which fell under his specific control as his duties as coordinator were those of a clearinghouse (Tr. 1058–1059).

Ridgely C. Bennett

57. Dr. Bennett has resided in the District of Columbia since 1950. He graduated from Howard University Medical School in 1955 and has been licensed to practice medicine in the District of Columbia since 1956. Dr. Bennett is a member of four District hospital staffs. He holds a teaching appointment at Georgetown University Medical School and has taught at Uniformed Services University School of Medicine in Bethesda, Maryland (District Ex. 3, p. 1). Dr. Bennett is a medical officer for the Food and Drug Administration and maintains an active private practice with offices in the District. He belongs to professional societies and several alumni and civic groups. In the event that District's application is granted, Bennett will serve on District's program board. He will devote four hours each week in preparing for and participating in the meetings of the board (District Ex. 3, pp. 1–2).

R. Kenneth Mundy

58. Mr. Mundy received a Bachelor of Law Degree in 1957. He has been in private law practice in the District of Columbia since 1965. He was employed as an attorney for the Federal Communications Commission from 1957–1965 (District Ex. 4, p. 1).

59. Mr. Mundy has served as: member of various bar related

committees; member, American Civil Liberties Union; member, board of directors, Merriweather Home for Children; member, board of directors and of the executive committee, Citizens Communications Center; attend as delegate/member World Peace Through Law; and member of various professional groups (District Ex. 4, pp. 1–3). In the event that District's application is granted, Mundy will serve as a member of District's program board. He will devote four hours each week in preparing for and participating in meetings of the board (District Ex. 4, p. 3).

Francis L. Smith

60. Dr. Smith has been a life-long resident of the District of Columbia. He graduated from Howard University Medical School in 1950. Smith has been employed since 1975 as a medical officer and then as chief medical officer of the District of Columbia Department of Corrections and has had an active practice in the District of Columbia in orthopedic surgery since 1957. Smith was a founder of the Independence Federal Savings and Loan Association in Washington, D.C., and has served as a director of that association since 1968. He is a member of the Washington, D.C. Chapter of the NAACP, of the Urban League, and the YMCA. He is also a member of various professional societies. In the event that District's application is granted, Smith will serve as a member of District's program board. He will devote four hours each week in preparing for and participating in meetings of the board (District Ex. 5, pp. 1–3).

Hispanic Broadcasting Corporation

61. Hispanic is a corporation formed for the purpose of filing the application under consideration. It has authorized issuance of 300 shares of stock. The stock subscribers, officers, and directors of Hispanic, all of whom are Hispanic, are:

> Angel S. Roubin, chairman, director, 80% subscriber; Fernando Casillas, treasurer, director, 5% subscriber;[15] Michael A. Erice, secretary, director, 4% subscriber; L. Miranda King, president, director, 3% subscriber; Arturo Valle, vice president, director, 5% subscriber; Adelina Pena Callahan, assistant treasurer, director, 1.3% subscriber; and Raquel Marquez Frankel, assistant secretary, director, 1.7% subscriber.

62. If the Hispanic application is granted, the corporation

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[15] On January 15, 1981 Hispanic tendered an amendment to its application representing that Fernando Casillas had resigned as officer and director and was no longer a stockholder. For purposes of the comparative issue, Casillas is considered to retain the positions he held with the corporation as of May 2, 1979 (Tr. 1461–1464). In an amendment tendered on June 25, 1981, Hispanic represented that Arturo Valle had replaced Casillas as treasurer and that his stock interests had been acquired by L. Miranda King, Adelina Pena Callahan, and Raquel Marquez Frankel. These latter individuals now are subscribers to 15 shares (5%), 9 shares (3%), and 9 shares (3%), respectively.

intends to employ a general manager with experience in the operation of Spanish-language broadcasting stations and a staff of Spanish-speaking professionals to operate the station. The board of directors will establish policies. The president will have the primary responsibility for directing the staff on a day-to-day basis, and she will devote a minimum of one hour per day at this task. A programming committee consisting of Miranda, Roubin, Frankel, and Erice will review the programming of the station and implement changes and modifications to it. A financial committee composed of Miranda, Roubin, Erice, Callahan, and Valle will supervise the financial operation of the station (Hispanic Ex. 4, p. 13).

Angel Roubin

63. Angel Roubin was born on January 15, 1935 in Ponte Vedra, Spain. The first language he learned was Spanish. On August 20, 1951 he came to the United States and worked thereafter in construction. In 1962 he and a cousin formed a company which contracts stone construction work nationwide and does general construction in the Washington area (Hispanic Ex. 3, pp. 1–2). Roubin is a founder of the Hemisphere National Bank of Washington, D.C., and is a stockholder, a member of the executive committee, and vice chairman of its board of directors. He is also a member of the board of directors of the Greater Washington Ibero-American Chamber of Commerce of Washington, D.C. He has been president and a member of the board of the Hispanic American Contractors Association. He lives in McLean, Virginia, and has resided continuously in the Washington area since 1962 (Hispanic Ex. 3, p. 2). Roubin has no interest in any medium of mass communications (Hispanic Ex. 3, p. 4).

Lourdes Raquel Miranda (King)

64. Lourdes Raquel Miranda was born September 20, 1938 in Puerto Rico and is of Spanish descent. Spanish was the language she first learned. After graduation from high school in Puerto Rico, she entered the University of California at Los Angeles, where she received a Bachelor of Arts degree in 1959. She also has a Master of Arts degree in Spanish Language and Literature. She has lived in Washington, D.C. since 1966 except for parts of the period 1969–1971. Miranda was a founder, president, and director of the National Conference of Puerto Rican Women, an organization devoted to the equal rights of Puerto Rican women in the United States (Hispanic Ex. 4, p. 4). She organized and led the First Hispanic Community Conference, sponsored by the Montgomery County, Maryland, public schools and served as a consultant on Hispanic culture for Montgomery County and Prince George's Counties, Maryland, public schools. She was also chairperson of the Montgomery County Public Schools' Hispanic Task Force which advised the schools on programs related

to Spanish-speaking students. She has also been a frequent speaker and panelist on questions of interest to the Spanish community and on various social questions and has been a consultant on a variety of social problems. In 1975 Miranda founded an educational and social research consulting firm. She founded and is president of the Association for Cross Cultural Education and Social Studies, Inc. (ACCESS), a private educational, nonprofit organization which particularly focuses on the concerns of women, minorities, the aged, the handicapped, and the socially and economically disadvantaged (Hispanic Ex. 4, p. 7). Her civic activities include membership on the board of directors of a number of business, social, educational, and communications organizations.

Michael A. Erice

65. Erice was born on December 22, 1922 in Cuba, the son of Cuban nationals. The first language he learned was Spanish (Hispanic Ex. 5, p. 1). On January 15, 1948 he and his wife came to the United States as permanent residents. For much of the time since 1954 he has been employed in news related occupations. He has also had an ownership interest in and managed a theater in Washington, D.C., which showed Spanish, Mexican, Argentinean, Arabian, and Chinese films. Since 1971 Erice has been a health and life insurance underwriter (Hispanic Ex. 5, pp. 4-5). He has been a member of various journalistic related organizations and other Hispanic related and business related organizations. He now lives in Falls Church, Virginia, and has been a resident of the Washington area on a continuous basis since 1959 (Hispanic Ex. 5, p. 5). He will devote at least one hour of each day to the supervision of the proposed station's local sales efforts. He will be a member of the financial and programming committees of the board of directors of Hispanic and proposes to spend from three to five hours each month on the work of each of these two committees (Hispanic Ex. 5, pp. 6–7). Erice does not own or have any interest in or connection with any existing media of mass communications.

Arturo Valle

66. Arturo Valle was born in Guatemala on April 6, 1928. His parents were natives of Guatemala. The first language he learned was Spanish. In September 1947 Valle came to the United States. He became a U.S. citizen in 1953 (Hispanic Ex. 6, p. 1). Together with a partner he founded a travel agency in 1958 which existed until 1961, when he established his own travel agency which he now owns and operates. Valle resides in the Adams-Morgan section of Washington, D.C., and has resided in the Washington area continuously since 1951. He has been a member of a Washington, D.C. chapter of the Lions Club since 1961. In 1977 he was appointed to the Latino Community Development Commission by Mayor Walter Washing-

ton. In 1977 he became a founding member of the executive board of the Greater Washington Ibero-American Chamber of Commerce. From 1975 to 1977 he was a member of Inter-American Businessmen's Association of Washington, D.C. He is also a member of several professional organizations. If Hispanic's application is granted, Valle will become a member of the financial committee of the board of directors and devote a minimum of five hours per month to the work of this committee. He does not own or have any interest in or connection with any existing media of mass communications (Hispanic Ex. 6, p. 4).

Raquel Marquez Frankel

67. Raquel Marquez Frankel was born on May 14, 1923 in El Paso, Texas, the daughter of Mexican immigrants to the United States. She graduated from St. Joseph's College, Albuquerque, New Mexico, received a Master's degree in social work from Loyola University, and has done graduate work in group therapy and physco-drama at the Psychiatric Institute Foundation of Washington, D.C., at the University of Maryland, and at the Institute for Policy Studies (Hispanic Ex. 7, p. 1). In 1962 Frankel moved to Washington, D.C., where she became a probation officer for the juvenile court system. From 1964 to 1966 she was a consultant for the United States Department of State, Alliance for Progress (Hispanic Ex. 7, pp. 2-3). She is now the Washington representative for *Nuestra* magazine. She lives in the northwest section of Washington, D.C., and has resided in the Washington area continuously since 1961 (Hispanic Ex. 7, p. 4). She has engaged in numerous civic activities, many of which have been involved with the Hispanic community. Frankel will spend a minimum of five hours per month on the work of the programming committee of the board of directors for the proposed station. She does not own or have any interest in or connection with any existing media of mass communications. At the time of the hearing, Frankel's husband had an interest in a corporation which held a construction permit for an unbuilt television station in Delaware. However, that corporation has since informed the Commission that it does not desire to construct the station.

Adelina Pena Callahan

68. Adelina Pena Callahan was born on January 12, 1935 in Washington, D.C. She has lived all of her life in Washington and attended Maryland and Georgetown Universities where she studied history and languages. In 1962 she and her husband opened a restaurant in Washington which they sold in January 1981. In September 1976 they purchased a second restaurant which she now helps manage. She has agreed to serve on Hispanic's financial committee of the board of directors and will devote at least five hours

per month to the work of this committee. She does not own or have any interest in or connection with any existing media of mass communications (Hispanic Ex. 8, pp. 1-4).

The Reporting Issue Concerning Hispanic

69. The issue was added on the basis of an allegation by United that then Hispanic stockholder Fernando Casillas had been found guilty of the commission of a crime, but that paragraph 8(d) of Section II of Hispanic's application indicated that none of its principals had been found guilty by any court of any felony or other crime (Hispanic Ex. 11, p. 2).

70. In the early summer of 1978 Casillas and the other principals of Hispanic received from their counsel a questionaire which included the following question:

> 4. Have you or any firm you have been associated with ever been found guilty by any court or administrative body of (1) any felony, (2) any crime, not a felony, involving moral turpitude . . . (Hispanic Ex. 10, pp. 1-2).[18]

71. Casillas contacted his attorney, a Mr. Brennan who had represented him in a criminal investigation, and asked if a plea of guilty he had entered in that investigation should be reported in answer to the question (Hispanic Ex. 9, p. 3). Brennan informed Casillas that the court's acceptance of his plea of guilty did not amount to a conviction of either a felony or a lesser crime involving moral turpitude and Casillas could truthfully answer this question "no" (Hispanic Ex. 12, pp. 3–4).

72. During 1975 and 1976 the Office of the United States Attorney for the District of Columbia conducted an investigation into contracts for printing between various government agencies and several local printing businesses including Casillas Press principally owned by Fernando Casillas. Casillas cooperated with the government in its investigations (Hispanic Ex. 9, p. 2; Ex. 12, p. 1) and on Brennan's advice, pled guilty to a violation of 18 U.S.C. 209(a), which, defines as a crime the payment to a government employee of money in exchange for services. This is a misdemeanor. Casillas completed the questionnaire given him by Hispanic counsel and answered the question concerning criminal convictions "no" (Hispanic Ex. 9, pp. 3–4; Tr. 1666–1667, 1669, 1681, 1684–1685).

73. The Hispanic application contained the answer "no" to question 8(d) of Section II which asked if "the applicant or any party to this application [had] been found guilty by any court of (1) any felony or other crime . . . ." The application was signed by Hispanic principal Lourdes Miranda. At the time she placed her signature on the application, she believed that the answer to the question was

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[18] The language following the number (1) tracks Form 301 as it was several years ago.

true and was not then aware that Casillas had been charged with or convicted of any crime (Hispanic Ex. 10, p. 2). Until United filed its petition to enlarge issues in this proceeding neither counsel for the applicant nor any of its principals was aware of the Casillas conviction (Hispanic Ex. 10, p. 3; Tr. 1791, 1922, 1978, 2015, 2064; United Ex. 83, pp. 25, 41; District Ex. 21, p. 12; Hispanic Ex. 9, pp. 3–4).

74. Miranda testified that Hispanic relied upon counsel to prepare the application. She had never seen counsel's forms completed by the other principals. Counsel was responsible for distributing, collecting, and ensuring the accuracy of these forms. She did not read the application carefully prior to signing it. She did not compare the counsel's forms with the questions of Form 301 (Tr. 2432–2434, 2437–2438, 2461). Michael Erice testified that "in the final analysis," counsel was responsible for the accuracy of information provided (Tr. 2072–2073).

The Washington Area Hispanic Community and Its Needs and Problems

75. Washington, D.C., Montgomery and Prince George's Counties in Maryland, Arlington, Fairfax, and Prince William Counties in Virginia, and the cities of Alexandria, Fairfax, and Falls Church in Virginia contain 91,216 people of "Spanish origin" according to the 1980 U.S. Census (Hispanic Ex. 3, p. 3; Ex. 25, p. 4; Ex. 26, pp. 4–5, 7–8). Hispanic's proposal would provide primary service to all of these people except for 164 persons of Spanish origin residing in Prince William County, Virginia and to 2,000 or more Hispanics who live beyond these areas (Hispanic Ex. 31, p. 2).

76. The census indicates that the Hispanic population of the city of Washington grew from 2% of the population in 1970 (15,108) to 2.8% of the population (17,652) in 1980. Surveys of Hispanics in the Maryland counties taken shortly before the census indicates that there were between 26,000 and 29,000 Hispanics in Montgomery County versus the 22,790 indicated by the census and about 22,000 Hispanics in Prince George's County versus the 14,421 counted by the census (Hispanic Ex. 22, p. 5; Ex. 27, p. 5; Ex. 23, p. 2).

77. The 1980 Census demonstrates a growth in the Hispanic population of the Washington area which lost in total population over the past decade. In addition to growth in Washington and the Maryland suburbs, the Hispanic population in the Virginia portion of the Washington SMSA increased from 1.6% to 3.4% of the population, a growth greater than that of the total population.

78. the educational backgrounds of Washington area Hispanics vary from the illiterate recent immigrant to the well educated and their socio-economic positions are similarly varied (Hispanic Ex. 17, pp. 1–2). Of the 18,000 persons provided service by the Spanish Catholic Center during 1980, many are from Central American

countries and are political refugees. Many are functionally illiterate, even in Spanish. Without English they remain at the lowest economic level (Hispanic Ex. 16, pp. 2–3; Tr. 2618–2619, 2397). These immigrants tend to be young adults with large families. For every funeral provided by the Catholic Church, 50 baptisms are performed (Hispanic Ex. 28, pp. 2–3; Ex. 19, p. 3; Ex. 16, p. 2). Hispanics in the Washington area tend to move from the District of Columbia to the suburbs as their economic situation improves. Slightly more than 20% of the Hispanics in the two Maryland counties moved there from the District of Columbia (Tr. 2872, 3743–3744; Hispanic Ex. 22, p. 38; Ex. 23, p. 37).

79. The foremost common trait of the population is the use of the Spanish language which is the overwhelming language of choice in the home and socially. About 90% of Hispanics in the Maryland counties spoke Spanish in the home and more than 60% spoke no English at all in the home although all Hispanics surveyed spoke some English. An overwhelming majority of Hispanics desire bilingual education (Hispanic Ex. 16, pp. 1–2; Ex. 17, pp. 4, 7; Ex. 22, pp. 21, 29, 39; Ex. 23, pp. 7, 13, 19, 39, 61; Ex. 28, p. 3; Tr. 2403, 2406–2407, 2410).

80. Father O'Malley estimates that about 25% of Hispanics in the city have no knowledge of spoken or written English and that about 50% have no knowledge of written English. Ms. Gillespie of the D.C. Office of Latino Affairs has observed similar deficiencies among Hispanics in the Adams-Morgan area of the city. Dr. Zayas of the D.C. Schools stated that these estimates are true throughout the Washington area for the most recent Hispanic immigrants (Hispanic Ex. 28, p. 3; Ex. 16, p. 2; Tr. 2403). About half of Montgomery and Prince George's Hispanics have problems in the English language. Hispanics perceive that lack of English proficiency is their most serious problem. Maryland demographic studies demonstrated a high direct correlation between English language proficiency and average income (Hispanic Ex. 22, pp. 31, 60, 64; Ex. 23, pp. 22, 39, 60, 69, 72).

81. The average annual income for Hispanic households in Montgomery County in 1980 was $14,754 as against the 1976 median annual income for all Montgomery County households of $27,850 (Hispanic Ex. 22, pp. 57–58; Ex. 23, p. 50). At the time of the Maryland surveys, 12.1% of the Hispanics in Montgomery County were unemployed versus 5% of the general population. In Prince George's County, 16% of Hispanics were unemployed versus 4% of the general population (Hispanic Ex. 22, pp. 44–45; Ex. 23, pp. 47–48). The median educational attainment of adult Hispanics in the two counties is approximately ten years. In Washington the average educational level attained by adult Hispanics is eight years and fewer than one in four Hispanics has the equivalent of a high school education. However, 37% of Montgomery Hispanics and 25% of

Prince George's Hispanics have completed more than one year of college. About 80% of Montgomery Hispanics received the major part of their education in other countries, while the figure was almost 90% for Hispanics in Prince George's County (Hispanic Ex. 19, p. 2; Ex. 22, p. 41; Ex. 23, p. 43).

82. Many Hispanics are not aware of social services which exist and many are unaware of the availability of medical and dental programs (Hispanic Ex. 19, p. 3). The Maryland studies showed that over 75% of the Hispanics in Prince George's County were unaware of rent assistance programs. Over 70% of Hispanics believed that there was a need for much improved dissemination to Hispanics of information on county programs (Hispanic Ex. 23, p. 67).

The Existing Mass Media's Efforts to Serve the Hispanic Population

83. The English language media provides poor coverage of subjects about which Hispanics desire to have information. While events in Spain and Latin America receive attention, reports on these events are cast in terms of their effect on the interests of the United States. Other developments concerning the economic, political, social and cultural life of Hispanic countries are rarely covered (Hispanic Ex. 17, pp. 7–8; Ex. 13, p. 9). Hispanics do not follow the English language media to the extent the rest of the population does (Hispanic Ex. 13, pp. 2, 6; Ex. 15, p. 5).

84. There are a substantial number of Hispanics who are functionally illiterate in Spanish. The Spanish Catholic Center publishes a monthly or sometimes bi-monthly newspaper, *El Pregono*, which carries items of interest to the Hispanic community, but it has a very limited circulation. There is also a commercially produced monthly newspaper, *Latino*. A weekly Spanish language paper *Hispano* was published for a short period of time but failed because it carried very little local news and instead concentrated on national and international events of interest to Hispanics (Hispanic Ex. 16, p. 2; Ex. 28, p. 5; Tr. 2922–2923). Two or three Spanish language papers ceased publication over the past few years. The locally published Spanish language media lacked the resources to cover the entire community and since they were not published on a daily basis, they were unable to provide Hispanics with current information (Hispanic Ex. 13, p. 4; Tr. 2234, 2236, 2258).

The Spanish Language Programming of Existing Broadcast Stations

85. Several television stations within the Washington area broadcast occasional Spanish language programming:

(a) WRC-TV broadcasts a bilingual (English/Spanish) public affairs program each Saturday morning at 7:00 a.m. and a one half hour public affairs Spanish language program, *Latin Tempo*, on each Sunday at 8:00 a.m. (Hispanic Ex. 13, p. 1; Ex. 30, p. 10).

(b) WHMM (EdTV) broadcasts *Carrascolendas* a Spanish language half hour educational network cultural program for Hispanic youth on Friday at 4:00 p.m. and *Mundo Real* a half hour network produced bilingual dramatic program broadcast Monday through Friday at 4:30 p.m. (Hispanic Ex. 30, p. 21).

(c) WETA-TV (EdTV) broadcast these Spanish language programs during the week of June 22–29, 1981: *Villa Alegre*, a bilingual half hour network produced program broadcast each Monday through Friday at 5:30 p.m. to educate Spanish youth in human relations, the environment, nutrition, energy, and man-made objects; *Mundo Real* (see preceding paragraph); *Presente*, a half hour news and entertainment program broadcast on Saturday at 2:30 p.m.; *Pochtlan*, a 30-minute weekly network produced program to teach English to Spanish speaking adults broadcast each Saturday at 2:00 p.m. During Hispanic Heritage Week, the station has broadcast four to five hours of Spanish language, network produced or syndicated programming covering Hispanic culture and arts (Hispanic Ex. 30, pp. 25–31).

(d) WJLA-TV broadcasts *Revista*, a local Spanish language public affairs/news program of one half hour length on Sundays at 2:30 p.m. and Fridays at 6:30 a.m. (Hispanic Ex. 30, pp. 13–14).

(e) WTTG-TV broadcasts a locally produced 30-minute Spanish language public affairs program at 2:00 p.m. on the last Friday of each month (Hispanic Ex. 16, p. 1; Tr. 2392).

(f) WDVM-TV broadcasts *Prisma*, a locally produced 30-minute Spanish language public affairs program each Saturday at 2:00 p.m. (Hispanic Ex. 30, p. 33).

(g) WDCA-TV has broadcast Spanish language public service announcements in the past (Hispanic Ex. 30, p. 37).

86. Several area radio stations broadcast occasional Spanish language programming. These stations and a description of that programming are:

(a) WPFW-FM broadcasts one Spanish language program, *Salsa de las Americas*, news and music from Central and South America on Sundays from 3:00 p.m.—6:00 p.m. (Hispanic Ex. 30, p. 72; Ex. 28, pp. 4–5).[17]

(b) WFAX (daytime only) broadcasts two 15-minute recorded religious programs in the Spanish language each Saturday from 2:15 p.m.—2:45 p.m. (Hispanic Ex. 30, p. 111).

(c) WJMD broadcasts public service announcements in Spanish (Hispanic Ex. 30, p. 176).

(d) WHUR broadcasts a Spanish language program, *The Latin Flavor*, on

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[17] This station also broadcasts several English language programs designed to appeal to the Hispanic community. These programs are:

Voces Puentes, a call-in format program broadcast on Wednesdays at 1:30 p.m.; *Centro Americanas*, an English language news and information program concerning Central America broadcast at 2:30 p.m. on Wednesdays; *Caribbeana*, a news and music program broadcast in the English language on Saturdays from 2:00 p.m.—6:00 p.m.; and *Caribbean Roots*, an English language information and music program broadcast on Mondays from 5:00 a.m.—7:00 a.m. (Hispanic Ex. 30, p. 72).

Saturdays from 5:00 p.m. to 7:00 p.m. The program is predominantly music, but the host usually interviews a guest for about 10 minutes (Tr. 2665–2666; Hispanic Ex. 28, pp. 4–5).[18]

(e) WGTS broadcasts *Houra Latina*, a 1-hour Spanish language program each Monday through Thursday at 8:00 p.m. The program is locally produced and deals primarily with public service topics but includes some entertainment (Tr. 2696–2697; Hispanic Ex. 25, p. 4). It also broadcast *Domingo Radio Latina*, a 1-hour Spanish language religious program broadcast at 8:00 p.m. on Sundays.

87. There are two other communications services in the Washington area which provide Spanish language programming:

(a) Los Cerezos Tele-Vision Company operates a "Full-Time Experimental Television Translator" station on television channel 56 providing 24-hour Spanish language programming originating from studios in San Antonio, Texas. These programs include sports, entertainment, international and national news, talk and variety, children's programs and religion. Local programming is not provided. The signal is directed toward the Adams-Morgan section of D.C. (Hispanic Ex. 30, pp. 207–209, 212–214; Tr. 2309).

(b) Combined Community Communications, Inc. operates a Spanish language service delivered over-the-air on the subcarrier FM multiplex facilities of WOOK(FM) and can be received only by subscribers who pay for a special receiver (United Ex. 78, p. 3; Ex. 88, p. 1).

The Spanish Language Radio Programming Proposed by Station WMDO, Wheaton, Maryland

88. On July 6, 1981 an application was filed for permission to assign the license of daytime only AM radio station WDON, Wheaton, Maryland, to Maryland Lotus Corporation. Maryland Lotus Corporation represented that all its programming would be broadcast in the Spanish language. Included would be five minutes of local, national, and regional news, each hour, seven days a week. Also proposed were two public service announcements each hour for local service, charitable and public spirited groups. The application proposed the broadcast of public affairs programs each Sunday morning from sign-on until 9:00 a.m. and three times per day "during prime listening hours" Monday through Friday (United Ex. 85, p. 1). On September 24, 1981 the Commission granted its consent to the assignment. The new licensee has changed its call sign to WMDO and has indicated that it will broadcast a Spanish-language entertainment and information format designed for all Spanish-speaking persons, including Blacks (United/District Joint Ex. 2, pp. 2–3).

89. WMDO is authorized to use 1 kW of power between sunrise and two hours thereafter and between two hours before sunset and

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[18] This station also broadcasts some English language programming designed to serve the Hispanic audience. It has a correspondent in Mexico who files reports from Latin America broadcast in the station's news programs at least three times per week (Tr. 2669). The station has broadcast public affairs programs dealing with subjects of interest to Hispanics (Tr. 2670).

sunset and 5 kW at other times. During those hours in which the station operates with 5 kW of power, it provides a primary signal to 96.4% of the District of Columbia, an unstated but lesser portion of Arlington County, Virginia, and substantial portions of Montgomery and Prince George's Counties, Maryland. When the station operates with 1 kW of power, it provides primary service to 61% of the District of Columbia, no portion of Virginia, and a reduced area of Montgomery and Prince George's Counties, Maryland (United/District Joint Ex. 1, pp. 1–2).

Hispanic's Proposal to Serve the Washington Area Hispanic Community

90. Hispanic proposes to operate its station from 5:00 a.m. to 2:30 a.m. Monday through Saturday and from 6:00 a.m. to 1:00 a.m. on Sundays for a total of 148 hours per week (Hispanic Ex. 13, App. A, p. 1). Hispanic's station will provide primary service to the areas and populations in the following table:

County or City	*Total Population Served*	*Persons of Spanish Origin Served*
Arlington, Va.	152,599	8,863
Fairfax, Va.	596,901	19,535
Fairfax City, Va.	191,390	379
Alexandria City, Va.	103,217	4,042
Falls Church City, Va.	9,515	315
Loudoun, Va.	22,328	168
Fauquier, Va.	3,909	28
Prince William, Va.	137,467	3,108
Washington, D.C.	637,651	17,652
Montgomery, Md.	571,053	22,737
Prince George's, Md.	664,023	14,416
Howard, Md.	34,433	588
Anne Arundel, Md.	31,543	603
Charles, Md.	51,756	998
Totals	3,035,785	93,432

91. The specific programs Hispanic will broadcast are (Hispanic Ex. 13, App. A, pp. 2–6):[19]

> *News* — Five-minute newscasts will be broadcast ten times daily Monday - Saturday. At 6:30 a.m. the applicant will broadcast a 30-minute program half of which will be news, an editorial and sports, and half will be devoted to a listing of community events. At 12:00 noon and 6:00 p.m. a 30-minute news and editorial program will be broadcast. At 6:30 p.m. there will be presented a [illegible]0-minute program on international news. At 11:00 p.m. the applicant will broadcast a 15-minute summary of the day's events. On Sunday from 11:00 a.m. until 1:00 p.m. the applicant will broadcast a program based upon a Spanish translation of the news and features appearing in the Sunday editions of Washington newspapers.

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[19] This programming was developed after taking an ascertainment survey and receiving expert professional advice (Hispanic Ex. 17).

Public Affairs — Hispanic will devote $8^{1}/_{2}$ hours per week to public affairs including programs on local Hispanic problems, organizations, senior citizens, women, youth, questions raised on an open-line program, and citizenship.

Instructional — Hispanic will devote $5^{1}/_{4}$ hours per week to English language instruction, including everyday English.

Cultural — Hispanic will offer 1 hour per week on local cultural matters, 1 hour on Latin American cultural matters, and a 2-hour concert of classical music by living Hispanic artists.

Minority Ownership of Broadcast Facilities in the Washington, D.C. Area

92. Arbitron defines the Washington, D.C. radio market as the District of Columbia, Montgomery, Prince George's, and Charles Counties in Maryland, and Fairfax, Loudon, and Prince William Counties in Virginia (United Ex. 76, pp. 2–3). In an effort to determine the number of stations owned or controlled by minorities in this area, the applicants requested each of the radio and television stations, a transmitter television station and an FM subsidiary communications service in that area to respond to a questionnaire (Hispanic Ex. 30). While all did not respond, those who did provided the information that follows (tabulated in Hispanic's proposed findings at pp. 126–129).

93. None of the five commercial television stations licensed to the Washington area is controlled by minorities. Of the three noncommercial stations licensed to the area one is controlled by Blacks and another has both Blacks (15%) and Hispanics (2%) represented on its governing board (Hispanic Ex. 30).

94. Of the 13 commercial radio stations licensed to Washington, D.C., WYCB, a full-time AM station, is 72.88% Black owned (*id.*, p. 40); WHUR, a commercial FM station licensed to Howard University, has a governing board 70% of which is Black (*id.*, p. 17); station WOL, a full-time AM station, is 100% Black owned (*id.*, p. 75). WGAY(FM) is 50% Hispanic owned (*id.*, pp. 199–205). Three of the stations indicated that they did not know whether 10% or more of their licensee corporations were owned by Blacks or Hispanics (*id.*, pp. 60, 65, 99). All of the remaining stations indicated that 10% or more of their stock was not owned by Blacks or Hispanics.

95. Of the four noncommercial radio stations licensed to Washington, D.C., WDCU, licensed to the University of the District of Columbia, was not in operation and did not respond to the Questionnaire (*id.*, p. 4). WPFW-FM is 16% Black controlled (*id.*, p. 70); WETA-FM is 15% Black, 2% Hispanic controlled (*id.*, pp. 94, 24); WAMU-FM, licensed to American University, indicated that 10% or more of its governing board was not comprised of Blacks or Hispanics (id., p. 104).

96. Blacks do not own 10% or more of the stock of any of the radio stations licensed to communities in the Maryland or Virginia

suburbs of Washington, nor do Blacks represent more than 10% of the board of directors of any such station. Station WGAY(AM), Silver Spring, Maryland, is 50% owned by a Hispanic (*id.*, pp. 199–200, 204).

Conclusions of Law

United's Past Broadcast Record

97. United's license for the station now known as WOOK(FM) has not been renewed since 1966. It filed applications in 1969, 1972, 1975, and 1978 which were not considered in any designation order by the Commission prior to the order released September 30, 1980 (81 FCC 2d 227). That order refers to the "above captioned application of United . . . for renewal of its license." Neither the caption of the referenced application nor the balance of the designation order describes any specific application. United is of the view that the only license period relevant to this proceeding is that for the latest renewal period, 1975–1978. That view has been rejected in this proceeding (Tr. 467–476) and a similar view expressed by an United subsidiary in a related proceeding has lately been rejected by the Review Board (*Intercontinental Radio, Inc.*, 90 FCC 2d 935). Because of its position and because of its alleged difficulties in locating evidence relating to programming in earlier periods, United offered no direct case respecting its pre-1975 broadcast record (United proposed findings, para. 55). As a result, evidence of United's performance during the time it was a Hispanic-oriented station is meager. District offered the renewal applications filed in 1969, 1972, and 1975 and some oral testimony relating to these periods; there is some information which was developed on cross-examination of United witnesses as well as those for Hispanic.

98. The composite weeks shown in the 1969, 1972, and 1975 renewal applications indicate that the percentage of time devoted to news during those periods was 8.2%, 7.48%, and 16%, respectively. There is nothing specific in the record to which these percentages may be compared but United did offer some Arbitron information (United Ex. 76) derived from 1978 applications. This includes percentages of time devoted to news in the Washington Metropolitan Area by 35 radio stations during the 1975–1978 composite years. Measured against those percentages, United's station would rank 11th for the 1969 composite year, 15th for the 1972 composite year, and 4th for the 1975 composite year. This is a good showing but it is diminished because during this period the station had almost no news staff and broadcast little local news.

99. The same comparison may be made with respect to all nonentertainment programming. The composite week shown in the 1969 application would have placed United 3rd from the bottom of the 35 stations for which information was available, the 1972

composite week would have placed United 7th from the bottom, and the 1975 composite week would put United in a tie for last place.

100. A number of the witnesses for Hispanic were themselves Hispanic and were knowledgeable about the Hispanic community. They testified that during the time that the station was broadcasting with a Hispanic format they listened to the station; that most of the Hispanics in the area looked to the station for entertainment, news and information; that at sometime during the 1967–1968 period there was a weekly 15-minute Hispanic news program; and that the loss of this Spanish-language programming was a considerable loss to the Washington area Hispanic community.

101. As indicated above, United's direct case focused on the period following the changeover in 1976 to a Black format. At sometime following the format change and prior to mid-1978, the news capability for the station was dramatically improved. There were then three full-time persons on the news staff including one who worked in the field daily covering local events. The Arbitron comparisons which appear in United's Exhibit 76, indicate that the 1978 renewal application composite weeks put WOOK(FM) in 10th place among metro area stations with respect to the percentage of time devoted to news and in 16th place in percentage of broadcast time devoted to nonentertainment programming. The April 1978 program audit done by United put WOOK(FM) in 7th place among area broadcasters in percentage of time devoted to news and in 12th place in percentage of time devoted to overall nonentertainment programming.

102. United also showed some community involvement, mostly in the 1977–1978 period, and provided information from a large group of community witnesses with backgrounds in community service which indicated that WOOK(FM) with its present format reaches a large number of the Black community with valuable news and information services.

103. An issue in this case requires consideration of the effect of the Commission's failure to renew United licenses for WOOK(AM) and WFAB on its qualifications to retain the WOOK(FM) license. The basic and comparative significance of those matters will be discussed subsequently, but it is noted in connection with the evidence regarding the WOOK(FM) past record that the designation order respecting the WOOK(AM) license was released June 13, 1969 (*United Television Co., Inc.*, 18 FCC 2d 363) and the designation order respecting WFAB was released January 2, 1973 (38 FCC 2d 956); the Commission decision denying renewal of the WOOK(AM) license was released on September 12, 1975 and the Commission decision denying renewal for the WFAB license was released on September 30 of the same year. Evidence respecting licensee improvements taking place after the filing of a competing application has been

traditionally deemed valueless as showing only the reaction of a station to the fear of the nonrenewal of its license. See, for example, *RKO General, Inc.*, 35 FCC 2d 100. Under that theory the evidence with respect to United broadcast practices after the WOOK(AM) and WFAB decisions must be accorded only diminished weight.

Matters Relating to the WOOK(AM) and WFAB Renewals, Notice of Apparent Liability, and Matters in Mitigation

104. Since collateral estoppel rules bar relitigation of questions raised in the WOOK(AM) and WFAB matters, the principal questions remaining relate to material offered in mitigation and the death of Richard Eaton.

105. District argues (proposed findings p. 71) that improvements made after an alleged violation has been designated may not be considered in mitigation, citing *The Trustees of the University of Pennsylvania*, 69 FCC 2d 1394. United argues that the rule should not apply to a multiple owner because conduct found to be disqualifying at one station would automatically disqualify all other commonly owned stations, a course obviously not followed by the Commission. United's position does not necessarily follow, but in this multiple license situation, matters done to mitigate wrongdoing at another station will be considered relevant to the question of the renewability of the WOOK(FM) license because the wrongdoing at other stations [WOOK(AM) and WFAB] must, under the Commission's direction, be considered here. The question then becomes one of the weight to be given the evidence offered in mitigation. One matter offered in mitigation was that in 1973 United switched to a procedure whereby all bills for advertising are submitted by a central office and are based on station logs showing advertising that actually ran. This change followed designation by the Commission of the WFAB renewal on charges of double billing. Similarly, United's practice of checking its stations for technical compliance came after sharp criticism of its technical performance in WOOK(AM). While it cannot be said that every improvement by United with respect to control of its stations was begun as a result of a specific Commission criticism, it is true that most of United's concern with its local operations did not come until after scathing criticism of its indifference to or inability to control its stations. The mitigating effort, principally in the late 1970s, came only when United knew its licenses were in jeopardy.

106. The rule violations considered with respect to the Notice of Apparent Liability are principally significant in that they indicate a continuing failure by United to clean up its operations as late as 1977 and early 1978. These violations militate against the mitigating

effect of the United effort to improve which had begun at least a year earlier.[20]

107. The Commission's *Memorandum Opinion and Order* released April 30, 1981 (86 FCC 2d 452), which added the WOOK(AM) and WFAB issue, anticipated that there might be an involuntary transfer of control caused by Mr. Eaton's illness. If so, the order said, there would still be "a serious question . . . about the soundness and reliability of the licensee's operations, and thus, about United's basic qualifications." That order was written before Mr. Eaton died; the question posed remains.

108. United argues that "to the extent that [WOOK(AM) and WFAB] incidents reflect poorly on United's operations, it must be emphasized both that the incidents occurred during the time when United was absolutely controlled by Richard Eaton, and that the Commission itself attributed the incidents, directly or indirectly, to him. Richard Eaton is dead, and control of United has passed to a new and different generation of broadcasters. Richard Eaton represented the old United, the United founded and controlled by the efforts of a single broadcast pioneer. In the years since the WOOK(AM) and WFAB(AM) misconduct, a new United has gradually developed as Richard Eaton's health forced him to delegate some of his responsibilities. The new United has adopted stringent operating procedures to prevent the mistakes of the past from recurring and to guard against any mistakes in the future" (United proposed findings, p. 246). United has also argued: "A final point needs to be emphasized here. DBC [District] seeks to de-emphasize the importance of the death of Richard Eaton [citations omitted]. In doing so, DBC blinds itself to the fact that Richard Eaton was the only common thread connecting the WOOK(AM) and WFAB(AM) proceedings. He was, after all, United." It says further, "the fact that he died after this proceeding was underway does not relieve the Commission of the responsibility of assessing the full impact of his death on United's qualifications. That impact must be significant, since it removes the last vestigial connection between the old United which lost WOOK(AM) and WFAB(AM), and the new United, which has enjoyed a virtually unblemished record at WOOK(FM) for ten years" (United reply findings, pp. 25–26).

109. As pointed out by the Bureau and District (and by United in para. 7 of its reply findings), there are connections between the "new" United and United as it existed at the time of the WFAB and WOOK(AM) offenses. Pierre Eaton was a director of the WFAB licensee and is now a director of United. E. Carlton Myers, Jr. was the station general manager of WOOK(AM) and is now a vice president of United as well as general manager of station

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[20] These violations are not disqualifying conduct—considered alone or as part of all relevant information.

WOOK(FM). Clifton D. Holland was a program director and vice president of WOOK(AM); he is currently a vice president of United and public affairs director of WOOK(FM). Gerald J. Hroblak was assistant controller of United prior to 1972 and in that year became controller; he is now chairman, president, and treasurer of United and actively takes part in WOOK(FM) management.

110. United did not offer evidence that Richard Eaton was the sole decision maker with respect to the stations and was therefore responsible for the WFAB, WOOK(AM), and WOOK(FM) problems. This may have been because the hearing began March 16, 1981, before Mr. Eaton's death on June 1, 1981. In any event United cannot now rely on what might have been the fact but which it did not prove.

111. Notwithstanding all that, Richard Eaton was the sole stockholder, president, chairman of the board, and active in the management of United during his lifetime. Those factors, together with the implications of the Commission's *Memorandum Opinion and Order* in *Friendly Broadcasting Company*, released June 17, 1982 (90 FCC 2d 225)[21] preclude a holding that where the sole stockholder of a multiple licensee dies, disqualifying conduct during his lifetime at one station disqualifies the company as licensee at another station. The effect of the death of Mr. Eaton on the comparative aspects of this case is another matter.

United's Comparative Case

112. The Commission's policy with respect to the post designation death of a sole owner is different in the comparative process than it is in the qualifying process. Traditionally, the death of a sole owner and the resulting involuntary transfer of his stock may not be used to change the comparative situation that existed prior to designation. See *Rose Broadcasting Company*, 68 FCC 2d 1242; *Mid-Florida Television Corporation*, 69 FCC 2d 607. Thus the death of Richard Eaton may not be used to upgrade United's comparative case.

113. In *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), the

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[21] Friendly, an United subsidiary wholly owned by Richard Eaton at his death, was licensee of two stations in Cleveland. In a noncomparative proceeding the stations' renewal licenses had been denied by an ALJ because of disqualifying conduct at one of the stations and at WFAB (FCC 77D-7). After Eaton died, the Commission terminated the proceeding without consideration of the qualifying matters. "Commission policy has been to afford relief to a licensee in a renewal proceeding after the death of the licensee's principal, even where the deceased was implicated in prior misconduct at the station, provided that there is no evidence indicating that the misconduct is likely to recur. The death of the sole proprietor of a station obviates the administrative need for an evidentiary hearing. Where there is no evidence that the improper practices would recur under the new management, the Commission will terminate a proceeding and allow the decedent's interest to pass to his estate [citation omitted]."

Commission indicated that a comparative renewal process must consider that an existing licensee is entitled to a comparative preference if its past record was substantial or better but is entitled to no preference if its past record was minimal. It is clear that past records are to be weighed in the general comparative process. See *Central Florida Enterprises, Inc.* v. *F.C.C.*, 683 F.2d 503 (1982).

114. With respect to its past record, United is entitled to a plus for the amount of time devoted to news during the years it was a Spanish-language station. It is entitled to a plus for the service that the Hispanic witnesses testified it gave to the Hispanic community. Against those two pluses is weighed a minus for the poor record that the station had for local news coverage and a minus for its poor showing in regard to the amount of time it devoted to nonentertainment programming other than news. For the years during which United was a Spanish-language station, on balance, its performance was minimal. United's performance after it adopted a Black format would be considered substantial if that performance had come at a time before United had fears for its licenses. The credit given United for those years is therefore diminished. United reaps a substantial demerit for its unwillingness or inability to control local stations WFAB and WOOK(AM). Matters shown in mitigation are somewhat discounted by their motivation. The forfeiture matter regarding WOOK(FM) is a negative but of minor significance. The total record is no better than minimal.

115. With respect to diversification, United must be given a demerit for its interest in other broadcast stations, particularly those in Rockville and Baltimore, Maryland. United claims no integration credit and on the basis of the record is entitled to none.

Hispanic's Reporting Issue

116. There is no question that Mr. Casillas' conviction was not reported and that it should have been. United and District would expand this failure by Hispanic's principals into a general inquiry into whether Hispanic kept control of its application though there is no such issue. The only matter to be decided is the specific failure mentioned. The Hispanic principals left the checking of personal histories to the Hispanic attorney. The mis-reporting was a result of an out-of-date reporting form and some advice by the personal attorney of the principal involved respecting the classification of the crime to which Casillas pled guilty. The Hispanic principals were derelict in their duty to supervise in only a very minor way and that minor failing is decisionally insignificant.

Hispanic Programming Proposal

117. Hispanic has expanded its argument that its programming proposal entitles it to a comparative preference into the following claim: "The combination of minority ownership, Spanish language

programming and overwhelming need for that programming demonstrated by the record in this proceeding requires a grant of its application without the necessity of a full comparison under the traditional comparative criteria." (See Hispanic reply findings para. 38.) Hispanic claims credit as a minority owned applicant notwithstanding the fact that District is also minority owned because there are several Black owned broadcast stations in the area but few Hispanic owned stations. The Commission has recognized minority ownership in the comparative process through the integration of ownership and management criteria and has not granted separate preferences for minority ownership standing alone (*WPIX, Inc.*, 68 FCC 2d 381, 411).

118. Events have overtaken Hispanic's programming proposal. At the time the inquiry was authorized, there was no station in the metropolitan area which specialized in Spanish-language programming and it was questionable whether the programming that then existed was "meaningful" as that term has been used in the recent cases. Two cases, *Flint Family Radio, Inc.*, 69 FCC 2d 38, and *George E. Cameron Jr. Communications*, 71 FCC 2d 460, have defined a new approach to specialized programming purposes. In *Flint* the Review Board refused to grant a preference as between proposed religious and proposed Black programming. "This is not to say that a preference in this area can never be earned, but rather that unless an applicant proposing a specialized program format can first establish that the type of programming it proposes (*e.g.*, Black-oriented, religious, foreign language, etc.) is not already available from existing stations in any meaningful amount, we see no satisfactory objective means of accessing the need for additional amounts of programming and making a comparison between competing claims of greater need. Our refusal to accord either [applicant] a preference for its specialized programming format is not a marked departure from the results reached in earlier decisions. In *La Fiesta Broadcasting Co.*, 6 FCC 2d 65, 9 RR 2d 295 (Rev. Bd. 1966), the significant preference granted to the applicant proposing Spanish language programming was based upon the absence of any locally originated Spanish language programming."

119. WMDO has begun broadcasting from Wheaton in the Spanish language from sunrise to sunset. During the first two hours after sunrise and the last two hours before sunset it is limited to 1 kW of power and may broadcast with 5 kW of power at other times. During the times it can broadcast at 5 kW it provides a primary signal to almost all of the District, parts of Arlington County, Virginia, and substantial portions of Montgomery and Prince George's Counties, Maryland. When the station operates at 1 kW it provides primary service to 61% of the District, none to Virginia, and to a lesser portion of Montgomery and Prince George's Counties. The broadcasting includes Spanish-language entertainment and

local, regional, and national news. It also provides for public affairs programming during the early hours on Sunday and three times a day during prime hours Monday through Friday. Whatever the situation with respect to the Spanish-language broadcasting now provided by other stations, it must be concluded that under the *Flint Family Radio* test, there is meaningful Spanish-language broadcasting in the area and that Hispanic is entitled to no programming preference.

120. With respect to diversification, the husband of Raquel Marquez Frankel owned an interest in a corporation which had a construction permit for a television station in Delaware. That interest is decisionally insignificant. No other Hispanic principal has any interest in any medium of mass communications.

121. Hispanic makes no claim for integration credit; its proposal includes only minimum participation by its principals. Since none of the participation approaches 20 hours per week, under the *Midwest Broadcasting Company,*; 70 FCC 2d 1489, test, it can be given no quantitative integration credit.

District Broadcasting

122. There are no special issues directed specifically to District. While it proposes to broadcast a Black format it has claimed no credit for its proposed programming. Neither District nor any of its principals have any interest in any medium of mass communications. All of District's principals are Black and each will own 25% of District. All except Herman F. Stamps propose to devote four hours a week to District programming board and so are entitled to no quantitative integration credit though the District proposal is enhanced in a minor way by reason of their participation and the fact that each is Black.

123. It is proposed that Herman F. Stamps will devote 40 hours a week as the station's full-time managing director; he is to be the executive in charge of broad management and company planning under the direction of the board of directors. The question of credit to be given for Stamps' participation is the only one needing resolution with regard to the District proposal.

124. United (and Hispanic by adoption) argues that the Stamps integration proposal should not be considered because it came late, because Stamps' track record as an administrator at Howard is marred as well as overstated, and because District and Stamps are insincere in the proposal.

125. Stamps' participation as managing director was contained in a District amendment filed March 14, 1979. The designation order was released September 30, 1980. District had a right to amend the application at the time it did and to upgrade its comparative proposal under the rules. See *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 431.

126. United argued in effect that the OSHA violations charged against Howard University at the time that Stamps coordinated OSHA compliance indicate that his attitude toward regulation is questionable and that his willingness to claim responsibility in his role at Howard while disclaiming responsibility for specific violations, manifests insincerity. There is no issue with respect to OSHA violations and the record is skimpy as to what happened. There is not enough shown to prove a cavalier attitude toward regulation in general. The double attitude charged to Stamps by United reveals nothing more than a commonly observed tendency of most humans to emphasize their strengths and minimize their weaknesses. This obviously can be done to a fault but that is not the case here.

127. On the facts shown, it cannot be concluded that Stamps will not work full time at specified management duties if District's application is granted. The fact that he has no experience in the broadcast field does not lessen the integration credit which attaches to full-time employment by an owner [*Webster-Baker Broadcasting Company*, 88 FCC 2d 944 (Rev. Bd. 1981)].

128. United argues that it is unfair to deny it the opportunity to show as part of its broadcast record events which occurred after competing applications were filed while allowing District to amend its application to improve its comparative posture. Any renewal applicant is as free as any nonrenewal applicant to amend its proposal at any appropriate time in order to improve any aspect of its comparative showing except past broadcast record. Had Hispanic or District been licensees at other stations, their past broadcast records would have been examined under the same conditions as was United's.

129. District has no demerit for diversification and is entitled to 25% integration credit for participation by Dr. Stamps. It has a minor preference for its standby generator.

Ultimate Conclusions

130. It is concluded that United is basically qualified to be granted a renewal of its license for WOOK(FM). United is comparatively less qualified than either Hispanic or District because of its minimal past broadcast record, its lack of integration credit, and its relatively inferior position respecting diversification. Hispanic and District rank equally respecting diversification but District has a 25% integration credit and Hispanic has no integration credit. District has a minor credtit for its proposed emergency power supply and Hispanic is entitled to no preference for its programming proposal. Of the three applicants, District is, from a comparative point of view, best qualified.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276

of the rules, the application of United Broadcasting Company, Inc., for renewal of its license to operate an FM station on channel 262, Washington, D.C., IS DENIED; the application of Hispanic Broadcasting Corporation for a construction permit for a new FM station to operate on channel 262, Washington, D.C., IS DENIED; and the application of District Broadcasting Company for a construction permit for a new FM station to operate on channel 262, Washington, D.C., IS GRANTED.[22]

FEDERAL COMMUNICATIONS COMMISSION
FREDERIC J. COUFAL, *Administrative Law Judge*

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[22] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Agreement, Between Applicants
Grant, Conditional
Pleading Dismissal of
Settlement

> **Review Board granted joint request for approval of agreement calling for grant of one application and dismissal of competing applications. Unauthorized pleading seeking condition on grant dismissed. Board on its own motion, however, added condition to the award of the construction permit.**
> **–*Whitco Broadcasters, Inc.***
> **BC Docket No. 81–733**

FCC 83R–50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WHITCO BROADCASTS, INC. Hollywood, Florida	BC Docket No. 81–733 File No. BPCT-800815KG
FAMILY TELEVISION 69, INC. Hollywood, Florida	BC Docket No. 81–734 File No. BPCT-801121KH
GOLDEN EAST BROADCASTERS, INC. Hollywood, Florida	BC Docket No. 81–735 File No. BPCT-801121KI
CHRISTIAN MEDIA OF FLORIDA, INC. Hollywood, Florida	BC Docket No. 81–736 File No. BPCT-801121KJ
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: July 12, 1983; Released: July 15, 1983)

BY THE REVIEW BOARD: BOARD MEMBER JACOBS ABSENT.

1. On July 5, as supplemented on July 11, 1983, the applicants in this case filed a joint request for approval of agreement proposing

the grant of the Whitco application for a new UHF construction permit in Hollywood, Florida, and the dismissal of the other applications. We will grant the joint request because it complies with the new requirements of the Communications Act and the Commission's Rules.

2. In an Initial Decision, FCC 83D-24, released April 12, 1983 (I.D.), Administrative Law Judge Conlin granted Whitco Broadcaster's application because 100% of its ownership would participate full time in the operation of the station and because "it is entirely minority owned," citing *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982). I.D., para. 56. The parties have not filed exceptions; instead they have entered into an agreement and made the showing required by Section 311(c)(3)(a) and (b) of the Communications Act. *See Berkshire Television, Inc.*, FCC 83R-30, released Arpil 21, 1983, and cases cited therein.

3. Affidavits have been submitted by the parties showing that the dismissing applications were filed in good faith to obtain a grant and not to harass any other applicants and coerce a payment contrary to the requirements of new Section 311(c)(3)(b). They have also shown that the public and private interests would be served by approval of the agreement because it would conserve the resources of the Commission and the parties, and would expedite the institution of new service. *See* Section 311(c)(3)(a).

4. On May 12, 1983, the National Association of Business and Educational Radio, Inc. (NABER) filed comments requesting that a grant in this case be made subject to a specific condition that broadcast operation will comply with Section 73.687(i)(1) of the Commission's Rules. Thereafter, on May 27, 1983, the Mass Media Bureau filed a motion to dismiss NABER's comments on the grounds that only parties to a proceeding are permitted to file pleadings after an Initial Decision.

5. We agree with the parties that NABER's comments are unauthorized under our Rules. *See* Section 1.276(a). They will therefore be dismissed. Nonetheless, the Review Board has previously held, following Commission precedent, that such a condition is appropriate; we will, therefore, *sua sponte*, add a condition to the award of the construction permit. *See Washington's Christian Television Outreach, Inc.*, FCC 83R-23, released March 28, 1983.

6. ACCORDINGLY, IT IS ORDERED, That the motion to dismiss comments of the National Association of Business and Educational Radio, Inc., filed by the Mass Media Bureau on May 27, 1983 IS GRANTED to the extent indicated above; and that the comments filed by the National Association of Business and Educational Radio, Inc., on May 12, 1983 ARE DISMISSED; and

7. IT IS FURTHER ORDERED, That the joint request for approval of agreement filed July 5, and supplemented July 11, 1983, IS GRANTED; that the application of Whitco Broadcasters, Inc., IS

GRANTED; and that the applications of Family Television 69, Inc.; Golden East Broadcasters, Inc., and Christian Media of Florida, Inc., ARE DISMISSED; and that this proceeding IS TERMINATED; and

8. IT IS FURTHER ORDERED, That grant of the construction permit is conditioned on the permittee taking adequate measures to provide interference protection to land mobile services in the 460–470 MHz band *prior to program test authorization*. No automatic equipment or program test authority will be permitted. Prior to conducting equipment tests, the permittee shall gain Commission approval of its plan to prevent undue interference to land mobile services. The permittee will be required to file a request for program test authority along with the license application, and document that objectional interference will not be caused to land mobile services as a result of Channel 69 operation.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WHITCO BROADCASTERS, INC. Hollywood, Florida	BC Docket No. 81-733 File No. BPCT-800815KG
FAMILY TELEVISION 69, INC. Hollywood, Florida	BC Docket No. 81-734 File No. BPCT-801121KH
GOLDEN EAST BROADCASTERS, INC. Hollywood, Florida	BC Docket No. 81-735 File No. BPCT-801121KI
CHRISTIAN MEDIA OF FLORIDA, INC. Hollywood, Florida	BC Docket No. 81-736 File No. BPCT-801121KJ
For Construction Permit	

Appearances

James J. Freeman and *Lawrence E. Carr*, on behalf of Whitco Broadcasters, Inc.; *Robert S. Stone*, on behalf of Family Television 69, Inc.; *John B. Jacob* and *Dennis J. Kelly*, on behalf of Golden East Broadcasters, Inc.; *Aaron Shainis* and *Lee Peltzman*, on behalf of Christian Media of Florida, Inc.; and *Y. Paulette Freeman*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued March 31, 1983; Released April 12, 1983)

Preliminary Statement

1. This proceeding involves four mutually exclusive applications for authority to construct a new commercial television broadcast station on Channel 69, Hollywood, Florida. The Hearing Designation Order released October 23, 1981 specified the following issues:

> 1. To determine with respect to Whitco Broadcasting [sic], Inc.:
>
> (a) whether applicant has an additional $855,265 available;

(b) whether, in light of the evidence adduced pursuant to (a), applicant is financially qualified.

2. To determine with respect to Golden East Broadcasters, Inc.:

(a) whether, applicant has an additional $342,438 available;

(b) whether, in light of the evidence adduced pursuant to (a), applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By separate orders (FCC 82M-0059 and FCC 82M-0063) released January 8, 1982, the financial issues specified against Whitco Broadcasters, Inc. and Golden East Broadcasters, Inc. were resolved in favor of the applicants. Consequently, the hearing proceeded solely on the comparative issue. A prehearing conference was held on January 6, 1982 and the hearing was held on April 20–22, 1982. Proposed findings and conclusions were filed on August 9, 1982 and replies were submitted on August 30.

Findings of Fact

Whitco Broadcasters, Inc. (Whitco)

3. Whitco is a stock corporation organized under the laws of the State of Delaware and qualified to do business in the State of Florida. All of the stock is owned by two individuals: Thomas J. Coates and Eddie L. Whitehead, each of whom holds a 50% interest. Neither Coates nor Whitehead has any ownership interests in any medium of communications. Both men are black.

4. Each owns 50% of J-Pax Broadcasters, Inc. which has filed applications for TV translator stations in a number of cities throughout the country. All of these applications were subject to the low power freeze and at the time of the hearing had not been accepted for filing. The same is true of several other similar applications in which Whitehead but not Coates has an interest.

5. Coates is the president of Whitco and will serve as full-time (a minimum of 40 hours per week) general manager of the proposed station. His job will encompass all of the responsibilities normally associated with the position of general manager, including general responsibility for day-to-day programming decisions, establishment and supervision of personnel and general office practices, and coordination and supervision of all subordinate sections.

6. Coates currently is self-employed as president and 51% owner of Coates Construction and Development, Inc., an investment venture emphasizing investments in the construction field (Tr. 45–46). He also serves as a consultant to a Chicago bank. He is primarily involved in monitoring existing investments and seeking new

opportunities. The only project with which the company is now actively involved is in Louisville, Kentucky (Whitco Ex. 1). Coates intends to maintain control over the Louisville project by telephone and he estimates that maintaining his interest in Coates Construction will require a maximum of approximately 12 to 15 hours per week (Whitco Ex. 1; Tr. 71). Coates presently lives in Chicago but intends, in the event of a grant, to move to Hollywood and give priority to his managerial duties at the proposed station (Whitco Ex. 1; Tr. 53, 90–91).

7. Whitehead is vice president of Whitco and will become the station's full-time (40 hours per week) sales manager. He will be responsible for the operation of the sales staff generally, and he will be specifically responsible for the supervision and maintenance of the station's accounts, establishing rate schedules and directing sales research (Whitco Ex. 2).

8. Whitehead is self-employed as an investor, most of his investments being in real estate on the west coast where he now lives (Tr. 122–124). Whitehead will move to the Hollywood area if the application is granted and proposes to employ managers to oversee his properties in the west. He expects to spend about 15 hours per week monitoring those investments (Whitco Ex. 2).

Family Television 69, Inc. (Family)

9. Family is a Florida corporation currently comprised of eight stock subscribers, who are subscribers to the following shares of stock and who hold the following positions in the corporation:

Stock Subscriber	*No. of Shares*	*% of Shares*	*Office*
Adib Eden, Sr.	500 (950)	14.28 (27.13)	President, Director
Adib Eden, Jr.	0 (100)	0.00 (2.85)	Vice President, Director
Juan Sixto	500	14.28	None
Vicente Vadillo	150	4.28	None
Jose Concepcion	100	2.85	None
Interamerican Community Church, Inc.	800	22.85	None
Jose Luis Soto	500	14.28	None
Rafael Pena	400	11.42	None

As of the Commission's "B" cut-off, Adib Eden, Sr. had a 14.28% interest in Family and Adib Eden, Jr. had a 0% interest. The parenthetical figures referenced above reflect the actual current agreement among the subscribers of Family. Interamerican Community Church, Inc. is a nonprofit, nonstock corporation, comprised of five officers and directors, including Adib Eden, Sr. and Adib Eden, Jr.

10. Neither Family nor any of its officers, directors, subscribers, or officers or directors of its corporate subscriber have any ownership interest in any existing outlet of mass communications.

11. Of the above individuals, Adib Eden, Sr. will serve as general manager of the proposed Hollywood television station and will devote a minimum of 20 hours per week to this position. Adib Eden, Jr. will serve as operations manager and will devote a minimum of 40 hours per week to this position. Vicente Vadillo will serve as sales manager of the facility and will devote a minimum of 40 hours per week to this position. In addition, the board of directors will participate in the formulation of program policies for the applicant, meeting on a regular basis and devoting about 10 hours per week to the operations of the facility.

12. Adib Eden, Sr. resides in Hialeah, Florida. As general manager of the station proposed by Family, he would oversee and supervise all operations of the station. Eden is now pastor of La Catedral Del Pueblo Church, a position he will continue to hold if the application is granted. He is also president of Adib Eden Evangelistic-Missionary Society, a nonprofit corporation organized for the purpose of the ministry; senior minister of Interamerican Community Church of Hialeah; and head of the Childhood Development Center in Miami, a center established for child care.

13. Eden has considerable broadcast-related experience. He has produced television programming which is presented regularly over WKID(TV), Fort Lauderdale, including La Catedral Del Pueblo, a one-hour religious program that appears over WKID(TV) on Sunday afternoons from 3:00 p.m. until 4:00 p.m. In addition, Eden is responsible for the production of the program "Realidades" which appears over WQBA, Miami, Florida, on Sunday mornings from 8:00 a.m. until 8:30 a.m. He also serves as moderator for this program which has been broadcast for the last four years.

14. In the past he has produced such programs as "Voces de Inspiracion," "El Camino Infinito" and "La Catedral Del Pueblo." All of these programs are religious in nature and have appeared regularly over stations in the Miami area.

15. For purposes of resolution of the comparative issue in the instant proceeding, Adib Eden, Jr. serves as vice president of Family's proposed station. He will serve as operations manager of Family's proposed station, devoting a minimum of 40 hours per week to the discharge of his duties as such operations manager (Family Ex. 3). His cognizable ownership interest in Family is derivative, stemming from his interest in Interamerican Community Church, Inc., one of Family's stock subscribers. Eden, as one of five directors

for this nonstock corporation, will be credited with a 4.5% interest in Family.

16. Eden is now director of productions of Semae Productions where he personally directs and/or produces television programs to be aired over WKID(TV), Fort Lauderdale, Florida, as well as several special programs annually for presentation in foreign countries throughout the Caribbean area. Semae Productions is also engaged in the production of commercials and other promotional announcements. He has engaged in this endeavor since 1974.

17. Vicente Vadillo, subscriber to 4.28% of Family's stock, will serve as sales manager of Family's proposed station should Family be awarded a construction permit. A Miami resident, Vadillo will devote a minimum of 40 hours per week at the station in discharging his duties as sales manager. Vadillo is now a public accountant and operates an accounting firm with his son. If Family is awarded a construction permit, he will discontinue working at the accounting firm in order to work full time at the television facility.

Golden East Broadcasters, Inc. (Golden East)

18. Golden East was chartered by the State of Florida on September 3, 1980. The corporation is authorized to issue 1,000 shares of common stock; each share has one vote and a par value of $1.00. Fourteen shares of Golden East's common stock have been issued and are outstanding.

19. The following individuals are principals of Golden East and own shares to the extent indicated:

Stock Owner	*Office*	*No. of Shares*	*% of Shares*
Howard L. Green Northfield, New Jersey	President, Director	2	14.285
Simon Goldman Lakewood, New York	Vice President, Director	1	7.143
Marilyn Goldman Lakewood, New York	None	1	7.143
Joseph J. Jackler Fayetteville, New York	Treasurer, Director	2	14.285
Michael C. Steele Elmira, New York	Secretary, Director	2	14.285
Alfred C. Cordon Gaithersburg, Maryland	Vice President, Director	2	14.285
John B. Jacob Alexandria, Virginia	Vice President, Director	2	14.285
Donald M. Simmons Sayre, Pennsylvania	Vice President	2	14.285

20. Howard L. Green is a career broadcaster, having been involved in the industry since 1949, and having been involved in the ownership and management of broadcast stations since 1957. He currently is officer, director and 50% stockholder of the licensees of WENY(AM), WLEZ(FM) and WENY-TV, Elmira, New York; WOND(AM), Pleasantville, New Jersey; WMGM-FM, Atlantic City, New Jersey; and officer, director and 25% stockholder of the licensee of WAAT(TV), Wildwood, New Jersey. The licensee of WENY-TV is also permittee of television translator stations at Hornell and Ithaca, New York.

21. Simon Goldman has managed broadcast stations since 1936, and has owned them since 1955. He is officer, director and 80% stockholder of James Broadcasting Company, Inc., licensee of WJTN(AM) and WWSE(FM), Jamestown, New York; 100% owner of the licensee of WLKK(AM) and WLVU(FM), Erie, Pennsylvania; 79% owner of Vermont Radio, Inc., licensee of WVMT(AM), Burlington, Vermont, WSYB(AM) and WRUT-FM, Rutland, Vermont; and permittee of MDS station WFY-943, Rutland, Vermont.

22. Marilyn Goldman is the wife of Simon Goldman and is 0.76% stockholder in James Broadcasting Company, Inc.

23. Joseph J. Jackler is an accountant in Syracuse, New York. He is an officer and director of the licensee of stations WOND(AM), Pleasantville, New Jersey, and WMGM-FM, Atlantic City, New Jersey.

24. Alfred C. Cordon, Gaithersburg, Maryland, is a communications attorney, having continuously practiced in the field since 1952.

25. John B. Jacob, Alexandria, Virginia, is a communications attorney, having continuously practiced in the field since 1952.

26. Michael C. Steele is a career broadcaster and has participated in the management of broadcast stations since 1962. Steele is 6.53% owner of the parent corporation of the licensee of KWEB(AM) and KRCH-FM, Rochester, Minnesota. He is currently general manager of WENY(AM), WLEZ(FM) and WENY-TV, Elmira, New York.

27. Donald M. Simmons, Sayre, Pennsylvania, is a businessman and broadcaster, having participated in the ownership of broadcast stations since 1957. He is currently officer, director and 50% stockholder in the licensees of WENY(AM), WLEZ(FM) and WENY-TV, Elmira, New York, WOND(AM), Pleasantville, New Jersey, and WMGM-FM, Atlantic City, New Jersey. He is also an officer, director and 25% stockholder in the licensee of WAAT-TV, Wildwood, New Jersey, as well as a 25% stockholder of Ocean City Sentinel-Ledger, Inc., publisher of the Ocean City, New Jersey *Sentinel-Ledger*.

28. None of these individuals plans to participate in the day-to-day operation of the station.

Christian Media of Florida, Inc. (Christian)

29. Christian is a nonprofit, nonstock corporation organized under the laws of Florida. The business and affairs of the corporation are managed under the direction of its board of directors. Christian has reported the following officers and directors:

Name	*Office*	*Director*
Arthur L. Shell, Jr.	President	Yes
John Alessi	Secretary, Treasurer	Yes
Selwyn Scott	None	Yes
Rose Marie Pagan	None	Yes
Palmira Reyes Lozada	None	Yes

30. Neither Christian nor any of its officers or directors have any ownership interest in or exercise any control over any medium of mass communications.

31. Reverend Shell will be general manager of the proposed station and has proposed to work full time in this position (Christian Ex. 4). He is presently pastor of Trinity Church, Inc. of Miami, which has more than 500 members, and is a resident of Miami. He is also a member of the Greater Miami Ministerial Association, a member of the board of directors of Teen Challenge of Florida, and a board member of Good Samaritans, Inc. Reverend Shell has indicated that he would continue to be pastor (Tr. 263) and has not indicated any intention to give up his other activities.

32. Reverend Shell's experience in broadcasting includes three years of television ministry on a weekly basis sponsored in Miami by the Trinity Church. In connection with the Greater Miami Ministerial Association, he has been given the assignment of rotating time on Channel 10 and also has been asked to present the daily devotions for Channel 7 in Miami. Since coming to Miami in 1977 he has become a member of the Greater Miami Ministerial Association. He is presently serving as a member of the board of directors of Teen Challenge of Florida, a drug and alcohol rehabilitation program for all races. This organization has established a home for men in Miami and one for women in Avon Park, Florida. He has been active with the Miami Rescue Mission and has assisted pastors of both Black and Spanish churches in securing finances with which to purchase or build churches. He is chairman of the committee working toward the construction of a major church for Spanish people in Little Havana (Dade County, Florida). This committee appointment is from the National Home Missions Board, General Council, Assemblies of God,

Springfield, Missouri headquarters. Both American and Spanish ministers are involved. He is a member of the board of directors of Good Samaritans, Inc., a newly formed nonprofit corporation. Its stated purpose is to furnish financial assistance and supplements to the income of persons and/or families whose primary source of income has been reduced as a result of a catastrophic terminal illness and/or permanent disability.

33. John Alessi will be sales manager of the proposed television station and will serve as Christian's secretary/treasurer. Reverend Alessi proposes to be employed full time at the station (40 hours per week) and described his work as assisting in the responsibilities of day-to-day decisions, supervision and direction of the operation of the station. In 1963 Reverend Alessi founded the "Grace Church of Kendall," where he is presently senior pastor (Christian Ex. 8, p. 3). In addition to his activities as senior pastor, Reverend Alessi is president of Givani Developers, Inc., a Florida corporation apparently involved in real estate and construction (*id.*). His present civic activities include serving as vice president of New Horizon's Ministries, a nonprofit organization dealing with children. He is also a member of the Greater Miami Fellowship of Churches, the Miami Ministerial Association and the National Association of Evangelicals. There is no evidence that Reverend Alessi will discontinue his involvement in these employment and other activities should Christian receive a grant in this proceeding. He is a resident of Miami.

34. Selwyn Scott, a resident of Opa-Locka, Florida,[1] is proposed to be the full-time station manager should Christian's application be granted. In that position he will be responsible for day-to-day decisions, supervision and direction of the operation of the station under the supervision of the general manager. Scott is currently the pastor of the Revival Tabernacle Church Assembly of God in Miami, Florida. This church is located in Miami and ministers primarily to black people of varied socio-economical backgrounds. As pastor he is involved in all areas of people's lives from marital counseling to court appearances. He also holds a license to preach with Peninsular Florida District of the Assemblies of God. In 1979 he obtained a Florida real estate license and is a member of the Hollywood and Miami board of realtors.

35. Rose Pagan, a resident of Miami, Florida, is proposed to be the full-time program director and coordinator of religious affairs at the station. She will be responsible for day-to-day decisions and for the supervision and direction of her department under the general manager. Ms. Pagan has been a resident of Miami since 1979. She is currently employed as a sales person for a surgical supply company.

36. Palmira Lozada, a resident of Miami, Florida, is proposed to

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[1] Opa-Locka is in the immediate Hollywood area.

be the full-time director of community and minority affairs and news director of the station. She will be responsible for the supervision and proper presentation of programming involving the needs of the community. She moved to Miami in 1970 and became a school teacher in the Dade County school system. She later became involved in the field of real estate. She is currently employed by Eastern Airlines as a part-time control tower agent. Her status with Eastern is such that she can control her time and be able to put her time and effort toward the advancement of her duties for Christian. She has been for the past 12 years an active member of the Grace Church of Kendall, where she served as the secretary/treasurer for 11 years.

37. Both Ms. Lozada and Ms. Pagan are Hispanics.

Comparative Analysis

38. Golden East proposes no participation by its ownership in the day-to-day management of the station and most of its principals have ownership interests in numerous broadcast facilities. None of the other applicants and none of their principals hold any interests in existing media of communications. Family's full-time integration, in the persons of Eden, Jr. and Vadillo, amounts to 8.85%, with substantial part-time participation being provided by Eden, Sr., a 14.28% owner. On the other hand, Whitco and Christian propose full-time integration in station affairs by all of their principals. Clearly, then, the outcome of this case depends on which of these two applicants is to be preferred under the integration criterion.[2]

39. *Whitco*. Whitco is owned by two black males, Coates and Whitehead, each of whom holds 50% of its stock. Coates is president of the corporation and proposes to work full time as general manager of the proposed station. Whitehead is vice president and proposes to work full time as the station's sales manager. Neither man has broadcast experience and neither resides in the Hollywood area, although both intend to move there if their application is granted.

40. Their integration proposal has been challenged by the other applicants, largely on the ground that the existing business obligations of Coates and Whitehead (see paras. 6, 8, *supra*) would preclude them from fulfilling their commitments to the station. These contentions have been carefully considered, but on the basis of the evidence of record they must be rejected.

41. While Coates currently works 40–50 hours per week, he has testified that he would no longer serve as a consultant to Central National Bank in Chicago if the Hollywood application is granted (Tr. 86). Coates also explained why his involvement with Coates

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[2] In reaching this judgment, note has been taken of Family's local residence, broadcast experience, civic participation and the fact that its owners are members of an ethnic minority. These attributes enhance its integration but come nowhere near compensating for the vast quantitative difference between its proposal and those of Whitco and Christian.

Construction and Development, Inc., of which he is the 51% owner, will not interfere with his proposed station activities. While Coates stated that "at this point" he does not presently intend to divest himself of Coates Construction (Tr. 47), he made it clear that the reason he could and would continue this association is that it would not interfere with his responsibilities at the station. Coates testified that he has no obligation to undertake any particular number of projects on behalf of Coates Construction or to work any particular number of hours for the construction company (Tr. 86), which is primarily an investment entity (Tr. 70–71) with no employees (Tr. 54). Much of the time he presently devotes to the company involves researching potential investments for the future, an activity he does not plan to continue once the Hollywood station becomes operational because the station itself would be his major investment (Tr. 70). As stated earlier (para. 6, *supra*), Coates testified that his commitment to Coates Construction would take no more than 12–15 hours per week after grant of Whitco's application.

42. With respect to the Louisville project, the only major project with which Coates Construction is currently involved, Coates' primary area of participation is in the development phase (Tr. 80, 85), which will be "long completed" by the time the station begins operation (Tr. 80). He also stated that based upon his prior experience, he is confident that he could do whatever else might be needed for Coates Construction over the telephone (Tr. 79–80). The leasing and ultimate management of the project would be the responsibility of Coates Construction's local Louisville associates (Tr. 85).

43. In addition to explaining why his existing responsibilities would not get in the way of his ability to effectuate his commitment to the station, Coates explicitly testified that in the event of a conflict "[t]he Hollywood station would take absolute priority" over all of his other matters (Tr. 90).

44. It is also asserted that Whitehead's west coast real estate investments make his proposed integration incapable of effectuation because he has not made specific plans to retain other individuals to manage his properties in the event the application is granted. However, Whitehead testified that he would contract out much of his management responsibilities if Whitco's application is granted and that he would thereby limit the time commitment to his investments to 15 hours per week. He has explored the cost effectiveness of contracting out oversight responsibilities and intends to contract out the units he personally manages to a property management firm in the event of a grant (Tr. 140–141). He also explained that even the 15 hours per week he would devote to his investments would not interfere with his station responsibilities because the three-hour time differential between his intended residence in Hollywood, Florida and California, where his investments are located, would

permit him to do much of his real estate related work in the evenings. Finally, Whitehead testified that his commitment to the Hollywood station would take priority over his other investments to the point that he would "think in terms of divesting [himself] of those other interests" if such interests conflicted with his duties at the station (Tr. 146).

45. In short, both Coates and Whitehead have shown that they can accommodate those portions of their present activities which they will continue with their full-time integration into the station's operations, and both have also testified that the station would be their most important priority. Thus, there is an entirely reasonable likelihood that they will be able to effectuate their integration proposals. See *Central Texas Broadcasting Co., Ltd.*, 90 F.C.C. 2d 583, 586 (Rev. Bd. 1982).

46. *Christian*. Christian is a nonstock corporation with five directors. Reverend Arthur Shell is the president and Reverend John Alessi is secretary-treasurer. Both are directors, as are Selwyn Scott, Rose Pagan and Palmira Lozada. All propose to work full time at the station, Shell as general manager, Alessi as sales manager, Scott as station manager, Pagan as program director and Lozada as director of news and community affairs. Scott is black and Pagan and Lozada Hispanic. All reside within the station's service area but none in Hollywood, the community of license. Shell has appeared frequently on radio and television broadcasts and his former church once sponsored daily radio programs.

47. The credibility of Christian's integration proposal has been attacked on several grounds: that the board of directors is apt to be impermanent; that Reverend Shell's church is actually the "owner" of the applicant; and that Christian has failed to show how the directors can devote full time to the station in view of their other activities.

48. The first argument rests on speculation. Reverend Shell testified that there was always a possibility that the board might be expanded or its membership altered (Tr. 239, 262, 267–268, 271); but there is nothing in the record demonstrating that changes are presently contemplated or would be likely to occur in the near future.

49. The claim that Trinity Church would be the real owner of the station is also rejected. The church has provided substantial financial support for the applicant, and its pastor, Reverend Shell, was the moving force in the formation of the applicant (Tr. 219–221, 223–226, 303–305). As president of the corporation and general manager of the station, he is likely to remain an influential figure in the organization. However, his testimony is to the effect that while the church is supportive of the endeavor, it is understood by all that the church

would have no ownership interest (Tr. 262, 275, 281). There is nothing in the record that would contradict this testimony.[3]

50. The contention that Christian has failed to demonstrate that its integration proposal can be effectuated is more troublesome. "It is well settled that for an applicant to receive credit for the station participation of principals with other time consuming interests, the applicant must demonstrate a reasonable likelihood that the proposals would be fully effectuated." *Central Texas Broadcasting Co., Ltd.*, *supra*. The above language and the cases cited by the Board in its decision[4] make it clear that this burden is upon the applicant.

51. As previously stated, all of Christian's directors propose to work full time at the station. The record shows that Reverends Shell, Alessi and Scott are pastors of church congregations in the Miami area. They are also active in numerous religious and social service organizations, and Reverends Alessi and Scott are involved in real estate and construction activities as well (paras. 31–34, *supra*). The applicant must therefore provide "some indication of how [these] other . . . interests will be eliminated, or curtailed"[5] so as to permit these principals to fulfill their commitments to the proposed station. The record is silent on this point. Reverend Shell stated that he would not be giving up his pastoral duties (Tr. 263), and there is no evidence that he or the others propose to curtail any of their current activities. There is also no evidence as to the amount of time tye presently devote to the interests and activities described in their testimony, but it would appear that they are living full and active lives. How they would arrange their affairs in order to devote full time to the proposed station is a matter that the applicant simply does not address on this record. In sum, the showing called for in *Central Texas*, *supra*, has not been made.[6]

52. Christian contends that because these individuals have submitted sworn testimony that they will work full time and since the other applicants chose not to cross-examine them on the matter, their testimony must be accepted. However, there is an inherent conflict in Christian's direct case, one that the applicant must

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[3] Indeed, in light of a recent Review Board decision (*Las Misiones De Bejar Television Co.*, 93 F.C.C. 2d 191, FCC 83R-10, released February 11, 1983), it would appear that the absence of a specific issue on the question of ownership precludes consideration of this matter now.

[4] *Blancett Broadcasting Co.*, 17 F.C.C. 2d 227 (Rev. Bd. 1969); *Lewis Broadcasting Corp.*, 11 F.C.C. 2d 889 (Rev. Bd. 1968).

[5] *Blancett Broadcasting Co.*, *supra*, at 230.

[6] In contrast to the absence of record evidence in this case, the principal in *Central Texas* "testified on the number of hours he would devote to his outside business interests, i.e., 5 per week; he allocated an additional 10 to 20 hours to his work week to ensure that he can meet his commitment to the broadcast station and still engage in his other interests; he presented evidence on the number of hours previously devoted to these activities; and he represented that he will terminate his positions in those outside entities should the time spent on these activities detract from his full-time duties at the broadcast station." 90 F.C.C. 2d at 586.

resolve if the testimony is to be credited. Christian's principals are described as being substantially engaged in pastoral activities and other worthy endeavors and, at the same time and without explanation, it is represented that they will devote full time to the proposed station. In the circumstances, Christian's opponents had the option to cross-examine or to let the matter rest and assert the point on the basis of the evidence already submitted.[7] In view of the record evidence regarding the proposed integration of Reverends Shell, Alessi and Scott, the following judgment reached by the Review Board in an earlier case seems appropriate here:

> [I]n view of the present . . . activities of the three . . . principals . . . and the absence of any indication these activities could or would be curtailed, it would have to be concluded that a serious doubt exists as to the amount of time which [the three principals] could effectively devote to the day-to-day operation of the station, regardless of their sincere intentions. *Lorenzo W. Milan and Jeremy D. Lansman*, 6 F.C.C. 2d 198, 204 (Rev. Bd. 1966), *aff'd sub nom. Christian Fundamental Church* v. *FCC*, 12 P&F RR 2d 2116 (D. C. Cir. 1968).

53. The presiding officer has less hesitancy in crediting the integration proposals of Lozada and Pagan. The former has addressed the problem in her testimony, which indicates that her present part-time employment would not interfere with her work at the proposed station. Pagan's testimony is less clear, but the demands on her time (para. 35, *supra*) seem less extensive than is the case with Shell, Alessi and Scott, and the credibility of her proposal seems for this reason less suspect.

54. *Ultimate Findings*. Whitco's integration proposal is preferred. Its two stockholders will work full time at the station, occupying important managerial positions, Coates in the key post of general manager and Whitehead as sales manager. Both men are presently self-employed and, unlike Christian, have explained how their current activities will be curtailed or delegated in a fashion that would permit them to fulfill their obligations to the station. From a qualitative standpoint, the integration proposal is enhanced by their proposed local residence and, more importantly, by the fact that both stockholders are black, thereby bringing to the area a broadcast facility that is wholly minority owned.

55. Christian also proposes full-time participation by all of its principals in station affairs. Its proposal suffers in comparison with Whitco's in that no evidence was introduced demonstrating how three of its directors will reconcile their numerous current activities with a full-time (i.e., 40 hours per week) commitment to work at the

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[7] Christian also requests that official notice be taken of certain of its answers to interrogatories relating to this matter. It is well settled that answers to interrogatories are not a proper subject of judicial or official notice. 8 Wright, Federal Practice and Procedure, §2180 at 572; 4A Moores Federal Practice, p. 33-178; *Bracey* v. *Grenoble*, 494 F.2d 566, 570, n. 7 (3d Cir. 1974). To be considered such answers must be introduced into evidence at the trial. This was not done.

proposed station. Though the presiding officer has little doubt as to the sincerity with which the proposal is advanced, the record evidence simply provides less assurance than in the case of Whitco that its planned integration is capable of being effectuated. These individuals will not therefore be credited with full-time participation; their proposal will not be entirely discounted, however, but will be accepted as indicating considerable part-time involvement in the station.[8] Thus, with the full-time participation of the other two directors, Christian's quantitative integration amounts to 40% full-time participation and 60% substantial part time. Qualitatively, its showing is strong: all of its principals are area residents; at least three of them have been involved in laudable civic activities; and three, Scott, Pagan and Lozada, are members of ethnic minorities, the latter two being female as well.[9]

56. In sum, Whitco has been preferred because it has provided greater assurance that its proposed 100% full-time integration can be realized and because it is entirely minority owned. The former consideration establishes a significant margin of superiority for its quantitative integration; and the latter, together with local ownership, is at least sufficient to offset the enhancing elements of Christian's qualitative integration.[10] For the reasons stated at the beginning of this discussion (para. 38, *supra*), Family and Golden East must be rated far behind the other two applicants under the comparative issue.

Conclusions

57. It has been found that Whitco, Family and Christian, having no current ownership interests, are superior to Golden East in terms of media diversification; and as to integration of ownership with management, the only other comparative criterion relevant to this proceeding, Whitco is to be preferred. It is therefore concluded that the public interest, convenience and necessity would be best served by a grant of the Whitco application

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Whitco Broadcasters, Inc. for a permit to construct a new commercial television station on Channel 69, Hollywood, Florida IS GRANTED and the applications of Family

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[8] See *Lewis Broadcasting Corp., supra*, at 892–893.

[9] Under the heading of broadcast experience, note is also taken of Reverend Shell's frequent appearances over radio and television.

[10] See *Waters Broadcasting Corporation*, 91 F.C.C. 2d 1260 (1982); 52 P&F RR 2d 1063, 1068 (minority ownership given "full application and significant weight" in comparative cases).

Television 69, Inc., Golden East Broadcasters, Inc. and Christian Media of Florida, Inc. for the same facility ARE DENIED.[11]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

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[11] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Network Program Procurement Practices
Network Regulation
Syndication, Network

In this *Tentative Decision and Request for Further Comment* (BC Docket 82-345), the Commission reviewed its network television financial interest and syndication rules (47 C.F.R. §73.658(j)). The Commission concluded that the financial interest rule could be eliminated without adverse consequence to the public but that a modified version of the syndication rule should be retained.

-Amendment of Part 47
BC Docket No. 82-345

FCC 83-377

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of 47 CFR §73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules.	BC Docket No. 82-345

TENTATIVE DECISION AND REQUEST FOR FURTHER COMMENTS

(Adopted: August 4, 1983; Released: August 12, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

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I. *INTRODUCTION AND BACKGROUND*

Introduction

1. In this proceeding, through our *Notice of Proposed Rule Making in BC Docket 82–345*, 47 Fed. Reg. 32959 (1982), we sought comment on a proposal to repeal the network television financial interest and syndication rules. The rules, 47 CFR §73.658(j), regulate the rights the national television broadcast networks may acquire or retain in programming used for network distribution.

2. A brief description of the process of network program development will help place these rules and this proceeding in perspective. The prime time entertainment series that are aired on the networks are generally produced by the major film studios, major independent producers or minor independent producers. The networks serve as producers of a small number of their own programs, but their production activity is limited by the respective consent decrees that each has entered into with the Department of Justice.

3. The process of developing an entertainment series varies among the networks, although there are some common elements. In general, program ideas come from network development departments or producers. A producer can either present an idea directly to a network or to the network through an agent or major studio. A program passes through four stages of development: 1) the treatment; 2) a pilot script; 3) a pilot; and 4) series production. The network development departments finance the first three stages and may terminate the process at any point. The financial terms negotiated between networks and producers at the developmental stages vary greatly, but may include fees, delivery dates, options and possibly the license fee if the program should become a series. Since

pilots are expensive, relatively few are made in proportion to the number of treatments and scripts ordered by the networks, and only a fraction of the pilots that are made become series. For example, CBS had pilots made for 32 shows out of the 155 scripts it had ordered for the 1982–83 TV season. From these 32 pilots, 13 new prime time series were created.

4. The producer of a TV series is paid a license fee by the network for each episode produced. The license fee entitles the network to exclusive rights to air the program for a period of time. Typical license fees are about $300,000 for a half hour show and approximately $600,000 for an hour series. License fees can be renegotiated during the run of a series.

5. Successful network programs have value beyond their network run. They can be sold to individual stations through the syndication market. Syndicators may be studios, multiple station groups, advertisers or companies set up specifically to act as syndicators. Under individual contract terms, off-network syndication may begin following the expiration of the licensing network's exclusivity protection for each episode. The most important characteristic common to all off-network syndicated programs is that they have achieved successful network runs in prime time. For a program to be syndicatable, it must have run long enough on the network to have approximately 80–100 episodes. The large number of episodes is required because the off-network syndicated series is usually broadcast daily, in the same time period, a practice known as stripping.

6. The rights to syndicate a program are often negotiated early in the production process. An established producer may even be able to obtain a cash advance from a syndicator based on prospective syndication of a series. The negotiations between producers and syndicators focus on the basic arrangements for dividing syndication revenues, the duration of the syndication rights, the territory where the program may be sold, and any cash advances. A syndicator operates by contacting stations individually and, if enough stations are willing to buy a particular program, then the off-network show feasibly can go into syndication. The price a station pays for a syndicated show is largely dependent on the station's market size. In recent years, local stations in New York and Los Angeles have paid as much as $90,000 per episode for a syndicated program. Typically, syndicators keep 30% to 40% of the syndication revenues as their fee. Out of this, they pay their operating expenses, which normally include only the costs of distributing the program and the residuals fees that must be paid to actors.

7. The financial interest and syndication rules place several constraints on how the networks may behave in the process described above. The *financial interest* rule provides that no network shall:

> . . . acquire any financial or proprietary right or interest in the exhibition,

> distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network . . . .

The *syndication rule* provides that no network shall:

> . . . sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as "syndication" within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States; or reserve any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution . . . .

Under the rules, a network can only purchase the rights from a producer to air a program over the network's distribution system. In the absence of the rules, the networks could negotiate for a financial interest and participation in syndication rights. For programs wholly produced by the networks, the rule requires that, if the program is to be syndicated, the networks must sell their syndication rights to others.

8. The *Notice* in this proceeding questioned whether these rules could reasonably be expected to promote their intended goals of television program and outlet diversity. Comment was also sought on whether the rules were necessary in today's video marketplace given the emergence of various competitive electronic media.

9. In response to the *Notice*, more than 120 formal written comments were received, many containing detailed economic studies on the functioning of the rules and the markets affected by them. The preparation of these comments was facilitated by unusually long comment and reply comment periods. In addition to the written comments, oral proceedings were held at which 40 parties argued their positions to the Commission.

Summary of Tentative Decision and Request for Further Comments

10. Our own review of the rules and the responses to the *Notice* in this proceeding have persuaded us that the rules are in need of very substantial revision. While the continuation of some measure of regulatory control relating to the licensing and use of off-network programming does appear to be appropriate, it does not appear that the financial interest rule is either necessary or desirable. A detailed review of the analysis leading to these conclusions is set forth in the *Discussion* and *Conclusion* sections of this document. However, at this point we will provide a brief overview of the changes we are undertaking.

11. First, it does not appear that it is necessary to control the ability of the networks to bargain for and acquire passive "financial

interests" in programs purchased or produced for network exhibition.

12. Second, we will continue to prohibit network participation in the domestic syndication of prime time entertainment program series. Thus, the scope of the syndication prohibition would be narrowed to include only participation in *domestic* syndication markets and to cover only *prime time series* programs (as defined below) rather than all types of programming.

13. Third, programming in which a network retained any continuing off-network "financial interest," would in every case have to be made available for syndicated sale within six months after the end of the network exhibition "run." Moreover, for series that run for more than five years, the network would have to make the series available for syndication no later than the end of the fifth year of the network exhibition. We also believe that it may be appropriate to "sunset" the syndication restrictions that are maintained, in 1990, unless the Commission makes an affirmative public interest finding that they should continue in effect.

14. In short, our tentative decision is to eliminate the financial interest rule while narrowing the syndication rule to ensure against possible network incentives to restrict the availability of the most critical off-network programming for independent television station use. While financial and syndication rights are not unrelated, it is not uncommon in the entertainment world to separate passive profit sharing interests from interests that involve active management control and we see no reason why a similar type of separation cannot be used effectively to further our objectives here. It appears from the record that the other restraints of the rules were either initially misguided or are no longer necessary in light of evolving market conditions and we intend to eliminate them. However, we will herein seek additional comments to fine tune the syndication prohibition of the rules, to ensure that it provides appropriate protections but does not unnecessarily interfere with the conduct of normal negotiations between networks and producers. While the basic elements of these alternative forms of regulation have been set forth as options in a number of the comments received, and thus have already been the subject of some discussion, we believe replies focused more specifically on the attached rules would be useful.

Historical Background of the Rules

15. In 1959 the Commission instituted an investigatory proceeding designed to obtain information relating "to the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of

programs for television exhibition . . . ." *Order for Investigatory Proceeding, Docket 12782*, 24 Fed. Reg. 1605.[1] Based on the results of this inquiry, the Commission issued a *Notice of Proposed Rule Making* in 1965 which proposed adoption of rules designed to correct a perceived competitive imbalance in the program production and distribution industries. *Competition and Responsibility in Network Television Broadcasting*, 45 F.C.C. 2146. In that *Notice* the Commission stated:

> The information and data before the Commission appear to establish that network corporations, with the acquiesence of their affiliates, have adopted and pursued practices in television program procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television, but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs. *Id.* at 2147.

The original purposes of the proposed rules were to provide an opportunity for the entry of more competitive elements into the market for television programs for network exhibition and to encourage the growth of alternate sources of television programs for both network and non-network exhibition. *Id.*

16. The Commission stated that the undue concentration of control in the three networks over television programs was inherently undesirable because diversification of economic interests and power in this area was a cardinal principle of the public interest standard found in the Communications Act. Concentration also decreased the competitive opportunity for independent program producers and the syndication industry, the success of which was considered vital to the further development of the television service, especially UHF stations. Finally, the Commission found the networks' acquisition of financial interests and syndication rights a conflict of interest. The Commission reasoned that networks would be guided in their programming decisions more by their attainment of such interests in the programming than their objective judgments as to whether the programs were likely to serve the public interest. *Id.* at 2157. The Commission stated that the presence of networks as domestic syndicators was inherently undesirable because they were in the position of selling programs to independent stations that directly competed with the networks' affiliates.

17. Based on these concerns, the Commission adopted the

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[1] A detailed review of the Commission's continuing interest in networking can be found in the following reports issued by the Network Inquiry Special Staff in Docket 21049: *The Historical Evolution of the Commercial Network Broadcast System Leading to Adoption of the Prime Time Access Rule, the Financial Interest Rule, and the Syndication Rule*, Dockets 12782 and 19622 (October 1979); and, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (October 1980) (hereafter, Network Inquiry Staff Report).

financial interest and syndication rules in 1970. *Report and Order in Docket 12782*, 23 FCC 2d 382 (1970).[2] According to the Commission's statements in the *Order* affirming the financial interest and syndication rules on reconsideration, the regulations had two principal purposes: to lessen the bargaining power of the networks, and to remove the possibility that acquisition of subsidiary financial and syndication rights would become a prerequisite to network exhibition. 25 F.C.C.2d 318, 331 (1970). The Commission expressed its opinion that the rules would greatly enhance independent producers' abilities to operate in the network television program market and would also remove the possibility of networks taking advantage of their relationships with affiliates in their syndication dealings. *Id.* The Commission concluded that the rules would tend to improve the bargaining positions of producers with networks so as to bring about a desirable degree of expansion of stable and viable program sources. *Id.* at 332. On appeal the rules were sustained by the U.S. Court of Appeals for the Second Circuit in *Mt. Mansfield Television, Inc. v. F.C.C.*, 442 F.2d 470 (2nd Cir. 1971)

18. In 1972 the United States Department of Justice filed antitrust suits against the three networks, asserting that:[3]

> (a) ownership and control of television entertainment programs broadcast during prime time hours were concentrated among the three networks;
>
> (b) competition in the production, distribution, and sale of television entertainment programs, including feature films, had been unreasonably restrained;
>
> (c) competition in the sale of television entertainment programs to the three networks by outside suppliers had been unreasonably restrained; and,
>
> (d) the viewing public had been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

NBC entered into a consent decree with the Department of Justice in 1978 and ABC and CBS entered into similar consent decrees in 1980.[4]

19. These consent decrees, which are currently in effect, impose restraints on network practices that both include and surpass the restrictions imposed by the Commission's syndication and financial interest rules. For example, while both the rules and the consent decrees permit foreign syndication of programs wholly produced by a

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[2] At the same time, the Commission adopted the prime time access rule, 47 C.F.R. §73.658 (k), which limits the amount of network programming that can be broadcast during prime time in the top 50 markets.

[3] The suits were dismissed on procedural grounds but were refiled in 1974.

[4] *United States v. National Broadcasting Co.*, 449 F.Supp. 1127 (C.D. Cal. 1978), *aff'd mem.* No. 77-3381 (9th Cir. April 12, 1978), *cert. denied sub nom. CBS v. U.S. District Court for Central Division of Calif.*, 48 U.S.L.W. 3186 (1979); *United States v. CBS, Inc.*, Civ. No. 74-3599-RJK (C.D. Cal. July 31, 1980), *reprinted in* 45 Fed. Reg. 34465, *United States v. ABC, Inc.*, Civil No. 74-3600 (C.D. Cal.), *reprinted in* 45 Fed. Reg. 58441.

network, the consent decrees impose a requirement not contained in the Commission's rule for foreign syndication of foreign-produced programs: that the foreign syndication rights must be obtained in negotiations separate from those for domestic syndication licensing.[5] Similarly, whereas both the rules and consent decrees permit acquisition of non-broadcast rights, the consent decrees permit acquisition of such rights only when negotiated separately from those for a broadcast license.[6]

20. In 1977, the Commission instituted its latest network inquiry. *Commercial Television Network Practices*, 62 F.C.C. 2d 548 (*Notice of Inquiry* 1977). The inquiry was intended to focus specifically on the relationships between networks and affiliate stations to consider the extent to which licensee programming discretion was being subverted by the networks. A concommitant issue under consideration was whether networks had maintained anti-competitive policies which had unduly restricted the development of programming sources. 62 F.C.C. 2d at 548–49. In a *Further Notice of Inquiry* adopted the next year, the Commission summarized its concerns in the following manner:

> First, in judging the performance of the industry, we are primarily concerned with "protecting the interest of the public in receiving the best possible programming service . . . ." The economic well-being of networks, stations or program suppliers is, thus, important only to the extent that it affects their ability to serve the public. Second, while a wide variety of specific practices is identified for analysis, we are centrally concerned about whether these practices enable the existing major commercial networks, in their relations with affiliates and program suppliers, to limit the opportunities for others to compete for station broadcast time and thereby exert an anti-competitive influence upon the industry's behavior. *Further Notice of Inquiry*, 69 F.C.C. 2d 1524, 1528 (1978).

The Commission also expanded the scope of the inquiry to include an examination of the structure of the television industry and the extent to which structural remedies might be applied to ease the pressures created by the three network system of program procurement and distribution.

21. After extensive research and analysis, the Network Inquiry Special Staff made several findings which are at odds with many of the assumptions used by the Commission to justify the financial interest and syndication rules. The staff disagreed with the Commission's conclusions regarding concentration in the program supply market and argued that the market for first-run and off-network

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[5] Although the language of the syndication rule is somewhat vague, the Commission has subsequently indicated that the rule was not intended to cover the acquisition of foreign-produced programs for foreign distribution. *Memorandum Opinion and Order*, 26 F.C.C. 2d 28, 31 n.3 (1970).

[6] The Commission explicity found that non-broadcast interests could be acquired irrespective of whether acquired in separate negotiations. Memorandum Opinion and Order, 87 F.C.C. 2d 30, 35 (1981), *petition for review denied sub nom.*, *Viacom Int'l v. F.C.C.*, 672 F.2d 1034 (2d Cir. 1982]).

syndicated programming is now and was competitively structured at the time the rules were adopted in 1970. The staff also argued that the financial interest and syndication rules might well be disrupting an efficient risk-sharing arrangement between the networks and their program suppliers. Based on its analysis of the network/supplier relationship, the staff concluded that the licensing of various program property rights such financial interests and syndication rights provides a method for producers to share the risk of unsuccessful series with the networks. Networks provided higher program development and production fees to producers when the networks had a share in after-market profits. With the rules in place, network fees to producers were reduced, thus forcing the producer to shoulder a greater financial risk initially. The staff observed that this might in fact lead to more concentration in the program production industry as small independent producers unable to absorb the greater risks are forced to merge with larger, more financially sound, producers.[7]

22. The Commission has never expressly endorsed or rejected the conclusions or recommendations of the Network Inquiry Special Staff. However, having noted the staff's conclusions that the rules were not necessary when adopted and could not possibly deter the practices they were designed to reach, we instituted the present rule making proceeding in June 1982, in order to evaluate the special staff's conclusions. Of equal import, we asked whether changes in market conditions over the past decade may have obviated the need for the financial interest and syndication rules. In this regard, we noted:

> Our professed goals of protecting licensees from the exercise of anticompetitive network practices and fostering a healthy independent production industry were established during a period when the gateway to presentation of television programming virtually required use of over-the-air facilities. The Commission became concerned when the acquisition of programming became centralized in the hands of only the three major television networks. However, the market for television programming has undergone significant change since adoption of the syndication and financial interest rule. Over the past few years, the rate of technological change in television program service has increased in a fashion which could not have been anticipated by us a decade ago. In addition the pace appears to be increasing with no peak in sight. Therefore, our concern over the abilities of the networks to act as monopsonists in the purchase of television programming may no longer be justified. *Notice* at para. 32.

23. Moreover, the *Notice* asked whether the rules are appropriate mechanisms to accomplish their stated goals. We solicited comments on whether producers, who are themselves powerful actors in today's program marketplace are in need of protection from the exercise of undue influence by the networks. More fundamental-

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[7] For a detailed report of the special staff's findings, see "An Analysis of Television Program Production, Acquisition and Distribution," at page 293 of Volume II of Network Inquiry Staff Report.

ly, we questioned whether protection of program producers from undue influence is an appropriate subject for Commission concern. In situations where the program producer is not so large or influential, we asked whether the rules created any reasonable balance in the bargaining positions of the parties. In more general terms, we also asked parties to provide their insights into the network/program producer relationship and how the rules affect that relationship. Next, we noted that, because other media were not restricted by the financial interest and syndication rules in their dealings with producers, those entities may have a competitive advantage over the networks in their dealings with program producers. We also requested that commenters address the issue of how deletion of the rules might affect independent television stations, since networks acting as syndicators of off-network programming would be in the position of selling that programming to their direct competitors. Finally, we sought comments on the relationship between the financial interest and syndication rules and the network consent decrees.

II. *COMMENT SUMMARY*

24. This section contains a summary of the major facts and arguments contained in the comments. It is not intended to set forth every idea or notion conveyed in the comments, although every formal and informal comment was considered fully. The comment summary is divided into seven segments, each dealing with a separate aspect of the rules: (1) The effect of the rules on the production industry; (2) The effect of the rules on television broadcast stations; (3) Effects on advertising costs; (4) The effect of the rules on the networks; (5) The effect on new television networks; (6) Alternative regulatory proposals; and (7) Additional issues. Within each grouping, the arguments favoring repeal are presented first.

25. Before beginning this summary, it may be helpful to generally describe the traditional broadcast video industry in terms of its program sources. The industry is divided into two broad classes of stations: network affiliates and independents. Network affiliates are those stations that have a contractual relationship with one of the three national television networks (ABC, NBC and CBS) and serve as the local distributors of the programming obtained by the networks from their original producers. Currently, network provided programming makes up about 70% of the average affiliate's broadcast day, and virtually 100% of prime time (8–11 p.m. ET, Monday - Saturday and 7–11 p.m. ET, Sunday). While stations may preempt the network programming in favor of their own, this is rarely done. For example, the average ABC affiliate clears close to 99% of the network's shows, regardless of day-part. During those day-parts when the networks are not feeding programming to their affiliates,

typically 71;2 hours a day, the stations must either originate their own shows or purchase programs directly from program suppliers (syndicators).

26. Independent television stations broadcast programming that is either locally originated or obtained directly from program suppliers. The vast majority of independents today (116 out of 179) air general programming consisting of news, sports, movies, programs previously shown on the networks (called off-network syndicated series), and first-run programming specifically created for the syndication market. Forty-two independent stations are "specialty stations" which broadcast foreign language or religious programming aimed at a small segment of the audience. Another 21 independents are subscription television (STV) operations, at least part of whose programming is only available via subscription.

27. Prime time entertainment series programming accounts for 23% of the network schedule, 50% of its advertising revenues and 30% of its profits. It is also the major source of off-network syndicated programming. Following the network run (generally two showings of each episode), these programs may become the product available for purchase by individual stations in the syndication market. The amount of this off-network programming used by independent stations varies. Estimates range from 22% of their programming time for Turner Broadcasting, 30-35% for Taft Broadcasting and 59% for Metromedia. Off-network syndicated series are the principal type of programming aired by independents during the 4-8 p.m. ET day-part, which is considered independents' peak time. During this time, the independent station is programming opposite news and non-network programming on network affiliated stations. According to one commenter, this time period may account for as much as 60% of an independent's revenues, although the average is approximately 50%.

Effects of the Rules on the Production Industry

28. *Arguments for Repeal*. Proponents of repeal argue that the rules were unnecessary to equalize the bargaining power of networks and producers. Although, the Commission believed that the networks had monopsony power, the Network Inquiry Special Staff (NISS) found that the program supply market was in fact competitive prior to the rules' adoption. However, CBS presents data indicating that before the rules were adopted, networks acquired financial interests and syndication rights on a fully competitive basis. An empirical study conducted by Robert Crandall concludes that payments for such rights were made in the form of higher license fees, and the payments approximated the full market value of the rights. The National Telecommuncations Information Agency (NTIA) asserts that there is not historical evidence (i.e., pre-1970) that the networks took advantage of their market position.

29. NBC and ABC state that even if networks had monopsony power when the rules were promulgated, the changed marketplace has rendered the rules obsolete. Studies are submitted by CBS showing that the share of the three networks in total program expenditures dropped from 74% to almost 54% in the past decade. NBC further states that the rules clearly decrease competition in the program supply market by making small producers dependent on major Hollywood studios, their competitors, for needed financing. CBS presents data indicating the number of producers supplying prime time entertainment programming to the networks has fallen from 60 to 41 between 1969 and 1981. Further, the CBS data show that the market share for the major suppliers has increased and caused the disappearance of many small producers. The National Black Media Coalition believes the rules have led to a dwindling number of program suppliers who dislike competition and exclude minority independent producers. The ABC affiliates association suggests that, to the extent competition and program diversity exist, the prime time access rule, and not the financial interest and syndication rules, is responsible.

30. The networks contend that the rules have no relation to bargaining power. Financial interests in programming and syndication rights are merely financial terms over which the parties must bargain. Program selection does not turn on the resolution of one particular financial term. Renegotiation becomes almost continuous after the first season's exhibition. Thus, suppliers are not bound to terms negotiated at the early development stages of production, and once a show becomes a hit, producers are in a much better bargaining position. Also, the networks insist that they make programming decisions on the basis of program quality and audience appeal rather than whether they have a financial interest in the program. ABC presents a study which determines that over the past decade network program costs have risen faster than network advertising revenues. This increase in cost cannot be explained by a corresponding increase in producer input costs. ABC states that an important characteristic of the monopsonist is the ability to control its cost—the ability to extract economic rents from its suppliers. The networks obviously have not been able to do this. Thus, program producers have substantial bargaining power.

31. The Department of Justice states that any market power the networks have derives from the market structure. Regulation of one element in the bargaining process will simply cause the networks to shift their focus to other parts of the bargaining process. The networks also allege that the rules make program supply less efficient. They argue that the sale of syndication rights by program producers is an efficient risk sharing arrangement. Prohibiting this risk sharing raises the cost of programming, reduces total invest-

ment in program production, and may reduce diversity by encouraging excessive production of "tried and true" program types.

32. CBS states that the rules force suppliers who wish to sell financial interests or syndication rights to operate in a market artifically narrowed by the exclusion of three major purchasers. This results in reduced efficiency, competition, and diversity in the supply of network programming. The networks argue that they are particularly well suited to bear risk for three reasons: they each finance a large number of programs; since they also schedule their programs, they can take account of inter-program externalities (audience spillover, etc.); and, they can promote programs efficiently over time by coordinating the network and off-network runs. Thus, the program rights are worth more to the networks than to other parties. The Department of Justice and NTIA agree and argue that repeal of the rule would shift the risks to more efficient risk-bearing entities, that is, the networks. Alfred Kahn asserts that ultimately the public is harmed if private markets are not free to work efficiently.

33. CBS argues that the networks must participate in decisions on program content. The networks' participation in program development is an inseparable part of the networks' role. Networks are participants in the creative process, not merely gatekeepers. NTIA agrees, stating that the networks already have ultimate or final control over the nature of the programs they purchase for broadcast. As a licensee and with a responsibility to its affiliates, each network properly oversees the content of each program.

34. *Arguments for Retention*. Opponents of repeal contend that this proceeding is premised on faulty analyses by the Network Inquiry Special Staff and a misunderstanding of the entire program production distribution exhibition market. The central argument of those who support retention of the financial interest and syndication rules centers on the proposition that the networks now possess and will maintain substantial market power in the foreseeable future. Taft Broadcasting reminds the Commission that the Department of Justice only three years ago finalized proceedings in which the networks were found to engage in anticompetitive activity. Taft finds no change in the marketplace since then that justifies the current proceeding. Similarly, the Association of Program Distributors (APD) states that there has been no demonstration that the networks or the public have suffered under the rules. APD contends that changing the rules on the basis of abstract economic theory such as that supplied by the NISS, rather than demonstrated injury, is unfair. Cox Communications agrees and states that the network inquiry staff's conclusions were based on a misreading of the FCC's objectives and a disregard of the factual record.

35. The Committee for Prudent Deregulation (CPD), a coalition of producers, syndicators, independent television stations, artists and

others, states that repeal of the rules would limit diversity of programming sources by weakening or eliminating television program producers. CPD supports the Commission's original determination that the networks used their oligopsonistic positions to extract valuable concessions from program producers including profit shares and syndication rights. The Caucus for Producers, Writers and Directors (The Caucus) indicates that prior to the rules the networks had a financial interest in 93% of all exhibited programs and syndication rights in all popular shows. CPD states that there are more independent producers now than before the rules, and, as a result, the program supply market is healthier and more competitive. Prior to the rules the networks paid producers enough to remain in business but it was not necessarily an amount sufficient to allow producers to remain fully independent. According to Embassy Communications and Tandem Productions, the rules have achieved success in making the production industry more vital and independent as well as competitive. The Motion Picture Association of America (MPAA) states that there would be no risk of concentration in the production industry if the rules were retained. MPAA contends that few barriers currently exist to entry in the production industry, but that there would be few incentives to enter the business if the networks took control.

36. The opponents of repeal state that the producer is most vulnerable at the program development stage of production where the networks' leverage is the greatest. According to The Caucus, networks consistently force producers to violate their contracts with the craft unions with respect to creative control over a program. Moreover, the license fee provided by the networks is almost never enough to cover the production cost of the program. MCA maintains that existing network payments do not reflect true value but are the lowest payment level at which producers will produce. For the most part, producers must realize any profits from a program through syndication sales which often occur several years after production.

37. If the rules are repealed, the commenters argue that the networks will use their monopsony power against producers. Supporters of the existing rules argue that the networks provide the sole market for first-run series, and the three networks act as one when purchasing programs. Thus, the networks can pay low prices and force producers to cede valuable rights as the *quid pro quo* of every network license. This will reduce the profitability of program production, and limit access to the business.

38. Several commenters admit there may be some economies due to more efficient risk sharing and the elimination of transactions costs, but suggest that those savings are likely to be relatively small. They not that no party has provided any empirical evidence whatsoever on the size of the presumed economies. The commenters also argue that advance financing by the network is not necessary. A

commitment by a network to exhibit a proposed show is a "bankable item" that is itself sufficient to allow a producer to obtain conventional financing. CPD states that the risk-sharing inefficiency created by the rule may not be significant where producers have other means of sharing the risks of production. CPD states that the major studios and large independent producers can engage in risk-pooling. For instance, the NISS Report points out that where the probability of financial loss is assumed to be 50 percent on a single program, it falls to approximately three percent if five statistically independent programs are pooled. Independent producers can pool risk through joint ventures. ICF Incorporated, in a report commissioned by CPD, states that the number of producers of prime time programs declined from the mid-1960's until 1974/75 and increased thereafter. Similarly, concentration measured either by Herfindahl indices or the leading firms' combined market shares generally increased until 1974/75 and declined thereafter. Thus, since there is no strong evidence that risk-aversion by program suppliers exists, it is doubtful that the rules have much effect on risk-sharing efficiency.

39. In response to arguments that the rules merely shift income among major producers on one hand and the three networks on the other, The Caucus insists that this is not a battle of corporate giants. Rather, repeal would have serious effects on small, independent producers and distributors, which, in turn, would adversely affect the public interest in diversity. According to the National Association of Independent Television Producers and Distributors (NAITPD), the rules do not effectuate merely a reallocation of rents. Instead, the major achievement of the rules has been the creation of a new class of producers and distributors who are the primary sources of first-run syndicated material and who represent the only competition to the major studios in off-network syndication programming and financing new productions. These new companies account for approximately one half of the top twenty prime time entertainment series, and, according to NAITPD, are dependent on the financial interest and syndication rules for survival. From the buyer's standpoint, the National Institute for Low Power Television sees significant differences between dealing with producers on the one hand and the networks on the other. In negotiating with producers, price is the major issue; with the networks, certain anticompetitive considerations are always present.

40. With respect to the rules' effects on the creative process, members of The Caucus aver that repeal would strengthen network influence. They contend that program quality decreases as network influence increases, and this record of interference will not improve if the networks get even more power. The role of the networks is to make a profit; the role of the producer is to make a profit plus deliver a message. Repeal of the rules will eliminate both roles for the independent producer. Lorimar contends that a producer's ability to

create diverse and original programming is largely a direct result of the financial interest and syndication rules. The National Association of Black Owned Broadcasters agrees and states that repeal would grant inordinate control to the networks and decrease any chance for the development of specific programs that appeal to minority audiences. CPD states that in the past the networks have engaged in imitative programming and scheduling, and that repeal will result in more common denominator shows with tried and true formulas. This, in turn, will force producers to turn to other media.

41. *Replies*. In reply comments, CBS reiterates its contention that the rules have diminished television program diversity. According to CBS, the rules have led to increased concentration in program supply and have discouraged the production of innovative, risky programming. NBC adds that the ban on network acquisition of profit shares does not promote more suppliers, more diversity, or more creativity. The network further contends that the issue of relative bargaining strength between the parties is irrelevant. The Department of Justice states that the rules do not promote competition or diversity in the program production market. The program production market is already competitive, and the networks themselves, as the three gatekeepers of network programming, determine the diversity of prime time programming.

42. The United Church of Christ, *et. al.* (UCC) contends that repeal of the rules based on pure speculation would be disruptive and contrary to the public interest. UCC states that the present competitive program production environment is largely attributable to the success of the rules. The Association of Program Distributors echoes this thought by stating that the rules succeeded in halting the networks' concentration of control of program content thereby retaining and enlarging program markets for new competitors. Paramount adds that the rules do not provide anticompetitive advantages to large production companies. There is substantial competition among suppliers of entertainment programs, and independent producers supply 50% of the prime time viewing hours. APD attests to the fact that the rules encourage program diversity by noting that the mere pendency of the present rulemaking is affecting financing for new product. Syndicators are reluctant to commit funds to new projects with the future of the rules in doubt. On the issue of bargaining power, Paramount states that the networks can and do require major creative and financial concessions. According to Paramount, no producer has the power to resist these demands, which appear in license agreements as non-negotiable, boilerplate provisions.

43. With respect to the risk-sharing issue, the Department of Justice states that the efficiency losses imposed by the rules are not large. DOJ contends that the major studios may in fact be more efficient risk bearers than the networks due to their ability to engage

in "hedging", that is, spreading their risks by placing programs on all three networks. DOJ also points to the fact that shows selected for a network run readily attract capital as further evidence that the rules cause little efficiency losses. Paramount adds that when major production companies join with independent producers, both parties do so willingly through fair bargaining. This would not be the case if the networks were allowed to take financial interests. APD concludes that the risk-sharing problem is the major cost cited to justify repeal, but that all small producers are eager to assume those risks without network involvement. Cox adds that even if the rules create certain inefficiencies, the benefits of the rules—diversity and a healthy independent television industry—justify their continued existence.

Effects of the Rules on Television Broadcast Stations

44. *Arguments for Repeal.* Proponents of repeal state that the rules decrease the number of potential syndicators and thereby limit competition in syndication. This, asserts NBC, is harmful not only to stations purchasing syndicated programming, but also to small suppliers lacking distribution arms and to the public. According to NBC, there never were any abuses which required networks to be barred from syndication, and there is no need to do so today because the market is competitively structured. CBS adds that before the rules were adopted the three broadcast networks obtained syndication rights in only a small percentage of the programs broadcast, and it is unlikely that they could again ever achieve that level.

45. In an appendix to the CBS comment, William J. Baumol states that the rules adversely affect television stations affiliated with the networks and firms that purchase advertising time in conjunction with the networks' television broadcasts. Making the networks less efficient suppliers of broadcast material weakens the position of the affiliates, and offers advertisers a less efficient medium. The ABC Affiliates Association expands this line of reasoning by stating that the rules discourage networks from producing creative, high-risk programming. This undermines programming quality and diverts network resources to the production of programming for less encumbered media services. The Association contends that the rules act as an incentive for the networks to bypass local broadcast affiliates and encourage the migration of high quality programming from free over-the-air television to pay distribution systems. Gateway Communications states that stations were treated more fairly by syndicators before the rules. According to Gateway, small stations are currently shut out by syndicators, who sell almost exclusively to large group operators.

46. Those supporting repeal state that there was no history of affiliate favoritism in the networks' conduct of the syndication business before the rules were in place. They argue that independent

stations are the best syndication customers, and that discriminating against independent stations therefore would be bad business judgment. Withholding product from the independent stations would provide slim, if any, benefits; only a fraction of the audience diverted from independent stations would tune to the networks. The networks contend warehousing syndicated programs would be an unsound business practice that might result in civil liability to other profit participants in a program. Also, many syndication contracts call for guaranteed profits; such agreements are clearly inconsistent with warehousing practices. Warehousing is only efficient if the revenues from withholding programs are greater than the syndication revenues, which is unlikely. In fact, NBC claims that buyers have many alternative sources of similar programming, and that the loss of revenues through warehousing would be enormous.

47. Alfred Kahn opines that the networks probably have some incentive to withhold programming from independent stations, or charge them more for it than they otherwise would, because they are in competition for audiences. But the three networks are not a single entity, and they compete intensely for programming. The networks did not gain dominant control over syndication rights before the rules went into effect, but they might attempt to secure control over syndication of the programs they purchase if the rules were removed, since the syndication market has grown in importance. According to Kahn, however, the following considerations argue against the expectation that the networks would achieve monopoly power in the offer of programs to independent stations: the networks' failure to acquire syndication rights from large producers; their small share of domestic off-network syndication rights previous to the rule; the availability of substitutes for off-network programs; the fact that exercise of monopoly power would depend upon either collusion or consciously parallel policies; the fact that the syndication market is very valuable and that the interests and abilities of the networks vary greatly; and the evidence that the networks did not tend to give programs to their affiliates rather than to others. Kahn states that it may be time to turn the surveillance of this industry's conduct over entirely to the jurisdiction of the antitrust laws.

48. The Department of Justice states that a network monopolist holding syndication rights might reduce the supply of off-network programs to broadcasters and thus raise broadcast license fees or advertising rates. Consumer harm would result from substitution of less desirable programming. Whether this potential abuse warrants regulatory restriction depends on the likelihood that the networks could coordinate their actions and whether a rule would reduce competitive problems without causing inefficiencies. DOJ states that the networks may be able to collude since the industry is highly concentrated, barriers to entry are high, and cheating would be easy

to detect. The data relied on in 1970 may not predict network behavior today, since the value of syndicated programs was smaller, the growth of independent stations may have changed the networks' incentives, and syndicated programming may not have constituted a separate market. New video distribution technology may not reduce the market power of the networks. The Department states that the rules cause efficiency losses and should be eliminated, but that the Commission should consider adopting a narrow rule designed to address the potential harm to the off-network syndication market if this can be done without reducing efficiency in program production and distribution. DOJ concludes that the antitrust laws should not be relied upon to ensure against anticompetitive network practices.

49. *Arguments for Retention*. Parties favoring retention of the financial interest and syndication rules aver that, because of the rules, the market for the purchase of off-network programs is competitive. Metromedia states that there can be no public interest justification for allowing the networks to gobble up the syndication/independent station sector of the television industry. It would be contrary to the public interest to take any action that would reduce the number of sellers in the off-network syndication market, particularly when the only remaining sellers would be three dominant networks with a history of conscious parallelism. Turner Broadcasting submits that if the rules are repealed, the networks will have the power to dominate the syndication business. They have bottleneck control of the initial years of a series' broadcast; they can rely on owned and operated stations (O&Os) as buyers of last resort; they can amortize program costs across a guaranteed audience; they have the power to raise their national advertising rates as necessary; and they can spread costs over their vast broadcast empire. Viacom International adds that if the rules were repealed, network O&O stations would purchase their syndicated programming from the network. Independent producers and syndicators would be severely disadvantaged if they were unable to syndicate their programs to the network O&Os.

50. The Committee for Prudent Deregulation asserts that repeal of the rules would be detrimental to independent television stations because it would place control of a vital source of their programming in the hands of their dominant competitors. Programming is the most important element in the success of any television station. Independent stations are the most significant source of competition to the major networks and their affiliates. The Association of Independent Television Stations (INTV) states that the growth of independent stations is due in part to access to recent off-network syndicated programs, and continued access to such programming is essential to permit further development. Metromedia presents figures showing that off-network programming comprises 51 to 78 percent of its stations' broadcast schedules.

51. INTV argues that the networks have a strong incentive to withhold programming that may attract audience to their competitors. If the Commission repeals the rules it will fortify the networks' supremacy over emerging services, and will retard the development of independent stations. The networks could favor their owned and affiliated outlets in a variety of undetectable ways, and they have more incentive to use their power today than in 1970. If the networks withheld or delayed syndication of the most popular network series, independent station schedules would be weakened and the quantity and quality of free program choices would be reduced. The independent stations would also lose their principal source of revenue and the financial ability to acquire high-quality first-run material. The prospects for the creation of a fourth network would disappear. The National Council of Churches/United Church of Christ posit that the rules have important non-economic objectives. They eliminate conflicts of interest in network scheduling and syndication sales to competitors. Repeal of the rules would result in less desirable program choices for the public, less credible competition for the networks, higher advertising prices, and higher consumer prices.

52. ICF Incorporated posits four scenarios in which the networks might maximize revenues and weaken independent stations, assuming that unshown but available programs restrain the prices of more popular ones. In the first model all off-network programs are controlled by a single firm, and the sole supplier could make unshown programs unavailable so they could ensure that they would no longer limit the prices charged for the more popular programs. Station program choices would not change but program prices would increase. In the second model, programs are supplied by a dominant firm and a competitive fringe. If the program that constrains prices is owned by one of the small suppliers, then the dominant firm might increase its profits by removing from syndication programming that would otherwise be shown. The program owned by a fringe would then replace the deleted program and another program would become the best unshown program. If there is a significant difference between the value of the two programs, then prices of all programs that are sold can be raised significantly. The dominant firm loses the revenue from the program it withdraws, but gains additional revenue on each program it continues to sell.

53. In the third model, the supplier is integrated into broadcasting and earns revenues from television advertising. Under some conditions, increases in the firm's advertising rates will increase the prices at which it can sell off-network programs. In the fourth model, the integrated supplier raises off-network program prices higher than would a non-integrated firm. Independent stations would be unable to earn a profit by showing the same set of programs, so they will offer programming that attracts fewer viewers, reduce broadcast

hours, or cease operation altogether. Advertising prices would rise, and the revenues lost from selling fewer programs would be offset by higher advertising revenues. An integrated supplier is more likely than an unintegrated one to reduce the hours of programming independents offer because its affiliated stations gain viewers and can charge higher advertising rates. Television viewers will have fewer viewing options; advertisers would pay higher rates; and consumers would pay more for advertised products.

54. ICF examines the conditions underlying these models and provides evidence on several points: recent off-network program prices will not be constrained by other types of programming if the rules are repealed. The value of the stock of older programs will rapidly decrease over time, and first-run syndication and theatrical movies are imperfect substitutes for off-network programs. Independent behavior by the networks could lead to a restriction of off-network program availability, and coordinated behavior is likely. The networks have stronger incentives and more ability than other owners of off-network programs to restrict supply, and they could achieve substantial gains from acquiring market power in off-network programming. Networks did not attempt to seize market power prior to adoption of the rules because: the independent stations were unprofitable; they had a smaller share of viewers and advertising revenues; and the networks were under intense scrutiny. A significant risk exists that repeal of the rules would lead to elevation of off-network program prices, and the magnitude of the effects could run in the hundreds of millions of dollars per annum.

55. Opponents of repeal also insist that warehousing is a very real concern. INTV quotes network statements indicating that repeal of the rules will retard the "premature" syndication of hit shows. INTV interprets these remarks as an intent to delay the availability of programs that still have significant network run appeal. Metromedia, noting the importance of made for television movies, believes that networks would warehouse such movies for repeated network exhibition and would never syndicate such features.

56. *Replies*. In reply comments ABC notes that the top 15 syndicators control 75.6% of the syndication market. ABC avers that the addition of the networks as domestic syndicators would contribute to the competitiveness of the syndication business. The ABC Television Affiliates Association suggests that independent station support for the rules takes the short view. Rather a reduction in the production of high-quality network programming will ultimately affect independent stations due to their heavy reliance on off-network fare. Several commenters reject the notion that the growth of the independent stations is somehow related to the financial interest and syndication rules. NBC, for example, states that the growth of the independent stations relates primarily to the general

upturn in the economy beginning in 1976, the reduction in the UHF handicap, and the lessening of advertiser bias against independent stations.

57. Much of the reply comments were devoted to the issue of warehousing, which several parties contend is the sole issue seriously in contention. The proponents of repeal attack the warehousing scenario by asserting that none of the conditions necessary for warehousing to work would be satisfied. First, the networks would not acquire a dominant share of syndication rights. In this regard, NBC submits a study showing that if the networks began acquiring syndication rights at the same rate as they did before the rules, the networks would have a combined 14% share of the off-network universe in ten years and a 20% share by the year 2000. Second, the networks and their supporters contest the assumption that recent off-network entertainment series constitute a relevant economic market. NTIA states that various first-run programs, older off-network series, and children's programming show the same ratings success as many new off-network series. NBC adds that if marginal syndicated product is withheld, many fungible substitutes are available. Third, the networks state that collusion is not possible. Fourth, according to CBS, the networks have no incentive to monopolize off-network programming to harm independent stations and raise advertising prices. The heavist use of off-network programming by independent stations is during the 4-8 p.m. period. Because this is a little-used period for network programming, the networks have no incentive to weaken independent stations during this daypart. The ABC Television Affiliate Association states that warehousing will not occur because it would hurt affiliates outside the top 50 markets who use off-network programming during the access period (generally 7-8 p.m. E.T.).

58. NAITPD states that the television industry will be harmed if networks are allowed to enter the syndication market because the small distributor will be forced out of business. This will adversely affect price competition and will leave the networks and major production houses free to set prices. The Association of Program Distributors avers that the networks could use their power to control the syndication market by obtaining syndication rights to off-network programs and attracting first-run syndication programming by offering financing and guaranteed clearances through the O&O's and affiliates. Independent distributors could not compete with such power and would eventually be forced out of business.

59. Westinghouse states that the syndication rule is needed more now than when adopted. Deletion of the rule would adversely affect affiliates that preempt network feeds with other sources of programs. Westinghouse asserts that the networks' access to off-network product, their unique delivery systems, and their affiliate systems would quickly threaten the competitive syndication market.

Permitting networks to syndicate would also allow them indirectly to circumvent the prime time access rule; networks could program the access period with first-run syndication programming. Accordingly, Westinghouse views the syndication rule as a necessary corollary to the prime time access rule.

60. On the issue of warehousing, Citizens Communication Center (CCC) contends that warehousing could be profitable when increased audience shares outweigh the loss in syndication revenues. Second, withholding only a small amount of programming would be enough to decrease supply and raise prices. Third, the alleged duty to other profit participants to maximize syndication profits would be irrelevant if the networks owned a 100% interest. Furthermore, litigation by other profit participants would be lengthy and expensive; damages would be speculative and hard to prove. Also, damages may be less than warehousing gains. Finally, CCC states that warehousing does not require collusion but can result from parallel behavior.

61. NAITPD asserts that neither antitrust remedies nor DOJ enforcement can replace the FCC as a guardian of the public interest in broadcasting. Antitrust remedies are largely corrective, whereas FCC policies are intended affirmatively to promote the public interest. Taft and Paramount both take issue with characterizing the problem as "warehousing." Paramount contends that warehousing is unlikely only because such an extreme measure would be unnecessary to achieve the networks' anticompetitive purpose. Delays in release would be almost as effective and would make FCC oversight or antitrust enforcement virtually impossible. Taft concludes that the issues is not warehousing but control of the market.

62. In its reply comments, the Department of Justice reiterates its view that the only issue of concern in this rule making involves the effects of repeal on the syndication market. DOJ argues that the networks could control the syndication rights to enough programs to make withholding a profitable strategy, although network coordination of withholding would be difficult. DOJ also states that networks have the incentive to warehouse, and that the antitrust laws may not be effective enforcement devices. DOJ concludes that a limited syndication rule is advisable to minimize the potential adverse effects of the rules' repeal.[8]

Effects of the Rules on Advertising Costs[9]

63. The parties supporting retention of the rules assert that, if the rules are repealed, the advertisers and consumers of advertised products would suffer due to increased advertising rates. The

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[8] DOJ's proposed syndication rule as well as other compromise solutions offered by the commenters, is summarized in a later section of this document.

[9] This issue was first raised by the opponents of repeal in the initial comments. Therefore, the positions of those favoring repeal were presented in the replies.

Association of National Advertisers believes that recision of the rule is clearly premature. Deleting the rules at this time would create a significant risk of further concentrating the television ad market when more competition is beginning to emerge. According to the commenters' analysis, advertising "inventory" value is determined by the audience that is garnered by a station for a particular program. CPD claims that the financial interest and syndication rules ensure programming availability to independent stations. These stations, therefore, have an advertising inventory that increases competition for the advertising dollar and holds advertising costs down. Both CPD and the Association of National Advertisers supply data purporting to show that the cost of advertising per 1000 viewers is 20-60% lower in markets with strong independent stations.

64. If the rules are repealed, however, networks will have the ability to restrict supply of recent programming, thereby decreasing the strength of independent stations. This decrease in independent station audience shares and the concomitant increase in network shares would allow the network affiliates to raise advertising rates. CPD states that the networks could also raise advertising rates by reducing the amount of advertising time available. Without strong independent stations to absorb advertiser demand, the networks and their affiliates alone will reap the benefits of higher advertising rates. If, on the other hand, independent stations can absorb advertiser demand and thus obtain increased revenues, the networks would be able to recapture a portion of those revenues by raising the prices of off-network programming. Polygram's Norman Horowitz adds that if networks actively engage in syndication, they would probably offer many series on a "barter" basis. This would enlarge network control of availabilities and give the networks further power to influence rates.

65. Finally, according to those parties addressing this issue, in the field of advertising there is really no comparable substitute for television exposure. Accordingly, a strong independent television service is the only identifiable entity capable of restraining the network's power to influence advertising rates.

66. In response to the charges that repeal of the rules would adversely affect advertising rates, both CBS and DOJ indicate that there is no evidence that advertisements shown during the 4:00 to 8:00 p.m. time period constitute an economic market. DOJ continues that if advertisers have reasonable substitutes for the 4:00 to 8:00 p.m. exposures, advertising rates cannot be affected by reducing such exposures. Also, because the 4:00 to 8:00 p.m. time period is not heavily programmed by the networks, DOJ suggests that the real benefit of reducing availabilities in that time period would accrue only to the network owned and operated stations.

67. The Federal Trade Commission (FTC) states that the models

used to predict harm to ad rates are based on assumptions that the networks will collude: on the purchase of rights to programs; in the distribution of off-network series to the independent stations; and in the determination of advertising rates. The FTC concludes that collusion in these three areas is highly unlikely. The FTC also notes that the ICF and ANA studies attribute changes in advertising cost per thousand (CPM) to a single factor, number of viewers delivered, but that cost also depends upon the demographic composition of the viewers, the expected number of viewers for future showings and the degree of uncertainty associated with each of these measurements. Further, a new study cited by the FTC suggests that neither lower market share for independent stations nor a reduction in the number of independents would enable networks to collude on the price of advertisements. Thus, the FTC concludes that the contention that a reduction in the competitive position of independent stations would permit networks to estabish monopsonistic advertising rates is not supported either by empirical evidence or economic analysis. With regard to barter transactions, CBS opines that networks would simply be participating in an existing syndication practice.

68. In support of the position that repeal of the rules will lead to higher advertising prices, General Mills states that competition is the single most important factor in establishing ad prices. The rules provide independent stations a continuous supply of programs that attract viewers and enable stations to compete for advertising dollars. General Mills presents data comparing network advertising prices, spot market prices, and the Consumer Price Index (CPI). These figures show that the network advertising CPM is significantly higher than the spot market CPM due to less competition. Network power to control ad prices is evidenced by 1983–84 advertising price increases ranging 15–22% higher than last year's prices, which were 13–16% higher than the year before. These increases are significantly higher than the increases in the CPI.

Effects of the Rules on Television Networks

69. *Arguments for Repeal*. The networks claim that their composite net audience share currently is declining and that projections indicate that net share will decline an additional 10–20 points by 1990. Between 1985 and 1990, program expenditures by cable television and subscription services will exceed the combined network programming expenditure. Thus, the new delivery systems are expanding and enhancing the opportunities for program suppliers. Given this situation, the networks and their affiliates argue it is fundamentally unfair to put them at a uniquely disadvantaged competitive position vis-a-vis emerging video technologies. They argue that repeal of the rules is of critical importance so the networks will be able to compete with the ever-burgeoning new purchasers of programming. Many of these new purchasers are pay

services that can outbid the networks for programming that would otherwise be shown on "free" TV. The American Legal Foundation contends that this situation eliminates programming options available to viewers unable to afford pay television. The NBC Affiliates indicate that repeal would contribute to the restoration of economic balance between the networks and the pay television industry. This is important in order to encourage the continuation of free TV, which serves the public interest by providing diversity, competition to pay services, public affairs programming, and greater opportunities for minority actors and producers.

70. NBC asserts that the rules discourage network production of high quality shows because they cannot achieve the program's full value due to their inability to engage in syndication. Television syndication is as important in amortizing programming developed initially for the new technologies as first-run network programs. Along the same lines, NTIA states that the networks need to be able to share non-network revenues generated through exploitation of subsidary rights in order to pay the high prices prime time programming demands. Shooshan and Jackson contend that the rules make the weakest network more averse to taking a risk on innovative or different programming, because it cannot reap the benefits of a successful gamble through syndication. The NBC Affiliates Association claims that this negative aspect of the rules, could filter down to affiliates and affect their economic health, especially in the network compensation area.

71. *Arguments for Retention*. The opponents of repeal see no imminent threat to network dominance. They quote network executives' speeches indicating that the networks will dominate the industry well into the 1990's. The Inter-Guild Council points out that even though network shares are predicted to decrease, the total network audience will increase due to growth in the number of television households. Golden West posits that the networks are enjoying unprecedented prosperity: the control over affiliate time is growing and there have been significant increases in network profits.

72. The opponents state that new technologies are not sufficiently powerful as yet to minimize the networks' oligopsonistic position.[10] Lorimar states that the networks are the only entities capable of high penetration and nationwide distribution, and the new media offer no adequate alternative to network coverage. Cox asserts that cable television penetration is currently around 35% of television

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[10] The Department of Justice states that networks may continue to be the primary source of syndicatable programming because the attractiveness of programming produced by the new distribution services is as yet undetermined. DOJ also cites the CBS study that predicts network dominance through 1990. Thus, DOJ contends that it is unclear whether new technologies will reduce substantially network market power.

households and is expected to increase to 50–60% by 1990, but audience shares for pay cable are expected to be only 9% by 1990. Cox contrasts these figures to the networks and their affiliates which reach virtually every television household. According to NAITPD, the new technologies have provided mostly advances in hardware rather than competitive video software. The network loss in shares has been primarily to the independent television stations, not to new technologies. With respect to the advertising perspective, the ANA states that competition from the alternative media is more illusory than real. Recent figures show that ad-supported cable obtained a 3% share of the television advertising market and 1.7% of total television ad revenues. ANA points to the recent failure of ad-supported cable networks and states that the future of such offerings is most uncertain.

73. Both MCA and the Association of Program Distributors point out the new technologies are not a dominant force in the acquisition of entertainment series programming. According to the APD, the new media are not competing for network-type entertainment programming, but they are outbidding the networks for theatrical movies and sporting events. Since such programs have no significant syndication value, the financial interest and syndication rules are essentially irrelevant. Thus the argument that free television is being harmed somehow by the rules is misleading and erroneous.

74. Parties in favor of retaining the rules indicate that the rules have not crippled the networks but are sound structural devices to restrain the overriding power of the networks. Cox states that network participation in the new technologies is in no way restricted by the financial interest and syndication rules, which only apply to broadcast rights. In fact, the networks are participating fully in new technologies. The FCC is already facilitating this process by proposing elimination of the cable/network cross ownership rules, granting waivers, and allowing networks to seek licenses in new areas such as DBS. INTV suggests that the networks are currently reinvesting their profits in new technologies instead of public interest broadcast services. The Association of Program Distributors concludes that the primary benefit of rescinding the rules would be to eliminate the largely conjectural disadvantages suffered by the three most highly favored licensees in 50 years of Commission history.

75. *Replies*. In its reply comments, Shooshan and Jackson aver that the rules are written so broadly that they create a series of unintended and unnecessary harms which deny viewing options to the American public. They recommend at the very least that networks be permitted to engage in the following activities: syndication of first-run programming; syndication of off-network programming carried initially on other networks; foreign syndication of off-network programming carried initially on other networks; foreign syndication; syndication of non-series and special interest program-

ming; and syndication of older off-network programming. The network O&O's should also be permitted to syndicate.

76. The reply comments from those parties supporting retention of the rules focus on the allegations that the rules place the networks at a competitive disadvantage. NAITPD alleges that it is also unfair that no other entities can engage in television networking to the extent of the existing three commercial networks. Citizens Communications Center states that the rules do not threaten the financial viability of the networks and, by inference, free television. Syndication rights are investment decisions, not financial panaceas. CCC points out that the networks have alternative investment opportunities available to them, and that they are in fact actively investing in the new technologies.

77. The Department of Justice again takes the position that the new technologies alone do not justify repeal of the rules at present. According to DOJ, it is unclear how much new product produced for the new media will be good substitutes for off-network programming. Further, the ability of pay services to compete for sports, movies and specials is irrelevant to this proceeding; such programs are not generally suitable for syndication in the 4–8 p.m. time period. DOJ asserts that the disadvantages cited by the networks with respect to bidding for sports and movies are the result of differences between pay and ad-supported television, not the rules. DOJ concludes that the networks are not competitively disadvantaged by virtue of the financial interest and syndication rules.

Effects of Rules on New Television Networks

78. Shooshan and Jackson suggest the rules have the unexpected effect of restricting potentially desirable "hybrid" ventures. These hybrid networks could take the form of several broadcast stations and a cable network. Such problems could not have been foreseen when the rules were initiated, but potential networks must consider the rules and plan around the regulatory constraints.

79. Taft Broadcasting states that the rules allow entities as small as Taft to begin to compete with the networks; however, the oligopsony force of the networks has restricted Taft's potential program production and distribution of its own programming. In support, the Bolter Study states that the three dominant networks could outbid any emerging network for the best programming thereby ensuring the demise or surely hampering the growth of nascent networks. Therefore, the rules should be retained for the major networks but not for others because they do not have the economic power wielded by the big three.

Alternative Regulatory Proposals

80. In the initial comments, during the oral presentations, and in the reply comments several parties suggested various compro-

mises whereby the rules would neither be completely retained nor completely deleted. The major compromise proposals and the comments engendered by them are described below.

81. *Forced sale of syndication interests in prime time series programs*. Under this option, which would apply only to the three major commercial networks, no restrictions would be placed on a network's ability to acquire and hold financial interests in programs shown over the network. Networks would also be allowed to acquire syndication rights to any program and would be permitted to syndicate those programs during the network run. However, the networks would be required to divest themselves of the syndication rights to a program in a one-time sale without legal restrictions to a third party no later than a fixed time after the end of the network run. The period between cancellation of the network run and the forced sale would be no longer than necessary to enable the networks to sell the syndication rights efficiently. By its terms, this forced sale would apply only to domestic television broadcast distribution rights of prime time entertainment series for non-network exhibition. The rule would not apply to off-network programs from any other day-parts, to network-produced first-run syndicated programming, or to made-for-TV movies.

82. DOJ explains that the networks would be unable to warehouse programs following the network run, but any risk-sharing inefficiencies created by the present rule would be eliminated. The rule would permit the networks to capture any increase in program values created by network efforts and would give the networks incentives to invest in and promote programs nearer to their optimal levels. Finally, the rule would be self-executing. Any attempt by the networks to control any term of domestic program distribution after the network run would violate the rule.

83. Commenters note that the forced sale option increases transaction costs since it would force the networks to undertake negotiations to sell program rights that might not be undertaken in the absence of the rule. DOJ responds that these costs would not be large, because the syndication market is preexisting and competitive, and this type of sale occurs continuously today. Commenters also contend that the sale might incur certain costs because the networks might be more efficient syndicators than those to whom the rights could be sold. DOJ contends that these losses would be small because there is no reason to believe that the networks would be more efficient syndicators than the firms now in the business. The FTC, however, submits that these efficiency costs may not be small.

84. ICF states that the networks could use the forced sale to their advantage by bundling the sale of programs to a few select syndicators. Together with the networks, these few syndicators could behave anticompetitively. DOJ responds that the networks have no incentive to create an oligopoly in syndication rights because this

oligopoly could turn against the networks. ICF also contends that the forced sale would have to be closely supervised by DOJ and the FCC if it is to work properly. Further, the time period set for the forced sale would be crucial: if it is too short it represents little change from the existing rule; if it is too long it provides inadequate protection from warehousing. The forced sale could also create inefficiencies in network decision-making. For example, if the networks have to divest themselves of syndication rights after the network run, the networks might not be able to enter into multi-year syndication contracts during the first run. Finally, ICF concludes that the networks should also be forced to sell their financial interests in order to prevent anticompetitive behavior. DOJ contends that the networks could not act anticompetitively in this area without detection. Further, because there is no ready market for the transfer of financial interests, transaction costs might be substantial.

85. *Limited partnership type interests*. Westinghouse points out that the financial interest rule affects networks' dealings with producers while the syndication rule affects the network-station relationship and stations' abilities to make independent programming judgments. The Network Inquiry Report did not address the rules' effects on local stations; therefore, the NISS report may be a basis for reviewing the financial interest rule, but not the syndication rule. Based on this analysis, Westinghouse offers a compromise rule which would allow networks to obtain a passive (noncontrolling) or limited partnership financial interest in network programming. However, networks would not be permitted to have any control over syndication. In setting a limit on the amount of financial interest that a network could acquire, the following guidelines are offered: The extent of network participation must not constitute presumptive or *de facto* control; and, the syndicator must have a sufficient economic incentive to participate aggressively as an independent force.

86. Westinghouse states that this rule would reduce the risk-sharing inefficiency of the existing rule and allow networks to earn a return for the risks they incur in program development and production. Also, the bar against network syndication prevents warehousing and insulates the networks from any so-called "conflict of interest" situations. The rule is also workable from the FCC's standpoint, and it focuses the Commission's responsibilities on protecting the public's interest in receiving television service from diverse, independent sources.

87. Other commenting parties express some reservation about the Westinghouse proposal. Some commenters suggest that "control" should be defined in terms of a percentage limitation on the network's allowable financial interest. Capital Cities suggests that the networks safely could have between a 20% to 40% ownership interest without obtaining control, but further comment should be

solicited on this issue. The FTC opines that effectively precluding control may not be so easy and will require "artful" drafting. DOJ asserts that limiting a network's financial interest would prevent the networks from taking advantage of vertical efficiencies. Further, enforcement costs would be high in reviewing the multiplicity of ownership interests that might develop.

88. Some commenters oppose this approach entirely. The Association of National Advertisers states that a compromise anti-warehousing rule would not be adequate. ANA believes that some anticompetitive activities could be accomplished if the networks acquired any level of financial interest. Network influence over the distributors might still be substantial and virtually undetectable. Taft asserts that networks would have access to syndication records which might give them information about competing stations' schedules. This would provide the networks with a substantial program planning advantage. The networks would also know what competitors paid for programming. This would permit network O&O's to undercut other stations's advertising rates. Taft concludes that allowing networks to obtain a profit share would lead to network pressure on when and how a particular program could be syndicated.

89. *Graduated Ownership Proposal.* During the oral presentation, Commissioner Quello distributed copies of a compromise rule and sought comments on the proposal. The proposal would permit the networks to acquire a significant, but variable percentage of financial interests in network programs. The percentage of interests that could be acquired would be tied to the combined audience ratings of the three networks. As audience ratings declined, indicating less network market power, the percentage of interests that the networks could acquire would increase.

90. ICF contends that conceptually this proposal is the best compromise solution because it allows the networks in, but slowly, as market conditions evolve. This option deals with only the financial interest portion of the rules. Because the syndication rule would be left intact, concerns over warehousing and conflicts of interest in off-network program distribution would be satisfied. ICF also suggests, however, that networks are likely to influence syndication if they have *any* financial interest in a program. This could lead to warehousing problems. DOJ states that it would be appropriate to link entry of the networks into this market with a decline in their market power. DOJ contends, however, that changes in network market share or network audience rating will not accurately predict changes in network market power with respect to warehousing. Network market share may be irrelevant to syndicated off-network programming if the changes in market share are based on viewing shifts to movies, sports, or specials. Both DOJ and ICF suggest that such a rule would entail high enforcement costs in drafting a workable formula and then measuring and applying it. Taft states

that this option is overly complex. ICF recommends that, if this proposal is adopted, the Commission should set a specific level and periodically review its adequacy rather than try to devise a sliding scale. ABC concludes that this option still hinders efficient risk sharing and that no valid reasons have been advanced to interfere with the bargaining process between the networks and program producers.

91. *"Use or lose" proposal.* Storer suggests that the financial interest rule be dropped entirely and that the syndication rule be replaced with a narrowly drawn rule designed to prevent warehousing. Under this rule, any syndication rights in programs not produced entirely by the networks, must be exercised within a stated term of years or revert back to the owner of the program. Storer asserts that an appropriate date for the "use or lose" decision might be three years from the first network exhibition of the program. The proposal eliminates any inefficiencies inherent in the financial interest rule yet prevents warehousing. Further, the rule would be closely monitored by those entities trying to regain the syndication rights. DOJ and the FTC assert, however, that it would be very difficult for the FCC to determine whether the networks have in fact aggressively attempted to syndicate the programming. Further, treatment of syndication in selected markets and questions of reversions in others would complicate its enforcement.

92. *Percent of programs limit.* Dr. Fisher, an economic consultant to CBS, proposed a compromise version of the rules that would permit networks to own unlimited financial interest and syndication rights in a limited number of programs. Fisher proposes that the networks be allowed to obtain such rights in 60% of programs for all three networks combined or 20% of programs for each network individually. Should these limits be exceeded, the networks would be required to sell the rights to some programs. In order to monitor this rule, the networks would be required to submit periodic reports detailing the rights and interests held by them. Because networks would be able to participate fully in a fixed percentage of programming, the risk-sharing inefficiencies would be reduced. Similarly, the possibility of successfully warehousing programs would be minimized.

93. ICF argues that allowing any concentration of syndication rights in the networks would be unhealthy since it could lead to anticompetitive behavior. DOJ asserts that this option would entail significant enforcement costs. The FCC would have to to determine and then enforce the relevant universe of programs to which the limitations apply and the percentage of these programs that the networks could control. DOJ, ICF, and the FTC all note that the networks could circumvent the rules' intent by disposing of rights in shows that turn out to be unattractive in order to buy a greater percentage of rights in new programs.

94. *Dominant/Non-dominant Network Proposal.* According to this proposal, the rules would be retained in their entirety, but would be applied only to CBS, NBC, and ABC. Turner recommends that a test for defining market power should include elements measuring the scope of service and the number, health, and relative size of the companies in network competition. Operationally, at least for the present, this proposal is similar to those offered by several other commenters. For example, although the Spanish International Network takes no position on the merits of the financial interest and syndication rules, it states that if the rules are retained, they should expressly apply only to the three major commercial networks. PBS reminds the Commission that it currently is exempt from the rules and that the Commission, in fashioning some alternative formulation of the rule, should not omit that exemption. Although supporting deletion of the rules entirely, Henry Geller and Donna Lampert state that, at the very least, the rules should be revised so as not to include new, emerging networks. Restricting the rule in this way would not hamper the creation of new broadcast or "hybrid" networks but would continue to restrain the dominant big three.

95. Although citing potential harms to emerging networks as an adverse effect of the rules, Shooshan and Jackson contend that Turner's analogy to dominant/non-dominant carriers is inappropriate. According to Shooshan & Jackson, occasional, *ad hoc* networks provide substantial competition to the major networks. This competition eliminates the bottleneck in program networking. Additionally, Shooshan and Jackson find no substantial barriers to engaging in this type of *ad hoc* networking. They reason that it therefore makes no sense to classify any firm as dominant in an industry where short-term, *ad hoc* competition is a real threat.

96. With respect to all the various compromise proposals offered by the commenters, CPD states that any new formulation must meet several important objectives. First, it must prevent network control over syndication. Second, this must be accomplished without significant enforcement or compliance costs. Third, there must be no significant costs in terms of economic efficiency. And fourth, the rules must be carefully drawn to avoid overbreadth. CPD also urges the Commission to weigh any transition costs inherent in modifying the rules against any benefits that might accrue from the changes. CPD concludes that after a consideration of all these factors, the existing rules remain the most effective and efficient.

Additional Issues

97. On April 21, 1983, the Office of Communication of the United Church of Christ, the Communications Commission of the National Council of the Churches of Christ in the U.S.A., and Paulist Productions filed a Petition for Further Notice of Proposed Rule Making. The parties allege that a Further Notice is necessary

because all interested parties have not been afforded equal opportunity to address "vague and nonspecific regulatory alternatives" which "appear to go beyond those contemplated by the Commission in initiating this proceeding." UCC *et al.* accordingly request that a Further Notice be issued to seek comments on proposed options for repeal, modification, or retention of the financial interest and syndication rules and to solicit additional options as well. The petition exhaustively documents various media articles and statements by Commissioners relating to compromise solutions to this proceeding. UCC contends that, by not specifically addressing these compromises and soliciting comment thereon, the Commission is depriving many parties from meaningfully participating. Accordingly, the Commission may be violating the Administrative Procedure Act and its own rules which may lead to "unpleasant litigation at best, and reversal at worst." UCC concludes that such problems," . . . and the consequential delay, expense and loss of public confidence can be avoided by the simple expedient of soliciting further comments."

98. In response, NBC argues that the original *Notice* in fact sought comments on appropriate modifications to the financial interest and syndication rules and that the *Notice* was not cast in "all or nothing" terms. NBC then lists a number of commenters who specifically forwarded and analyzed potential compromise positions in their initial comments. NBC further argues that the APA requires only a notice containing "either the terms of or substance of the proposed rule or a description of the subjects and issues involved." Citing *California Citizens Band Association v. United States*, 375 F. 2d 43, 48 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967), NBC asserts that the APA does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule. Hence, NBC concludes that the requirements of the APA have been met in this case and that the issuance of a Further Notice is neither necessary nor desirable.

99. In their reply comments, Henry Geller and Donna Lampert allege that, while the procedures being followed by the Commission are basically fair, the Commission is committing significant procedural error by labeling, for *ex parte* purposes, this proceeding as "non-restricted". Because this rule making, in the commenters' judgments, involves "competing claims to a valuable privilege", the proceeding, under the Commission's rules, must be considered restricted. Geller and Lampert suggest that this violation of the Commission's own rules could be corrected merely by eliminating the present restricted/non-restricted dichotomy in the Commission's rules and b conducting all proceedings under the non-restricted procedures. According to Geller and Lampert, the non-restricted procedures are fair and could be applied to all informal rule makings. However, until the Commission does change its *ex parte*

procedures, it is bound by its rules. The present rules state that *ex parte* contacts are not permitted in rule making proceedings involving competing claims to a valuable privilege. Thus, the Commission is not complying with its own rules in this proceeding. The commenters note that, since the *ex parte* provisions are procedural rules, they could be amended immediately without seeking public comment.

III. *DISCUSSION*

Legal and Policy Context of the Rules

100. This proceeding encompasses important issues relating to competition, diversity and efficiency in the production and distribution of television programming. There does not generally seem to be any disagreement among the parties to this proceeding that these important goals must guide our decision on whether to retain, modify or eliminate the financial interest and syndication rules. What is disputed is how various market practices and regulatory policies further or hinder the achievement of these goals and what weight should be given to each goal in situations where they may be contradictory. A discussion of these legal and policy issues will clarify the criteria used in reaching our tentative decision in this proceeding.

101. As a general matter, the Commission is guided in its decision making by the Communications Act of 1934, as amended. As is well known, the Act mandates that the Commission promote the public interest, convenience and necessity, but it does not define with any degree of precision the meaning of this direction. Rather, the Commission, subject to oversight by the Courts, has been traditionally afforded a considerable measure of discretion to formulate precise standards based on the objectives of the Act. In particularizing the public interest in adopting the financial interest and syndication rules, the Commission relied primarily on concepts of diversity and competition.

102. That the Commission should foster diversity in broadcasting is a concept that flows from the First Amendment and has been recognized in decisions of the Commission dating back to its creation. The Supreme Court has stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . " *Associated Press v. U.S.*, 326 U.S. 1, 20 (1943). Commission decisions of all types have relied heavily on this concept. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965); *Newspaper/Broadcast Cross-Ownership*, 50 FCC 2d 1046 (1975); *Great Lakes Broadcasting Co.* 3 F.R.C. Ann. Rep. 32, 34 (1929), *rev'd. on other grounds*, 37 F. 2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930); *Editorializing by Broadcast Licensees*, 13 FCC 2d

1246 (1949); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, Gen. Docket No. 82-797, 48 Fed. Reg. 5976 (February 9, 1983).

103. The desire to increase the diversity of programming sources available to the public has been one of the reasons the Commission has moved aggressively in recent years to eliminate policies and modify rules that limit the possiblity of diversity being made available to the public. *See e.g.*, *Cable Television Distant Signal and Syndicated Exclusivity Rules*, 79 FCC 2d 663 (1980) *aff'd sub nom. Malrite T.V. of New York v. FCC*, 652 F. 2d 1140 (2nd Cir. 1981) *cert. denied* 102 S. Ct. 1002 (1982) (eliminating certain restrictions on cable television operations); *Subscription Television Service*, 90 FCC 2d 341 (1982) (increasing the availability of broadcast subscription television service); *Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982) (authorizing operation of direct broadcast satellite stations); *Low Power Television Service*, 51 RR 2d 476 (1982) (authorizing low power television service); *Report and Order in Docket 80–90*, FCC 83–229 (May 26, 1983) (authorizing the licensing of additional FM radio broadcast stations); and *Report and Order in Gen. Docket 80–112*, FCC 82–243 (May 26, 1983) (authorizing multichannel multipoint distribution service stations).

104. The concept of diversity as it has been applied to the regulation of network broadcasting has been described as embodying two concepts—source diversity, which is a measure of the number of program originators, and outlet diversity, which is a measure of the number of independent transmission systems delivering programming to the public.[11]

105. In adopting the rules here in question the Commission used as its justification these long held and often repeated diversity increasing goals and it is therefore appropriate that in re-evaluating the rules we judge them again in terms of their impact on the program diversity.

106. The second stated objective of the rules—and test for their reexamination—is their effect in fostering competition. It has long been recognized that the field of broadcasting is intended to be a competitive one. The Supreme Court has stated that " . . . the Act recognizes that the field of broadcasting is one of free competition." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). The well known formulation is that "This Commission, although not charged with the duty of enforcing that law (Sherman Act) should administer its regulatory powers with respect to broadcasting in light of the purposes which the Sherman Act was designed to achieve." *N.B.C v. U.S.*, 63 S. Ct. 997, 1013 (1943). The Court of appeals has held that

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[11] Program diversity, measured by the number of actual program categories or types offered is also a relevant measure from the point of view of the public. However, it generally has not been a direct focus of Commission actions due to the necessity of our avoiding direct involvement in programming decisions.

"Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws." *Mansfield Journal v. FCC*, 180 F. 2d 28, 33 (D.C. Cir. 1950). Thus, a critical question in re-evaluating these rules is their effect on competition.

107. The Communications Act also charges the Commission in its regulatory activities, to act so as to develop a communications system that is "rapid," "efficient," and provides service at "reasonable charges." In the context of the present proceeding, this requires that regulations adopted or continued not impose undue costs or unreasonably interfere with the efficient conduct of business, and, at the same time, that private restraints on competition not interfere with the competitive spur that keeps businesses efficient and costs reasonable. In general, this suggests that the Commission should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.*, does not impose greater costs than the evil it is intended to remedy. Although a consideration of the costs imposed is implicit in every decision to impose or continue regulations, in recent years greater emphasis has been placed on identifying those costs and we believe that is particularly appropriate in this proceeding.

Economic Context of the Rules—the Video Industry

108. At the time the financial interest and syndication rules were adopted, in 1970, there were 59 million television households. Television programming was distributed by over-the-air, conventional broadcast TV and cable television. At that time, there were 690 commercial broadcast TV stations operating. Table 1 classifies those stations by channel assignment type and by status as network affiliates or independents.

Table 1
Commercial TV Stations-1970

	Total	*VHF*	*UHF*
All Stations	690	508	182
Affiliates	600	477	123
Independents[12]	90	31	59

In 1970, the average TV home received 6.8 broadcast stations. Network stations received the overwhelming preponderance of the TV viewing audience, about 90%. Independent stations attracted approximately a 9% share of the television audience. At that time, the networks had revenues of $1.1 billion, the affiliates (including those owned by the networks) had revenues of $1.4 billion and the independents received revenue of $200 million. As Table 2 shows, the networks earned $50 million and their affiliates (including the network O & O's) were profitable with income totaling approximately $400 million. The independents, as a whole, lost over $20 million, although the average VHF independent was profitable.

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[12] Independent stations were located in 43 of the nation's approximately 200 TV markets and served about 50% of all TV households.

Table 2
Financial Data-1970[13]
($ million)

	No. of Stations	*Revenue*	*Income*
Networks		1,144.6	50.1
Network O&O's	15	312.5	117.3
Affiliates	585	1,136.8	307.2
VHF	462	1,059.2	312.6
UHF	123	77.6	(5.4)
Independents	90	214.3	(20.8)
VHF	31	167.4	19.3
UHF	59	46.9	(40.1)

109. Cable television, in 1970, was principally a retransmission technology. It was a means of either distributing signals from nearby broadcast TV stations to areas where reception was poor or importing more distant stations' signals for areas where few local stations existed. At that time, there were 2,490 cable systems serving 4.5 million TV households.

110. In the production industry, there were 60 producers who created 93 prime time entertainment series for the networks for the 1969-70 season.[14] The top 4 firms held a 32.6% share of total programming hours with the top producer representing a 12.8% share. The top 8 firms created 46.3% of the total program hours and the top 20 production companies represented 68.4% of the market, in terms of hours of programming aired.[15] In 1968, the syndication

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[13] Television Broadcast Financial Data - 1970.

[14] Network Inquiry Staff Report, p. 571.

[15] CBS and CPD submitted similar estimates for the concentration of the production industry. (Source: CBS, Vol. I, Appendix I, CPD, ICF, Vol. 2, pp. 109, 133, 215, 216.)

	CBS	*CPD*
No. of producers	61	61
No. of programs	94	75
Top Firm	15.2%	12.7%
Top 4 Firms	35.9%	35.6%
Top 8 Firms	48.7%	48.7%
Top 20 Firms	69.8%	62.6%

industry was made up of 17 syndicators who distributed 67 off-network programs according to the NISS.[16] The top 4 syndicators had a 63.9% share of all off-network programming hours, with the top firm representing almost half this amount (30.9%). The leading 8 distributors of off-network series accounted for 87.9% of all such programming hours.[17] In 1967 network sales of off-network television series in domestic and foreign syndication was $26.1 million, at a time when total sales of off-network series were $100 million.[18]

111. Since 1970, two basic types of changes have taken place in the video industry. First, the older distribution technologies have shown significant growth. Second, new technologies have entered the marketplace. Table 3 shows the growth of broadcast and cable television over this period.

Table 3
Growth of Broadcast and Cable TV[19]

	1970	*1975*	*1980*	*1983*
TV Households (millions)	59	70	78	83
Commercial TV Stations	690	711	746	802
Affiliates	600	625	626	623
VHF	477	483	487	501
UHF	123	142	139	122
Independents	90	86	120	179
VHF	31	30	30	25
UHF	59	56	90	154
Cable Television				
No. of Systems	2,490	3,506	4,225	4,825
Homes Passed (millions)	9	20	35	45
Basic Subs. (millions)	4.5	9.8	16.0	28
Pay Subs. (millions)		.05	9	23

112. The average TV household now receives 9.8 signals, an increase of 3 (44%) since 1970. The growth in the number of UHF stations, many of which are independents, has been a significant factor in this increase. As more independents have become available

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[16] *An Analysis of Television Program Production, Acquisition and Distribution*, Preliminary Report, Network Inquiry Special Staff, Federal Communications Commission, June 1980, Table F-28 and F-29.

[17] CPD has made its own estimates of these same quantities. Its data list 20 distributors for the 1968-69 season with the top firm having a 13% share of program hours and the top 4 firms accounting for 48.8% of this market. The top 8 distributors represented 73.9% of the market, in terms of program hours. (ICF, Vol. 3, pp. 168, 177, 239, 240).

[18] *Report and Order in Docket 12782*, 23 FCC 2d 393 (1970).

[19] Source: *Television Factbook*, Services Volume 50, 1981-82, pp. 75-a, 83-a, *Cablevision*, April 11, 1983, p. 69. According to the latest Commission count, there were 844 commercial TV stations. FCC news release, June 16, 1983.

to viewers, their total share of viewing has grown relative to the networks.[20] The percent of homes passed by cable increased from 15.3% in 1970 to 54.2% in 1983. In 1982, the networks share of the television audience had fallen from 90% to approximately 80%, while independents and other over-the-air TV stations achieved a 17% share. It is also apparent from Table 4 that the independents have improved financially over this period. In 1980, the last year for which financial data are available, affiliates (including the network O & O's) had total income of approximately $1.2 billion on revenues close to $4 billion. In that year, both the average VHF and UHF independent stations were profitable. These stations had a total income of nearly $160 million and revenues of more than $900 million.

Table 4

Comparative Broadcast Financial Data[21]

($ millions)

	1970		*1975*		*1980*	
	Revenue	*Income*	*Revenue*	*Income*	*Revenue*	*Income*
Networks	1,144.6	50.1	1,673.8	208.5	3,865.2	325.6
Network O&O's	312.5	117.3	395.6	105.7	700.3	208.5
Affiliates	1,136.8	307.2	1,677.0	438.1	3,311.4	960.4
VHF	1,059.2	312.6	1,534.4	432.0	3,006.6	944.3
UHF	77.6	(5.4)	142.6	6.1	304.8	16.1
Independents	214.3	(20.8)	347.8	28.0	930.8	159.1
VHF	167.4	(19.3)	227.8	24.2	545.4	135.5
UHF	46.9	(40.1)	120.0	3.8	585.4	23.6

113. Since 1970, cable television has become much more than a means of distributing broadcast signals. Aided by the lauch of communications satellites and the removal of several restrictions on the operation of earth stations, a wide variety of cable networks has come into being since the mid-1970's.[22] Many of these networks are highly specialized, offering only news, sports, children's or cultural programs. Of the 34 basic service networks, 23 are advertiser-supported, including 3 independent stations, WTBS, WGN and WOR, which are distributed nationally via satellite and cable and often called superstations. Another 11 networks are supported directly or indirectly by subscriber fees. Cable systems also carry pay-cable channels in addition to the basic programming. The 17 currently available pay networks include movie channels, adult entertainment and regional sports channels. The largest pay cable networks are HBO and Showtime, which began principally as movie channels but have expanded their offerings to include original programming. The

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[20] There are currently 86 different TV markets with independent stations, accounting for 78% of all TV households.

[21] Source: Television Broadcast Financial Data, years as cited.

[22] As indicated on Table 3, currently cable systems pass 45 million homes, have 28 million basic subscribers, and have 23 million pay subscribers.

complete list of operating and proposed cable networks is extensive.[23] Table 5 lists examples of each type of cable channel.

Table 5
Examples of Cable Networks[24]

	No. of Systems	*No of Subs. (millions)*[25]
Advertiser-supported		
WTBS	4,293	23.3
ESPN (sports)	4,055	18.8
CBN (religious, family)	3,050	18.2
Subscriber-supported		
C-SPAN (public affairs)	1,000	10.5
Nickelodeon (children's)	1,725	9.0
PTL (religious, general)	600	6.5
Pay Cable		
HBO (movies, specials)	3,600	11.0
Showtime (movies, specials)	1,500	3.5
The Movie Channel (movies)	2,150	2.2

114. The rapid growth of cable in recent years (see Table 3) is also evident from its increasing revenues. As shown in Table 6, total cable industry operating income was $1.2 billion for 1981 on operating revenues of $3.6 billion. Pay cable revenues were $1.2 billion.

Table 6
Cable Television Financial Data[26]
($ billions)

	1977	*1979*	*1981*
Operating revenues	1.2	1.8	3.6
Pay cable revenues	0.2 (1978)	0.35	1.2
Ad revenues[27]	4.9	5.0	13.0
Operating income	0.5	0.7	1.2

115. Several new technologies have also become participants in the distribution of video programming. Subscription television consists of a scrambled broadcast signal available only to subscribers with decoders. That technology has grown to serve 1.4 million homes in 25 markets while it had only 20,000 subscribers at the end of 1977. Multi-point Distribution Service (MDS) is a pay service delivered to

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[23] See, for example, ICF, Vol. 1, Appendix 2, pp. 14-15, 25, CBS, Vol. I, Appendices D, E, H, NBC, pp. 30-33, 47; 49.

[24] Source: NBC, pp. 30-33, ICF, Vol. 2, Appendix 2, Exhibit 4, *Cablevision*, August 16, 1982, p. 70.

[25] For the advertiser and subscriber services, the number of subscribers is calculated as the number of homes where the network is available. For the pay channels, that number is the actual subscriber count.

[26] Source: FCC Cable Television Industry Financial Data Annual Reports.

[27] These data represent advertising revenues paid directly to cable systems and do not include the advertising revenues of the cable networks.

consumers via a microwave signal. MDS licensees are regulated as common carriers. The first MDS service became available in 1974. There are approximately 500,000 MDS subscribers at present. The satellite master antenna system (SMATV) is primarily available to multiple dwelling units since it uses antenna systems (including satellite earth stations installed on buildings) to gather programming which is then fed to the building's occupants by cable. SMATV has shown rapid growth, and already passes approximately 500,000 homes, 150,000 of which subscribe.

116. Although perhaps of less direct relevance in this context, other new forms of visual product delivery that compete with the older technologies are video tapes and video disk players. Video tape recorders not only allow prerecorded tape to be played but also permit the operator to record programs from the other media thus enabling the consumer to view programming at his leisure. Currently, there are an estimated 2.1 million homes with video recorders or about 2.6% of all households. Video disk players now are in 300,000 TV households, and this number continues to grow as new titles become available.

117. The networks, according to unchallenged data supplied by CBS, account for only 54% of the total video product purchases today, compared to 74% at the time the financial interest and syndication rules became effective. For example, 30% of HBO and Showtime's programs currently are produced either by them or by others for them. Daytime, a cable network showing women's programming, uses only original programming and about 55% of the children's programming carried by Nickelodeon, another cable network, is original with the network. HBO expects to spend $60 million on original programming in the next two years.[28] However, at present broadcast TV remains the principal purchaser of entertainment series.

118. Today, the syndication industry generates $800 million annually in revenues.[29] A staff analysis of November 1982 data from Arbitron's *Syndicated Program Analysis Report* indicates that there are currently 25 distributors of 117 off-network syndication series. According to our estimates, the top syndicator has about a 16.5% share of available off-network programming hours, the top 4 distributors have a 48.4% share of this market and the top 8 firms represent 73.8% of off-network programming hours.[30] Others present similar estimates.[31] The available data suggest that the off-

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[28] New York *Times*, April 3, 1983, Section 2, p. 1.

[29] CPD, p. 127.

[30] For each syndicated series, the distributor's share was weighted by program length and the number of markets where it is aired.

[31] The number of distributors of off-network syndicated entertainment series has varied little over the last decade, with the number generally between 20 and 25. The data submitted by CPD (ICF, Vol. 3, pp. 168, 189, 239, 240) and CBS (CBS

network syndication market is relatively concentrated now, just as it was a decade ago.

119. It appears that the future of the video market likely will be shaped by the growth of the new distribution technologies, including some fledging services not discussed in any detail here such as direct to home broadcast satellites and low power television, and the increasing number of cable and pay options. At least 38 new cable networks have already been announced.[32] It is widely predicted that prime time audiences will continue some shift away from the networks. However, forecasts of the prime time shares the networks will attract in 1990 vary widely, from 59% to 75% as the following table shows.

Table 7
1990 Prime Time Network Audience Share Estimates[33]

Forecaster	*Share*
CBS/Broadcast Group	70
ABC	60-70
NBC	68-70
Doyle Dane Bernback	65
J. Walter Thompson	63
Ogilvy & Mather	59
N.W. Ayer	75
Leo Burnett	70

120. The extent to which viewing patterns will change is, to a large extent, dependent on the growth of these new media. While specific predictions for 1990 vary, as Table 8 indicates, cable penetration is expected to approach 60% of all TV households with 45% of all TV homes expected to subscribe to at least one pay cable service.

Reply, Vol. I, Exhibit D, Table D-2, p. 6) for 1981-82 and the Network Inquiry Special Staff's most recent estimates (Preliminary Report, Tables F-28 and F-30) for 1977-78 are as follows:

	CPD	*CBS*	*NISS*
No. of distributors	25	NA	22
No. of programs	NA	NA	87
Top Firm	24.2%	17.8%	32.1%
Top 4 Firms	57.4%	60.9%	75.3%
Top 8 Firms	72.2%	98.3%	88.4%
Top 20 Firms	96.7%	NA	99.8%

Viacom (Appendix B) lists 23 distributors of off-network series, also. However, Metromedia lists 57 syndicators (Exhibit 5) of these programs. For purposes of comparison, CPD data for 1970 show 23 distributors, the top firm with a 15.6% share, the top 4, with 45.4%, the top 8 with 69.5%, and the top 20 with 97.9%.

[32] *Cablevision*, April 25, 1980, p. 98.

[33] Source: *Broadcasting*, March 7, 1983; CBS, Vol. I, p. 115; NBC, p. 99.

Table 8

Cable Predictions for 1990[34]

	Basic Subs. (millions)	*Basic Penetration (%)*	*Pay Subs. (millions)*	*Pay Penetration (%)*
Doyle Dane Bernbach	57.3	60		
CBS	60.0	60	45	45
Paul Kagan	53.4	57	46.1 (1989)	
Donaldson, Lufkin and Jenrette	53.5	55	65	
Frost and Sullivan	40.0 (1991)		34 (1991)	
J. Walter Thompson		60		30 (1989)
Ogilvy & Mather				46
NBC		60		45

121. It is expected that this growth in cable service will result in basic cable revenues rising to as much as $6.5 billion and pay cable revenues increasing to $8 billion compared to expected network revenues of between $15 and $20 billion. The other pay services also are expected to grow, to the point where 77% of all TV homes will have some type of pay service. This growth is expected to come from currently available pay services, direct broadcast satellites (DBS), and low power TV stations (LPTV). In addition, the Commission has recently authorized the allocation of additional frequencies to the MDS service so that they may provide a multichannel MDS service. This multichannel capability makes it more like an over-the-air cable service and may enable MDS to be a stronger competitor in the video marketplace. While it is difficult to predict the future with certainty, the following "educated guesses" in table 9 present a broad sketch of the video distribution industry showing the growth of the various video alternatives including estimates for the state of the industry in 1990.

Table 9

Availability of Video Options[35]

(millions)

	1970	*1975*	*1983*	*1990 Est.*
Broadcast TV (TV HHs)	59	70	83	97
Cable TV (subscribers)	5	10	28	58
Pay Cable (subscribers)		0.5	23	45
STV (subscribers)			1.4	5
MDS (subscribers)			0.5	3.2
SMATV (subscribers)			0.15	0.5-0.8
LPTV (TV HHs)				10
DBS (subscribers)				11
Multichannel MDS (subscribers)				6-12

122. It is extremely difficult to make estimates for the production and syndication industries of 1990. It is clear that the many new

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[34] Source: ICF, Vol. 1, pp. 20, 29; NBC, p. 27.

[35] Source: CBS, Vol. I, pp. 54–5, 79–91 and previously cited data.

outlets will require a vast supply of programming. Some of this programming, no doubt, will be similar to the general entertainment fare currently associated with network prime time television. Other programming may well respond to much more specialized needs.

Effects of the Rules on the Network-Producer Relationship

123. Based upon the foregoing description of the video industry, we now present an analysis of the effects of the financial interest and syndication rules. The analysis is performed on each component of the system of markets that together comprise the video industry. We examine the effect of the rules on: (1) the programming market involving program producers and the broadcast television networks, (2) the off-network programming market involving syndicators and television stations, (3) the competitive situation facing the broadcast television networks and (4) the possibility of new broadcast networks.

124. *Monopsony Power of the Networks.* Part of the original rationale for the financial interest and syndication rules was a concern that networks were able to use the power of their position as program purchasers to obtain rights from program producers at less than compensatory rates. Specifically, the stated concern was that the networks would not pay program producers enough for the programs, would insist on obtaining the syndication rights as a condition for airing the programs on the networks and would exert undue creative control over the final product. In order for these concerns to be realized, two conditions regarding network behavior must be met. First, the three networks must be able to act in concert, either tacitly (by parallel behavior) or collusively (by active conspiracy). Second, the three networks together must comprise the sole purchasers of the program producers' product. If either of these conditions is not met, it is not likely that the networks could exert power over program producers. This is so because, if adequate alternative program purchasers exist, any producer who may be dissatisfied with the treatment he receives by *a* single broadcast network has the option of offering his product to a different network or some other program purchaser. Competition among these program purchasers thus would ensure that the program supplier receives a competitive price (full market value) for his product.

125. After considering all the available evidence, we have concluded that the extent to which the conditions hypothesized above accurately characterize today's media marketplace is very much in doubt. First, there is evidence that the three networks do in fact compete with each other. The networks are rivals in a ratings war.[36] Ratings have been volatile in recent years, with changes

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[36] CBS comments, p. 37.

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occurring in the networks' relative positions.[37] Second, there has been an expansion in the number of television outlets and network services that has caused an increase in the number of program purchasers and an increased demand for new programming. As a result, the network share in total program expenditures has declined over the years until it has now fallen to 54% of all expenditures on programming. The total share of the audience garnered by the networks is declining, which is further evidence that other viewing outlets are effective competitors to the networks as suppliers of entertainment programming.[38] To say that networks control the programs they buy is clearly true, but alternative program purchasers are developing to which program suppliers can turn should the networks try to lower the price they offer to program suppliers.[39]

126. Empirical research indicates that program producers, and their talent inputs, are able to renegotiate their contracts and consequently receive a higher income when their television series become more popular, i.e., achieve higher ratings.[40] Thus, through the contract renegotiation process, program suppliers are able to share, with the networks, in the higher revenues that are earned as a show gains in popularity. If networks exercised collective monopsony power against their program suppliers, we would not expect them to be forced to share this added revenue with their program producers. In fact, if the networks had such collective monopsony power we might expect that they would attempt to lower the price they offer for successful programs during the network run since the amount a program would earn during its syndication run likely would be higher. Even though its network earnings would be less, a producer would be no worse off because it could recoup these revenues when the program goes into syndication. The network would have the ability to retain all the extra revenues which are earned due to a show's popularity because a producer would have no other program purchaser to whom it could sell the program, *i.e.*, the producer has no bargaining power. The networks' apparent inability to retain all the additional revenues earned by a successful television program during its network exhibition indicates that they are not exercising collective monopsony power against the program producers.

127. The available evidence also leads us to the conclusion that collusion among the networks would be difficult to achieve and maintain. Overt collusion would be hard to conceal and would be

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[37] CBS comments, Exhibit B.

[38] See CBS, pp. 98–99, 115; and NBC, pp. 97, 101, 103.

[39] See CBS, p. 101; and NBC, pp. 104–107.

[40] See Noll, Peck and McGowan, *Economic Aspects of Television Regulation* pp. 44–47 (1973); Owen, Beebe and Manning, *Television Economics*, pp. 38–40 (1974); Woodbury, Besen and Fournier, "The Determinants of Television Program Prices: Implicit Contracts, Regulation, and Bargaining Power," (mimeo, January 1983).

prosecutable under the Sherman Act. With respect to tacit collusion or parallel conduct, as the Department of Justice points out, the antitrust laws might not be as effective a tool. There are reasons to believe, however, that such conduct in terms of the type of conduct here in issue would be difficult for the parties themselves. Restrictions on price competition would likely require overt conduct. However, when nonprice features of goods or services such as product quality or contract terms, are not uniform and are important determinants of the value of a product coordination problems become severe. This is clearly the case with program purchases by the networks. The Network Inquiry Final Report describes, in exhaustive detail, the complicated and delicate contracting process between networks and program producers, beginning with idea development and ending when the program goes off the air. Maintaining parallel or collusive behavior in such a complex environment would require unreasonably complicated efforts.

128. The presentations by parties alleging network market power do not persuade us that such power is sufficient to result in the deleterious effects that have been alleged. For example, evidence is presented regarding the movement of personnel from one network to another.[41] It is not clear that this movement of personnel, which purports to be evidence of network parallel behavior, occurs at higher incidence than in other industries. Moreover, such movement would make collusive activity impossible to conceal.

129. Parties also claim that failure of the networks' license fees to cover all production costs is evidence of network market power. However, it is not evident that what they term "deficit financing" is a reflection of network monopsony power. Obviously, the costs of production must in the long run be covered by revenues from all the potential uses of the program, including foreign and domestic syndication. If producer's costs were not at least met, the industry would soon be bankrupt and all producers would leave the industry. From an economic standpoint, all costs need not be covered by network payments alone simply because all costs of production are incurred before network broadcast. In fact, if the rules have any effect, they might make "deficit financing" more likely. This is so because the rules prevent the networks from purchasing the complete set of rights to a program. Consequently, producers who want to cover their production costs immediately may have difficulty in obtaining other sources of financing to replace the full financing supplied by the networks prior to the rules.

130. Finally, there is empirical evidence that networks obtained syndication rights on a fully competitive basis prior to the rules. One study, performed by Robert Crandall, concluded that payments for

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[41] See ICF, p. 1–22.

these rights were made in the form of higher license fees, and that the payments approximated the full market value of the rights.[42] Furthermore, our analysis indicates that networks did not obtain a "monopoly" share of syndication rights when they purchased them before the rules. In fact, the networks together obtained less than a 25 percent market share.[43]

131. *Effectiveness of the Rules*. Focusing narrowly on the concerns scrutinized in this section of the analysis, we must conclude that the rules are unnecessary if the networks have no demonstrable monopsony power. Thus, it is expected that the financial arrangements arising from the normal business relationship between the networks and program producers will equitably reflect the competitive process. Of additional concern, however, is whether, even if the networks did have a significant degree of market power, the rules effectively would preclude the networks from exercising it. Our analysis leads us to believe that the financial interest and syndication rules are unlikely to curb any network market power that could exist. The fundamental reason leading us to this conclusion is that the rules do not modify the source of any such market power, *viz.*, the structure of the market. The market structure is defined by the fact that there are only three broadcast networks. Any market power that could derive from this structure could be exerted in ways other than bargaining for syndication rights. With regard to producers in particular, other aspects of their contracts with the network (such as the license fee paid to program suppliers) could reflect their inferior bargaining positions. The rules do not change the networks' control over the nature of the programs they choose to purchase for broadcast. Even with the rules in place, each network selects which program it will air and which it will not and thus holds veto power over any content it does not wish to air. Accordingly, producers' fear of losing creative control of their programs if the networks regain a financial interest appears unfounded.

132. Further, it does not seem in the best interest of the networks to behave in a manner that induces producers to exit. If there were fewer producers, they could more effectively act collectively and exercise market power with respect to their dealings with the networks. Under such an outcome, networks would be made worse off. The networks benefit from the presence of many independent producers contending for their patronage.

133. *Cost of the Rules: Inefficient Risk Sharing*. The financial interest rules prevent networks from obtaining a financial interest in programs produced by others. Therefore, the rules force suppliers who wish to permit others to have a financial interest in their

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[42] Crandall, "FCC Regulation, Monopsony, and Network Television Program Costs," 3 *Bell J. Economics*, p. 483 (1972).

[43] *Report and Order in Docket No. 12782*, 23 FCC 2d 393 (1970).

programs to choose between: (1) selling in a market with an artificially reduced number of prospective purchasers, since three major purchasers in a position to offer favorable terms have been excluded by the rules, or (2) retaining the rights or interests they would prefer to sell, thus bearing by themselves risks they would prefer to share or shift to others. The result of this artificial altering of the program market may be to reduce efficiency, competition and diversity in the supply of network programming.

134. Financing production of a good by the sale of future interests in one or more stages of distribution is a common and accepted method to distribute risk efficiently.[44] Although other members of the program production market, to some extent, are capable of bearing and hedging risk, the networks may be in a unique situation with respect to shouldering these risks. As analysts have found, (1) networks bring together an efficient nationwide group of station outlets, (2) networks have continuous information from both advertisers and station affiliates concerning changing public tastes, (3) networks are able to pool the risks of individual programs across an entire program schedule, and (4) networks have expertise in designing overall program schedules with maximum attractiveness in the face of competing schedules.[45] Further, networks may be able to promote programs more efficiently if they can coordinate network and off-network runs. This promotional aspect is important, however, only if the behavior on the part of the networks that enhances the value of a program's network run is different from that which would enhance the value of the program during its off-network run. In other words, if a network would not promote a program any more heavily if it would benefit from the syndication run than it would otherwise, then the rule does not prevent promotional efficiencies. Even so, the rule may lead to shorter-than-optimal runs for network programs.

135. To the extent the rules prevent an efficient sharing of program risks, there is less investment in network programming than there would be in the absence of the rules and the quantity, quality, and diversity of programming is artificially limited. Also, inefficient risk-sharing could lead to higher program production costs. In turn, the cost of network time to advertisers and the cost of advertised products to consumers likely are greater than they otherwise would have been. The programs most likely affected by such risk inefficiencies are those that present the most risk. Thus, the diversity of programming actually produced may have been

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[44] Network Inquiry, Staff Report, Vol. II, p. 406.

[45] Network Inquiry Staff Report, pp. 746–54; CBS Vol. I pp. 127–130; Franklin Fisher, CBS Vol. II, Appendix E, pp. 17–22; Alfred Kahn, p. 17; Shooshan and Jackson, pp. 5–11; FTC, pp. 31–34.

reduced because the rules have encouraged production using tried and true formulas.

136. Further, while the rules do not increase the aggregate profitability of all program producers, they may shift revenues among individual producers. Any producer less willing to bear risk than the networks might prefer to sell the rights to the network initially, but the rules bar such a producer from doing so. By making it more difficult for risk-averse producers to survive, the rules may aid those producers who are more willing and able to bear risk. Thus, if larger, established producers are better able, and hence more willing, to bear risk than smaller or new producers, the current rules work to the advantage of the larger producers who are relatively better off and insulated, to some degree, from competition and new entry. The end result may be a more concentrated and less diverse program supply industry.

137. The limitation on network-producer risk-sharing will cause significant inefficiencies only if producers are substantially less able than the networks to bear risks involved in program production. Indeed, there is some evidence that producers are currently interested in assuming some of the risk that the networks now bear.[46] This would indicate, at the least, that producers are not currently overburdened with risk. The Network Inquiry Report points out that where the probability of financial loss is assumed to be 50 percent on a single program, it falls to approximately three percent if five statistically independent programs are pooled.[47] If that level of pooling is not attained by some independent producers alone, it perhaps can be achieved through joint ventures. Further, large production companies, banks and other large corporations may have risk-spreading advantages the broadcast networks may not possess.[48] In addition to spreading investment risk across many programs, these non-broadcast entities can spread their investment risk across *networks*. Such an advantage may or may not be significant in quantitative terms. Their lack of expertise in the programming field may deter nonbroadcast entities from such investments since they may be unwilling to take large risks on projects they are unable to assess well. On the other hand, they can pool their entertainment investment risk with investments in other areas.

138. As discussed above, from a theoretical point of view the major effect of the rules as they relate to the program production industry appears to be to force inefficient risk-sharing arrangements that could cause a variety of ill effects on program producers and on

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[46] Comments of ICF, p. I-16. ICF contends that networks have consistently rejected producer proposals with incentive clauses for successful program performance and greater producer risk on the downside.

[47] Network Inquiry Staff Report, Vol. II, p. 617.

[48] DOJ reply comments, pp. 4–5.

the programs produced. Although intended to lessen concentration in the program supply industry and thereby increase diversity in the sources of programming exhibited on the networks, a close review of the economic effects of the rules makes it appear, at least at the theoretical level, that they could actually have the opposite effect. Considerable effort has therefore been expended in this proceeding in attempting to find empirical evidence to confirm or dispute this conclusion. Having reviewed the evidence relating to concentration in the supply market both before and after the rules, we find no evidence that the rules have served to decrease concentration in the supply market or increase the diversity of program sources. Instead, it appears that the supply market was not particularly concentrated at the time the rules were adopted and that this market was and is today a competitive one. While various definitional and statistical problems and the influence of factors beyond these rules make conclusive judgments difficult, there is some evidence to support the proposition that the rules create incentives that lead toward concentration rather than away from it.

139. There seems to be no disagreement that, in the years immediately following the adoption of these rules, the number of producers supplying programming for prime time network exhibition declined rather dramatically. Using the measurement statistics preferred by the Committee for Prudent Deregulation, the number of producers declined from 61 in the 1969–1970 television season to as low as 30 in the 1974–1975 season.[49] Averaging the data supplied from before and after the rules, again using the CPD preferred data, shows an average of 66 producers per year in the pre-rule, 1964–1971, period and an average of 47 producers per year in the post-rule, 1972–1982, period—a decrease of 29 percent. The Network Inquiry Special Staff in its study of this issue, after comparing 1969–1970 and 1977–1978 data, also found some measure of increased concentration but noted that most of the increase was due to the rise in the share of the leading firm which had doubled the number of series programs it was supplying.[50]

140. CPD argues, to the contrary, that, comparing 1969–1970 and 1981–1982 data, the number of suppliers has increased from 61 to 67. It should be noted, however, that 1981–1982 is the only season of the thirteen that have passed since the rules were adopted where this comparison would show an increase. Data contained in the appendix to the CPD comments, but not cited in the body, show that the most recent data (1982–1983) demonstrate a continued decline. Thus, even using the data most preferred by the proponents of continued regulation, there is no evidence that the rules have

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[49] ICF Vol. 2, appendix 3, p. 109.

[50] Network Inquiry Staff Report, Vol. II, p. 556. In subsequent years, the share of the leading firm declined, causing measured concentration to decrease.

decreased concentration and, indeed, there is some evidence that they may have increased it.

141. Other data supplied by other parties, evidence larger and more consistent declines in the number of producers. CBS data, for example, showed a substantial increase in concentration, with the number of prime time producers dropping to 41 in 1981–1982 from 61 in 1969–1970.[51] The reason for the difference between the CBS and CPD data is that each used a different definition of producer. CBS simply counted the number of entities who had contracted with a network for the production or delivery of a program.[52] CPD counted all those who had management and/or creative responsibility or a financial interest in the proceeds from the first-run exhibition.

142. In an effort to facilitate a comparison of the data from the two sources, the Commissison's staff prepared its own estimates. The staff established set fall schedules for both the 1969–70 and 1981–82 seasons. The data submitted by CBS and CPD were then used to arrive at producer and program counts for each methodology.[53] From these data, various estimates of production industry concentration were derived. The results are presented in the tables below.

Table 10
Summary of the Production Industry

	1969-70		*1981-82*	
No. of Programs	75		69	
No. of Hours	59		54	
	CPD Method	*CBS Method*	*CPD Method*	*CBS Method*
No. of Producers	61	48	65	31
Market Shares				
Top Firm	12.7%	14.4%	7.4%	9.3%

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[51] CBS comments, Vol. 1, p. 149, appendix J.

[52] CBS comments Vol. 1, p. 147, footnote 279 and data submitted April 25, 1983.

[53] More specifically, the staff methodology first defined a base fall season schedule for each year. (For 1969 the source was the *Complete Directory to Prime Time Network TV Shows 1946 - Present*, Tim Brooks and Earle March, Ballantine Books, New York, 1979. The 1981 fall schedule was derived from information in *Broadcasting*, May 4, 1981, pp. 30–1, August 17, 1981, pp. 134–5, August 24, 1981, p. 48, September 14, 1981, pp. 32–3, and November 23, 1981, p. 60.) For each program on this schedule, the producer or producers were identified from the raw data submitted by CBS and CPD. Then, for each producer and program a weight was calculated. This weight was the program length (hour, half hour, etc.) multiplied by the producer's share. For a sole producer this share was one. Where joint ventures existed, the share was equally divided among all production companies. (CPD weighted its data in this manner. CBS used the number of episodes, including reruns, as an additional factor.) Next, a total of these weights was calculated for each producer. Finally, this total was divided by the total number of prime time hours, which was equivalent to the sum of all producers' weights. The result was an estimate of each producer's market share.

Top 4	30.1%	33.9%	22.3%	31.6%
Top 8	42.4%	49.2%	37.9%	55.8%
Top 20	62.8%	70.4%	63.5%	87.7%
HHI[54]	381	476	283	525
Joint Ventures				
No. of Programs	17	7	33	1
% of programs	22.7	9.3	47.8	1.4
No. of hours	12.5	4	26	0.5
% hours	21.2	8.5	48.1	0.9
Studios[55]				
No. of programs	33	34	32	33
% of programs	44.0	45.3	46.4	47.8
No. of hours	26.5	27	23.5	24.50
% hours	44.9	45.8	43.5	45.4

143. Comparisons of these data show relatively small changes in the level of concentration in the production industry both in terms of concentration ratios and in the Herfindahl-Hirschman Index, the measure preferred by the Department of Justice. Using any of the measures, the production industry was relatively unconcentrated in 1969 and remains so today. These studies would appear to reveal that, in the production industry, the rules may have had some negative effect.

144. If it is correct that the rules function to prohibit the networks from operating as efficient risk bearers for more risk averse producers in the production of programming, then it could be expected that, after the rules went into effect, smaller producers would be increasingly forced into joint ventures with others. The chart below, prepared using the staff methodology and CPD producer definitions, does suggest some increase in the percent of programs that are produced by the major studios in combination with independents and by independents in conjunction with other independents, as theorized.

Table 11
Joint Ventures

	1969	*1981*	*1969*	*1981*
Producer	*(Percent Program)*		*(Percent Hours)*	
Network				
alone	4.0	5.8	5.1	7.4
w/independent	1.3	1.4	1.7	1.9
Total	5.3	7.2	6.8	9.3

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[54] The Herfindahl-Hirschman Index (HHI) is a standardized measure of concentration calculated by summing the squares of each firm's market share.

[55] The major studios producing prime time network programming during the periods in question were: Universal; MGM; Warner Brothers; Walt Disney; Embassy Communications (Avco/Embassy); 20th Century Fox; Paramount; Columbia (Screen Gems); and Orion (Filmways) (Source: ICF, Vol. 2, p. 110–124).

	(Percent Program)		*(Percent Hours)*	
Producer	*1969*	*1981*	*1969*	*1981*
Studio				
alone	29.3	13.0	31.4	11.1
w/independent	14.7	33.3	13.6	32.4
Total	44.0	46.4	44.9	43.5
Independent				
alone	44.0	33.0	42.4	33.3
w/independent	6.7	13.0	5.9	13.9
Total	50.7	46.4	48.3	47.2

Effects of the Rules in the Syndication Market

145. The second market where the effects of the rules are analyzed is the syndication market in which off-network programming is sold to local television stations. The concern has been expressed in the comments that repeal of the rules would allow the networks to exercise control over the availability of off-network programming, and that television stations, particularly independent stations in competition with network affiliates, would be affected adversely by such control. Indeed, this concern underlies much of the opposition to repeal of the rules. Commenters most commonly express a fear that some off-network programs might be "warehoused," *i.e.*, withheld from the market. Their argument is, in essence, that such warehousing of off-network programs would either drive up the price of programming or would reduce the size of independents' audiences.[56] Other commenters claim that repeal of the rules would have beneficial effects on television stations because it would permit the achievement of efficiencies in the production and distribution of programming.[57] Each allegation is discussed in some detail below.

146. *Withholding of Off-Network Programs*. The most comprehensive exposition of the argument that networks would have the ability and the incentive to withhold programming in an anticompetitive manner in the absence of the rules is contained in a study by ICF Incorporated, conducted under contract and submitted by CPD.[58] Since the ICF study was a central focus of many reply commenters, it is discussed here in considerable detail. A key assumption made by ICF in its report is that a small number of firms

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[56] Commenters expressing this view include the Committee for Prudent Deregulation (CPD), Independent Television Stations, Inc. (INTV), Metromedia, Inc., and others.

[57] These commenters include Franklin M. Fisher and William J. Baumol, in reports submitted as appendices to the comments of CBS, Inc., and the National Broadcasting Companies, Inc.

[58] ICF Incorporated, "Analysis of the Impact of Repeal of the Financial Interest and Syndication Rule," Report to the Committee for Prudent Deregulation, January 26, 1983.

would have as much power over program supply as would a single supplier. ICF asserts that, in some circumstances, those few firms would restrict the supply of programs by withholding some from the market in order to increase the price of the programming that remained on the market. Although their discussion is somewhat abstract, it is essential that a brief account of it be made here. ICF's theory runs as follows. Stations choose the programs they wish to air on the basis of the net revenues each will generate. When programs of differing quality, as indicated by the potential advertising revenues they would generate, are offered to stations, the prices of the programs chosen are held down by the prices of alternatives not selected, since stations could choose those alternatives instead of the programs actually selected. Removing the best unselected program from the market will leave a poorer unselected program as the best alternative.[59] Elimination of the best alternative program would increase the gap between the advertising revenues generated by the programs selected and the best alternative not selected. Prices of programs that are selected would then be free to rise above their original levels.[60] ICF asserts that such withholding could be accomplished by a single syndicator acting independently, and would not require collusion among syndicators.

147. ICF presents four theoretical cases in which a syndicator of television programs would elect to withhold programs from the market. In the first case, the programs withheld would not have been shown in any case, so that withholding them would not affect the programming shown. Such withholding would leave the programs

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[59] Some commenters (INTV and TBS) have asserted that the networks would have an incentive to withhold their most popular programs from syndication in order to deny them to independent stations and thus damage the independents' competitive position. Since the most popular programs earn the highest syndication revenues, withholding them would entail higher costs to the networks than withholding other programs. As in the case of other shown programs, for withholding to be profitable, the advertising revenues gained would have to outweigh the loss of syndication revenues. Consequently most commenters rule out withholding of the best programming; even ICF states that such withholding would be less likely than withholding of less popular programming. See "Response to comments on the ICF Report," ICF Incorporated, Apr. 26, 1983, p. 14.

[60] A hypothetical example may help clarify this theory. Suppose that programs A, B, and C are available for a single time slot and would generate advertising revenues of $1,000, $800, and $600, respectively. Assume also that the cost of distributing a program (the minimum price at which any program would be sold) is $100. If program B were to sell for $100, then the maximum that could be charged for program A is $300, since A would only earn $200 more revenue than B. If the owner of program A attempted to sell it for more than $300, B would earn higher net revenues for the purchasing station. But suppose A and B are owned by the same seller. Then that seller can withhold B from the market, and if C sells for $100, A can be sold for up to $500 and still earn more revenue for the station than C. The seller has increased the price of A by $200 and lost nothing, since B would not have been sold in any case.

available to viewers unchanged and so would not affect viewer welfare. Withholding of this sort also would impose no additional cost on the syndicator who withheld the programs, since he would not forego any revenues by withholding unshown programs. The sole direct effect would be an increase in program prices and a consequent transfer of revenues from the stations to the syndicators of the programs that are shown.

148. In addition, some supporters of the rules assert that, since stations' programming costs would rise with increasing program prices, there would be a reduction in independent stations' profits, which in turn would reduce those stations' ability to acquire high-quality first-run syndicated series or theatrical features.[61] Thus, they believe, the quality of programming on independent stations would deteriorate. Their argument does not appear to be valid, however, because one would expect program acquisition decisions to be made on the basis of the expected net revenues of the programs to be acquired, and that a loss of profits as a source of funds to purchase programs would be unlikely to affect those decisions. The same supporters of the rules state that a decrease in the profits of independent stations would retard the entry of new stations and, consequently, would decrease the likelihood of formation of a fourth network.

149. The second theoretical case that ICF discusses would result in the same effects as the first except that, in addition, the programming actually shown would change as a result of warehousing. In this second case, ICF posits some small fringe suppliers in addition to the dominant firm. If the dominant supplier owned several programs, but not the best unselected program, it could have an incentive to withhold one of its own programs that otherwise would have been selected. This would mean that the best previously unselected program would be purchased instead of the program withheld, leaving a still poorer program as the best unselected show. Such withholding would cause the prices of selected programs to rise.[62] If the dominant supplier also owned the program that became the best unselected program, it could have an incentive to withhold

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[61] Commenters expressing this opinion include TBS and INTV.

[62] Another numerical example may be useful. Suppose this time there are two time slots to be filled and programs A, B, C, and D, providing advertising revenues of $1,000, $900, $800, and $500, respectively, are available. Distribution cost is again $100. Programs A and B will be sold for at most $300 and $200, since the next best alternative is program C, which costs $100 and provides $100 less revenue than B and $200 less than A. If the owner of A does not own C, he cannot withhold it to raise the price of A and B. But if he owns B, he can withhold B so that C will be purchased instead. Then D will become the best alternative program. The price of A can rise to $600, since the best alternative costs $100 and provides $500 less revenue than A. The owner of A now earns more from selling A alone than he did from selling both A and B.

that program as well, thereby allowing the prices of selected programs to increase still further. In addition to the effects on prices, this strategy would cause stations' audiences and advertising revenues to fall, since programs would be withheld that would have attracted larger audiences than those actually shown. As a result viewers' welfare would decrease, since preferred alternatives would be unavailable to them. The syndicator who withheld the program (who also would be the dominant firm) would lose the revenues from the programs that were withheld, but all syndicators of shown programs would gain revenues from the increased prices of the programs that were shown.

150. These two strategies could be pursued by any syndicator who owned rights to the necessary programming. The third and fourth cases presented by ICF involve additional effects that ICF asserts the networks could accomplish because they are integrated into broadcasting and because they sell television advertising in competition with the independent stations. In the third case, the networks would raise advertising prices to a higher level than they would if they were not integrated into broadcasting. Raising their advertising rates would cause the networks to lose some advertisers to the independent stations, but as a consequence of the new demand for their time the independents' advertising revenues would increase and they would be able to pay more for programming. Then, according to ICF, the networks would be able to raise prices of off-network programs even higher than in the first two scenarios and could more than recover their initial losses of advertising revenues to the independents. Although independents may not be any worse off under this scenario—they would have higher costs but also higher revenues—consumers and advertisers would be adversely affected because advertising rates and prices of advertised products would rise.

151. In the fourth scenario, ICF asserts that the networks' involvement in broadcasting would give them an incentive to carry the withholding strategy further than if they merely distributed programming. Networks could reduce the quality of programming shown by independents either by making high-quality off-network programming unavailable or by raising the price of high-quality programs to the point where the expected advertising revenues from the programs would not cover their cost. This is the case about which most commenters expressed concern, and the one which yields the most detrimental alleged effects. If withholding of programming by the networks caused independent stations to show inferior programming the independents' audiences and advertising revenues would fall. Some of the viewers lost to independent stations would switch to the affiliates or owned stations of the network withholding programming, thereby potentially increasing that network's advertising revenues. In addition, if the increase in program prices or the

reduction in audiences caused independent stations to reduce their hours of operation or to cease operation, and if there were no good substitutes for television advertising, then the decrease in the quantity of advertising time available would cause an increase in its price. Thus, the networks and affiliates would gain not only from increased numbers of viewers but also from increased advertising revenues per viewer. In addition, ICF concludes that viewers would have less desirable programs from which to choose and a smaller number of choices. Finally, that part of the increase in advertising prices would be passed on to consumers in the form of increased prices for advertised products.

152. *Likelihood of Withholding Programs*. The ICF theories presented above appear consistent with economic theory. Whether or not they accurately depict reality, however, depends, on several assumptions about the characteristics of the syndication market. At the heart of the theories are the requirements that the networks both be able to affect the price of off-network syndicated programming by controlling its supply, and have an incentive to do so. We examine below the assumptions underlying the warehousing theory and the likelihood that they could all be met. While we conclude that withholding is unlikely, we find that it is impossible to rule it out entirely.

153. The first assumption is that off-network programs must constitute a separate, at least somewhat distinct, market. For control of the supply of off-network programming to enable the dominant supplier to affect its price, no good substitutes must be available near that programming's prevailing price. Otherwise, increasing the price of off-network programming would merely encourage independent stations to purchase one of the substitutes. In fact, many other forms of programming are available to independent stations, including first-run syndicated programs, sports shows, theatrical films, and locally-produced programs. Nevertheless, the half-hour segments of recent off-network shows may be somewhat better suited to this time slot.

154. ICF and others opposing repeal of the rules assert that, for important time periods, other forms of programming cannot generate net revenues as high as those of off-network programs.[63] Thus, the existence of such programming cannot constrain the prices of off-network programs. Off-network programs, they assert, cost less for similar program quality and audience ratings because their production costs have already been recouped during the network run. These parties believe that off-network programs are less risky than the alternatives because their ratings can be more readily predicted by

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[63] See ICF, "Paper 2: The Economic Effects of the Repeal of the Rule on Advertisers and Independent Stations," pp. 3-12—3-34, and comments of the Department of Justice.

using their ratings during the network run as a guide. In addition, they argue, for the 4:00 to 8:00 p.m. time period (a period during which independents earn a considerable portion of their revenues), longer programs such as movies and sports events are unsuitable because most viewers are unwilling to commit large blocks of time to watching television. To the extent this is true, there may be a distinct submarket.

155. The study submitted by Crandall, Noll, and Owen presents evidence that many first-run syndicated programs are shown between 4:30 and 7:30 p.m., and further, that many of those shows receive ratings as high as or higher than the highest-rated off-network programs.[64] Thus it appears that first-run syndicated programming can generate revenues similar to those of off-network programs, so that from the point of view of television stations they can be considered close substitutes for off-network shows. The study also shows that while only a few of the programs shown in the 4:30 to 7:30 p.m. period have high ratings, a large number of programs receiving more or less similar lower ratings, both off-network and first-run, are shown in that period.[65] Even if many of the best unshown programs were withheld, many more with the same potential revenues would be available. Without controlling nearly every unshown program in syndication, including first-run pro-

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[64] Robert W. Crandall, Roger G. Noll, and Bruce M. Owen, "Economic Effects of the Financial Interest and Syndication Rule: Comments on the ICF Report," Owen, Greenhalgh, & Myslinski Economists Inc., April 1983, pp. 84–5. Because the 7:30–8:00 p.m. period is omitted, the programs and ratings reported are not directly affected by the prime time access rule.

[65] *Id.*, pp. 83–86. ICF, in fact, defines the market more narrowly as recent off-network programs shown between 4:00 and 8:00 p.m. and between 11:00 p.m. and 1:00 a.m. Others, however, present evidence that programs shown in other time periods substitute readily for these programs. An FCC staff study reports that all but one of the 101 most popular syndicated programs are shown in more than one daypart. In fact, 42 percent of them appear in five or six dayparts. An implication of this fact is that while movies, sports, and the like may not be usable in the 4:00–8:00 p.m. period, they can be substituted for series shown in other dayparts that could be shifted to that period. *See* Jonathan D. Levy, "Is There a Separate Market for Off-Network Programming and How Easy Would It Be to Collude Therein?", p. 4. In a study submitted with CBS's reply comments, Joskow shows that a typical station shifts many programs between 4:00–8:00 p.m. and other dayparts. The station's audience shares, with few exceptions, appear fairly constant across dayparts. Paul L. Joskow, "Comments on the Effects of Repeal of the Financial Interest and Syndication Rule," in Reply Comments of CBS, Inc., Appendix B. Vol. 2, Table 20; ICF Exhibit 1–23. Joskow also notes that older off-network programs are good substitutes for recent ones. In a survey of ten top-rated independent stations, off-network programs in syndication more than five years accounted for about one-third of programming time between 4:00 and 8:00 p.m.; the stations broadcast an average of two programs more than ten years old during this period. *Id.*, Tables 16, 17. Joskow estimates that in a market with three affiliates and two independents, about sixty half-hour series a year—far too many to be supplied from popular, recent off-network fare—would be required to fill the 4:00–8:00 p.m. time period. *Id.*, p. 30.

grams, it would be impossible to create a gap in potential revenues between the last program shown and the best unused alternative. However, to the extent that such a gap may exist, successful warehousing, following the strategy referenced by ICF, Inc., might be practical. In this regard, it is appropriate to give some credence to the business judgment of industry practitioners. A statement by 58 managers of independent stations asserts that there are few good substitutes for off-network programs in the 4:00–8:00 p.m. period, and the revealed preference of at least one major group owner of independent stations is overwhelmingly for off-network programs in the early fringe period. Furthermore ICF, in its reply comments, cast some doubt on the homogeneity of the marginal programs asserted by Crandall, Noll, and Owen.[66]

156. A second assumption underlying ICF's warehousing theory is that the networks have the ability to acquire all syndication and financial rights to most or all off-network programs. If suppliers other than the networks controlled programs that would provide good substitutes for those over which the networks gained control, then a withholding strategy could not be effective. The ICF report asserts that the networks would have the power to extract syndication rights from program producers. CPD suggests that the broadcast networks would be able to acquire all syndication rights because there are no alternative buyers for the producers' programs, and because network program contracts are negotiated at an early stage when the producers are particularly vulnerable.[67] The fact that syndication rights are acquired early in a program's life, before the program's success is known, means that the networks would have to acquire syndication rights to most of their programs, whether they eventually went into syndication or not. While evidence concerning networks' market power in the purchase of programming appears mixed, as discussed earlier, there appears to be considerable evidence that contracts between networks and program producers

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[66] Comments on CPD, attachment 3, comments of Metromedia, Inc. at 35 and ICF, Inc. response to comment of the ICF Report at 12–13. It is noted that while Crandall, Noll, and Owen suggest that the supply of syndicated programming is elastic and hence that witholding is impossible, their own discussion shows an inelastic curve.

[67] Cable networks have begun to buy program series, so that the networks may in fact no longer be the sole purchasers for the producers' output. At the time comments were filed in this proceeding, some parties, including the Department of Justice, questioned the significance of these alternative buyers. Indeed, ICF, Inc. stated that "not one high quality series has ever been sold to pay cable." Now many examples of such programming could be cited. For instance, Home Box Office (HBO) now has two series in production, and HBO executives expect that original series will eventually make up about one-third of its original programming schedule. *Multichannel News*, February 14, 1983. Cinemax has recently bought the program "SCTV," dropped by NBC. New York *Times*, May 18, 1983. The Disney Channel plans to show 13 original series, making up 50 percent of its daily lineup. *Variety*, April 20, 1983.

tend to be informal and flexible, allowing renegotiation if a program becomes successful.[68] Thus members of the production industry appear to retain large shares of the profits of successful shows.[69] If so, it appears likely that producers would be able to retain a financial interest in syndication rights if those rights proved valuable.

157. If the networks merely bought syndication rights in a competitive market, then they would have to pay the full market value for those rights. If the prices paid reflected the full value of the programs, warehousing would be pointless, since such prices would incorporate all the revenues the programs would be expected to generate in syndication. Consequently, all the gains from withholding programs would be lost. Even if the syndication rights were worth more to the networks than to other potential purchasers, so that the networks could outbid everyone else, price competition among the networks could result in the full market value of the rights being paid. If, however, there is collusion, either overt or tacit, among the networks in the purchase of programs, prices might not rise to their full competitive market value.

158. As a practical matter, if the rules were repealed, the networks initially would hold no syndication rights, because they have been prevented from acquiring them up to this time. If they began acquiring such rights immediately, the programs whose rights they bought would still not enter syndication for several years.[70] For some years thereafter an inventory of economically-useful older off-network programs whose syndication rights belong to non-network companies would remain to compete with the networks' programs. In the meantime, series produced for cable or other new media would reach syndication and provide additional competition. Therefore, even if it were true that the narrowly-defined off-network program market was the relevant one and even if the networks could acquire control of recent off-network programs, they would continue to face

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[68] *See* Network Inquiry Staff Report, pp. 480–495, 515–526. See also Joskow, pp. 17–19.

[69] Stars of hit television series have been able to acquire from the networks commitments worth several million dollars to use the stars' companies for production of future series. The magnitude of the agreements suggests that in fact the production industry possesses considerable power vis-a-vis the networks. Los Angeles *Times*, January 23, 1983.

[70] As discussed earlier, about 80–100 episodes, which would require a network run of four or five years, are considered necessary for successful syndication. FCC Network Inquiry Special Staff, pp. 410–411. In a study for NBC, Booz, Allen, and Hamilton, Inc. estimate that if the networks acquired distribution rights to 50 percent of their prime time entertainment series—almost twice the percentage acquired before adoption of the rule—by the year 1993 they would jointly control less than 25 percent and by the year 2000 less than 40 percent of off-network programs shown in early and late fringe on independent stations in the top 20 markets. Reply comments of NBC, pp. 78–79.

competition from other sources. Although, as has been noted, some types of anticompetitive conduct are difficult to police, if the networks did acquire syndication rights to most off-network programs, that fact would be readily observable to the Commission, the Department of Justice, and the Federal Trade Commission.

159. A third assumption underlying the warehousing theory is that the networks must be able to collude in the sale of programs. The ICF Report asserts that a syndicator who owned even a small number of off-network programs might be able to withhold some of them and raise the price of all off-network programs that were shown.

160. As discussed above, withholding a program that would have been shown, or the best unshown program, causes a new program to become the best unshown program. If the revenue potential of the new best unshown program is substantially lower than that of the original one, then withholding can raise program prices significantly. ICF presents a hypothetical example in which program prices are driven up by a series of program withdrawals by three suppliers. However, as pointed out by Crandall, Noll, and Owen, once these programs have been withheld, the higher program prices create an incentive for individual syndicators to increase their profits by re-offering withheld programs at relatively low prices.[71] If they do so, program prices will fall to their original levels, and warehousing will fail. ICF's model prohibits such behavior, but provides no explanation of why it would not occur. In fact, collusion among program syndicators appears necessary to prevent re-offering of withheld programs.

161. This analysis leads us to believe that warehousing would require collusive behavior among syndicators in the sale as well as in the purchase of programs. It is widely believed that most collusive agreements tend to be unstable because the parties to the agreements face powerful incentives to violate them.[72] If a collusive agreement raised prices above competitive levels, a firm could secretly lower its prices or sell products instead of withholding them, and thus could expand its share of the market, and its profits, at the expense of the other parties to the agreement. Long-term maintenance of a collusive agreement requires certain conditions. Among other things, because of the incentives to violate such agreements, the colluders must be able to police each other's activities on a rather

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[71] Crandall, Noll, and Owen, pp. 59–64. First-run programs would also become relatively more attractive, and producers would have an incentive to expand the suppllly of such programs.

[72] For a thorough presentation of current economic thought concerning the conditions facilitating and limiting oligopolistic coordination, see F.M. Scherer, *Industrial Market Structure and Economic Performance* (Chicago: Rand McNally, 1980), pp. 169–227. See also George J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy* 72 (February 1964): 55–59.

detailed level. Adherence to the agreements must be visible to the colluders but, because such agreements are illegal under the Sherman Act, adherence must be invisible to everyone else. To make collusion manageable, the number of firms needs to be small and the terms of the agreement need to be simple. In addition, if the firms have differing interests, possibly as a result of their having different market shares or cost conditions, the would-be colluders may find it difficult to find terms on which they can agree. For instance, if one network held several marginal programs but few highly popular ones, it would gain little from warehousing, and side payments might be required to induce it to participate. In addition, since higher-than-competitive prices would entice new firms to enter the market, barriers to entry must exist to prevent potential new firms from offering a similar product and undercutting the prices of the existing ones.

162. An examination of the syndication industry for the presence of these necessary preconditions helps determine the likelihood of collusive warehousing in this industry. The market for syndicated programs is composed of a large number of local markets with widely differing characteristics. The number of programs sold in a given market varies with the number of stations in the market. In addition, since demographics and tastes vary from market to market, different programs will be popular in different markets, and programs' ratings will differ from market to market.[73] In addition, ratings will change over time as new programs enter the market and old ones become outdated. Moreover, the prices advertisers are willing to pay for a given audience size differ with the demographic characteristics of the audience. Thus, the revenues that will be generated by a given syndicated program depend on the many characteristics of the program and the market—and are basically unknown in advance. Given the differences in demand conditions across markets, the specific programs that would have to be withheld for the warehousing scheme to succeed would differ from market to market. Even if there were only a single syndicator, he would not know with any degree of certainty which programs to withhold from which markets. If he withheld a program that would have been sold he would forgo the revenues from the sale of that program. A successful warehousing scheme would appear to be difficult to devise even if collusion were unnecessary and all the other necessary conditions were met. However, to the extent a large fraction of markets had similar characteristics, the withholding process would be simplified.

163. In addition, accomplishing a collusive warehousing plan

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[73] The study of Crandall, Noll, and Owen reports that program ratings depend on a large number of program and market characteristics. It also presents evidence that the ratings of off-network programs vary widely across markets. Crandall, Noll, and Owen, pp. 71–72.

would appear to require detailed, frequently-updated agreements with different provisions in different markets. The complex nature of such agreements would tend to make them difficult to reach tacitly. Collusion under such circumstances would probably require explicit negotiation and agreement, and might be highly susceptible to detection. The colluding syndicators would have to consider the gains from their collusion great enough to justify the risk of being found out and prosecuted. Moreover, a study by Owen, Beebe, and Manning suggests that, in the past, the networks may have been able to coordinate their behavior in simple matters such as the number of reruns but not on more complicated issues such as the level of program quality.[74] Warehousing may fall someplace between the extremes. Finally, FCC actions encouraging the entry of new competitors and the expansion of new media technologies such as cable, MDS, STV, and, in the future, DBS and LPTV, have provided or will provide alternatives to the networks, both in the purchase of programming from producers and as a source of programming to independent stations. Thus they have greatly reduced the likelihood that collusive agreements would be successful.[75] In short, the likelihood that the networks would be able to reach and maintain collusive agreements under all these conditions appears remote, even if off-network programs had no good substitutes and the networks held syndication rights to all of them.

164. These factors suggest that collusion among the networks would be difficult. Nevertheless, the Department of Justice, one of the two principal government agencies responsible for antitrust enforcement, indicates that the possibility of tacit collusion cannot be ruled out.[76] While noting the difficulties of coordinating withholding across many separate geographic markets, the Department suggests that crude formulae, based on the number of independent stations per market or the number of available time slots in certain markets, could be used to facilitate collusion.

165. Although the Department of Justice does suggest that the networks would have stronger incentives to "warehouse" than other syndicators,[77] it is worth remembering that, if the networks could

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[74] Bruce M. Owen, Jack H. Beebe, and Willard G. Manning, Jr., *Television Economics* (Lexington, MA: D.C. Heath and Company, 1974), pp. 103–111.

[75] FCC actions facilitating entry or expansion of new video media include *Deregulation of Receive-Only Domestic Earth Stations*, 74 FCC 2d 205 (1979); *Report and Order* in General Docket No. 80-603 (authorization of direct broadcast satellite service), 47 F.R. 31555 (1982); *Third Report and Order* in Docket 21502 (subscription television deregulation), 47 F.R. 30069 (1982); *Report and Order* in BC Docket 78–253 (authorization of low-power television), 47 F.R. 21468 (1982); *Report and Order* in Docket 80–112 (multi-channel MDS), adopted May 26, 1983.

[76] Reply Comments of the United States Department of Justice at 15–18.

[77] *See* Reply Comments of the United States Department of Justice at 19–20 for a discussion of their rationale in this regard.

profit from a withholding strategy such as that described above, so too could existing syndicators. Since the syndication market appears to be moderately concentrated, collusion might also be possible there.[78] Consequently, entry into the syndication market by the networks might in fact reduce the likelihood of warehousing, since it would reduce the level of concentration in that industry.

166. The third and fourth scenarios presented by ICF require further preconditions, in addition to all those described above. As noted above, in ICF's third scenario, control of off-network programs would allow the networks to raise advertising prices higher than they would otherwise. They would lose some advertisers to independent stations, but because independents' advertising revenues would rise the independents would be able to pay more for off-network programming. The networks would then be able to raise off-network program prices and recapture some of the lost advertising revenues.

167. To affect advertising prices, the networks must be able to collude in setting advertising prices, as well as in the purchase and sale of programming. We have noted the difficulties of collusion in the sale of programs above; similar difficulties would confront an attempt to collude in the advertising market.

168. In a study submitted with CBS's reply comments, Joskow points out that even if the networks could succeed in raising advertising prices, there would be many leakages that would reduce the amount of their advertising revenue loss that the networks would be able to recapture from independent stations.[79] Only some of them are noted here. First, if advertisers consider that other forms of advertising are good substitutes for television advertising, increases in television advertising prices will merely cause advertisers to shift to radio, newspapers, or other media. Second, if advertising rates rise, some advertisers will simply choose to advertise less. Third, network stations must hold a large enough share of the advertising market so that, if they reduce the supply of advertising time to raise the price, the independents cannot counteract the effect by increasing their own supply of advertising.[80] At the same time, the smaller the independents' share the smaller the gain to the networks from

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[78] *See* ICF, Vol. 3, Appendix 4, pp. 175–242; Joskow, pp. 10–11, Table 8.

[79] Joskow, pp. 35–47.

[80] Joskow points out that the networks' share of total television advertising is only about 40 percent, which is probably too small to give them substantial power over advertising prices. So increasing the level of television advertising prices would have to be accomplished through the affiliates and O&O's. It is not clear how the networks would induce affiliates to participate in such a strategy, since the affiliates would only lose advertising revenues and would regain nothing in the syndication market. There are only three markets with three O&O's, and there are enough independents in these markets to make it unlikely that the O&O's could exercise market power. Indeed, Fournier and Martin present evidence that local stations do not exercise market power in the sale of non-network advertising. Gary M. Fournier and Donald L. Martin, "Does Government-

increasing the prices independents must pay for programs. Fourth, off-network programming must make up a large percentage of independents' total programming. While the prices of all television advertising will rise, the networks will only be able to recapture gains from increases in advertising revenues for advertising shown during off-network programs. Fifth, as Joskow points out, the price of a program is determined by the difference between its advertising revenues and those of the best unshown program. As advertising prices rise, the revenues of both programs will rise proportionately. So the increase in program prices will only be a percentage of the increase in advertising revenues. Clearly, in the process described above leakages occur at several stages, so that the networks can extract only a fraction of the increase in independents' advertising revenues. Joskow presents calculations demonstrating that even under very favorable assumptions, the networks could at best break even pursuing this strategy. The major effect would be that independents would gain at the expense of advertisers and consumers. This scenario thus appears to be, as Joskow asserts, "a theoretical curiosity that has no empirical significance."[81]

169. In the fourth case presented by ICF, the networks would carry the withholding strategy further than would a syndicator who did not sell television advertising because they would benefit from independents' losses of audiences and advertising revenues. In this scenario, higher program prices would cause independents to show poorer-quality programs and thus lose viewers, reduce hours of operation, or both. Networks and affiliates would benefit both from larger audiences and from a reduction in the supply of audience-minutes of advertising in the market, which would raise advertising rates per viewer. For networks to be able to affect independents' audiences and advertising revenues in this manner, all the conditions required for warehousing must hold. If there are a large number of programs of equal value available to replace the last unshown program, the networks could not raise program prices and could not cause the independents to lose viewers. In addition, as in the case described above, there must be no good substitutes for television advertising, or increases in television advertising prices will cause advertisers to desert the medium.

170. If the networks withheld programs that otherwise would have been shown, the effect on advertising revenues would have to be large enough to outweigh the loss in syndication revenues from the programs withheld from the market. However, only some fraction of the audience lost to the independents would accrue to the network withholding the program; the rest would turn to affiliates of

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Restricted Entry Produce Market Power?: New Evidence from the Market for Television Advertising," 14 *Bell Journal of Economics* (1983), pp. 44–56.

[81] *Id.*, p. 44.

other networks, other independents, cable systems, or other forms of video entertainment, or would simply do something else with their time. ICF claims that the primary effect of warehousing would occur in the 4:00–8:00 p.m. time period, since that is the only period when independents depend primarily on off-network programming. However, the evidence shows that, except for a half hour of news, the affiliates show almost no network programming during that time period. Thus, most of the gain from warehousing would accrue to the affiliates, not to the networks, except in the case of the few owned-and-operated stations. No mechanism is presented whereby the network could extract the affiliates' gains.[82]

171. ICF also argues that increases in program prices might cause independents to reduce their hours of operation or cease operation entirely. The only time period when they might cut back their hours as a result of higher-priced off-network programming is the period from 11:00 p.m. to 1:00 a.m. But Joskow points out that in a survey of independent stations, off-network programming made up only 25 percent of the programming shown during this period, and that first-run programming and movies appeared to be very good substitutes for off-network programming during this period.[83] Warehousing would not likely be successful during this period, therefore, and even if it were, audiences are sufficiently small that there would be little effect on either independents' or networks' revenues.

172. Past experience may provide useful evidence concerning the liklihood that networks would withhold programming from syndication. The only empirical evidence regarding the networks' actual acquisition of syndication rights and warehousing of programs comes from the period before the rules became effective, just over ten years ago. Prior to adoption of the rules, the networks acquired only a small percentage of the syndication rights to off-network programs.[84] None of the commenters asserts that the networks warehoused programs during this period. Some commenters state that the networks' failure to warehouse programs at that time shows either

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[82] It is useful to remember that the third and fourth scenarios discussed above are the only cases that have been presented in which the networks might have greater power or incentive than any other syndicator to manipulate the syndication market. If these effects are considered unlikely, then any remaining possibility of warehousing is as likely to occur through existing syndicators as through the networks.

[83] *Id.*, p. 50, Table 16.

[84] NBC in its comments asserts that the networks acquired syndication distribution rights in only about 25 percent of producer-supplied prime time entertainment series programming in the period immediately before the rules were adopted. Comments of National Broadcasting Company, Inc., p. 207. ABC states that in its experience, syndication rights were almost never acquired if the producer had a syndication arm. Comments of American Broadcasting Companies, Inc., p. 114.

that they were unable to gain control of syndication rights or that it would not have been profitable to warehouse programs.[85] Thus, those commenters think that this provides good evidence that they would not do so if the rules were rescinded. ICF, on the other hand, states that the networks' behavior prior to adoption of the rules is irrelevant because the independents have become much more profitable since the introduction of the rules. Consequently, they assert, revenues from syndication have risen and the potential returns from warehousing are greater than in the past. ICF also argues that, before adoption of the rules, scrutiny by the Commission and the Department of Justice deterred the networks from engaging in warehousing.

173. It should be noted here, that if the potential revenues to be derived from withholding programming are higher, then the cost of acquiring syndication rights will also be higher than in the past, unless the networks can obtain those rights at below-market prices. We have noted above that it is unlikely that networks will be able to extract such concessions from program producers. In addition, the ratio of stations' profits to expenditures for purchased programs appears to have remained about constant between 1970 and 1980, suggesting that no great increase in the potential for syndication profits has occurred.[86] In 1967 domestic syndication sales had already reached $139.2 million, which suggests that if warehousing were a profitable strategy under any circumstances the potential returns were already far from negligible.[87] There is, therefore, no obvious reason why a withholding strategy would be profitable in the future if it was not in the past. Indeed, since the networks have a smaller share of the television audience than in 1970, less of the benefit of diversion of audiences from the independents would accrue to them. And, as a consequence of the current rulemaking, the networks are now subject to scrutiny at least as intense as before the adoption of the rules. Hence, the fact that warehousing did not occur before the adoption of the rules appears to provide useful evidence that it probably would not occur if the rules were rescinded.

174. Several commenters assert that the increasing numbers and profitability of independent stations since the adoption of the rules provide evidence that the rules have been effective and beneficial.[88] In fact, however, the number of independent television stations appears to have increased in the years 1967–1971 and again

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[85] These commenters include CBS, Inc.; Franklin M. Fisher, William J. Baumol, and Paul L. Joskow in appendices to CBS's comments; and Alfred E. Kahn.

[86] Joskow, p. 16.

[87] Reply Comments of ABC, p.9.

[88] These include the Association of National Advertisers, Inc.,; the Communication Commission of the National Council of Churches of Christ in the U.S.A. and the Office of Communication of the United Church of Christ; INTV; Metromedia, Inc.; and Viacom International, Inc.

after 1977, but not in the years immediately following adoption of the rules.[89] In any case, implementation of the All-Channel Receiver Act, the expansion of cable, which improved reception of UHF stations, growth in demand for television advertising, and the Prime Time Access Rule undoubtedly contributed to independent stations' success during this period. While the availability of attractive programming has no doubt been a factor in independent station growth over the last decade it would be extremely difficult to disentangle the effects of all these factors and to what extent the financial interest and syndication rules affected the growth of independent stations.

175. *Other Effects on Television Stations.* Some commenters have asserted that repeal of the rules would have effects on television stations other than through warehousing. For instance, comments by Fisher and Baumol, attached as appendices to CBS's comments, assert that if the rules reduce the efficiency of program acquisition by the networks, they will cause network programs to have lower quality or higher costs than they would have otherwise. This will reduce affiliates' audiences and revenues. In the long run, they state, the effect will spread to independents as the quality of off-network programming available in syndication declines. The effect of this will be a long-term loss of audience by broadcast television to other media. Although we have no empirical estimates of the size of this effect, it is undoubtedly detrimental to the entire broadcast television industry.

176. In addition, as noted above, entry of new competitors into the syndication industry might hold down costs of syndication and reduce prices of syndicated programming to television stations. Again, by preventing the networks from entering this industry, the rules may keep program prices higher than they would be otherwise and may adversely affect all television stations.

Effects of the Rules on Television Networks

177. This section considers the effects of the financial interest and syndication rules on the three major broadcast networks. The following section examines the likely effects of the rules on the prospects for forming additional major networks.

178. In considering the effects of the rules, it is helpful to recall the recent changes in the competitive position of the networks. As discussed above, at the time of adoption of the rules in 1970, the three broadcast networks held a commanding share, over 90 percent, of the video audience. Together with their affiliates they captured about 92 percent ($2.6 billion) of television advertising revenue. Independent television stations had 9 percent of the audience and

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[89] Joskow, Table 1; ICF Exhibit 1–22.

about 9 percent of the revenues. Only 2500 cable systems existed; pay systems were almost nonexistent.

179. In the intervening years competitors have made significant inroads into the broadcast networks' position. The number of independent television stations has almost doubled in the past decade, and their revenues have increased more than threefold. By 1980 the number of cable systems had increased by 70 percent and the number of subscribers had grown by 250 percent. Both continue to grow rapidly. In the mid-1970's, cable networks came into being, providing programming to cable systems via satellite. Over-the-air subscription television and multipoint distribution service have experienced significant growth in major markets. The growth of these other services has eroded the networks' share of the video audience to 80 percent.[90] Even more telling is the decline in the proportion of video product purchased by the networks over this period, which has fallen from 74 percent to 54 percent since adoption of the rules. The purchasing power of the other video media has, thus, grown substantially.

180. Most observers expect the growth of these non-network video outlets to continue; in addition, new technologies, such as direct broadcast satellite (DBS) systems and low-power television, are expected to provide many additional channels in most localities. DBS in particular will provide programming on a national or regional basis, in direct competition with the broadcast and cable networks. Thus the networks' share of the total audience appears likely to continue its decline. As shown in Table 7 *infra*, industry analysts predict that by 1990 the network share of the prime time audience will lie between 59 percent and 75 percent. Revenues from pay cable are predicted to reach $8 billion by 1990, over and above an estimated $6.5 billion for basic cable. These estimates compare favorably with the $15 to $20 billion combined revenues predicted for the networks. Of course all predictions of the future contain some uncertainty, as recent setbacks experienced by pay television stations show.[91] Nevertheless, the effects of the rules must be considered in the context of a market in which the dominance of the networks is clearly eroding, and additional networks promise to provide major alternatives in the distribution of programming.

181. As discussed above, most analysts consider a primary effect of the rules to be the prohibition of voluntary arrangements to distribute the risk of program production. Since it is impossible to predict before a program is produced whether it will be successful in syndication or even go into syndication, syndication rights or

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[90] Evidence submitted at the oral proceeding by ABC shows network audience in 36 channel cable homes in one market (Tulsa) down to a 56 percent prime time audience share.

[91] *Business Week*, May 16, 1983, p. 28.

financial interests in program production are highly risky assets. If the networks are in a better position than other entities to bear this risk, then it will be more efficient and less costly for the networks to hold these rights. If the networks are prohibited from purchasing them, the cost of programming to the networks will be higher and their competitive position relative to other program sources will be weakened. The Network Inquiry Special Staff and subsequent analysts have concluded that in fact the networks stand in a unique position to minimize the risks associated with new television series.[92] This is true for a number of reasons. First, they can ensure exposure of the programs through an efficient set of outlets. Second, they have information on viewers' tastes that gives them an unusual ability to judge the likely success of programs. Third, they can pool the risks of a large number of programs, so that the failure of any individual program will not cause them severe harm. Finally, they can choose programs and schedule them to maximize the value of the entire lineup.[93] Small producers with only one or two programs lack the risk-pooling capacity of the networks; banks or other financial institutions cannot judge as well as the networks the potential success of new programs.

182. In many situations, as a consequence, syndication rights may in fact have greater value to the networks than to any alternative holder, and prohibiting the network from holding them will cause the cost of programming to be higher and, in extreme circumstances, may prevent programming from being produced that might be produced otherwise. If less investment in programming occurs as a result, or if networks choose less risky programming than they would if they could obtain syndication rights, then the quality and diversity of network programming, and the networks' competitive position relative to the other media will be harmed.

183. Shooshan and Jackson assert, plausibly, that the rules handicap the lowest-rated network in attempting to improve its position relative to the more popular networks. The network may wish to buy what it believes to be high-quality programming in order to increase its audience. It will value the syndication rights to such programming more highly than would the producer or other holder of the rights, who would discount their value because the programs would be shown on a low-rated network. Thus the network will be deprived of an opportunity to receive the rewards from a risk it is willing to take, and will be less likely to take the risk as a consequence.

184. A further effect of the rules may be to prevent the networks from entering into lines of business that they are naturally

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[92] Network Inquiry, Staff Report, Vol. II, pp. 616–17; Franklin M. Fisher, CBS Vol. II, Appendix E, p. 3; William J. Baumol, CBS Vol. II, Appendix F, p. 12.

[93] CBS, p. 127.

positioned to enter and where they might operate more efficiently than other entities and might provide additional competition. Since the expansion of many new delivery modes makes the future direction of the home video industry extremely unpredictable, a sensible strategy for any participant in the market would be to hedge his bets by experimenting in various markets and with various delivery methods. The rules inhibit such efficient adaptation to changes in the market by prohibiting, or making unnecessarily costly, many reasonable ventures. For example, they prevent network owned and operated stations from syndicating their own, locally-produced programs. They prevent, for instance, CBS Records from syndicating video productions of their recording stars' performances; and they prevent a network publishing subsidiary from distributing audio-visual "tele-courses" and associated texts, through noncommercial stations. Because of the rules, programs produced and owned by networks can be distributed to cable systems but not to broadcast stations, except through the network feed, which deprives broadcast audiences of access to the programming.[94] It is difficult to see how the domestic program production or syndication markets could be harmed by any of these practices. In each case syndication could be performed by some other entity, but in cases where a network is best positioned to perform the job an efficiency loss to society is incurred if it is not allowed to do so.

Effects of the Rules on New Networks

185. The financial interest and syndication rules as currently drafted also would apply to new broadcast networks, and to the extent that the rules hinder the development of new networks they limit competition with the established networks. Companies that now engage in syndication would be barred from networking, unless they ceased their syndication activities.[95] Such companies might in fact be ideally positioned to enter networking, and requiring them to choose between networking and another important line of business may in fact provide a major deterrent to entry into networking.

186. Of particular importance, the rules could inhibit the formation of so-called hybrid networks, that is, networks serving both broadcast and cable affiliates, by deterring existing cable networks from distributing programming to broadcast stations. Viewers in areas not served by cable would be harmed, and if the cable network could not survive serving only cable outlets, cable viewers would also lose. Since a new network would probably have only a few outlets in the beginning, and in fact might never reach

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[94] Shooshan and Jackson, pp. 28–33.

[95] The Christian Broadcasting Network had to receive a waiver from the Commission to distribute programming to stations by satellite, and is limited in the number of hours per week it can broadcast by the terms of the waiver. *Id.*, p. 27.

the coverage of existing broadcast networks, the ability to distribute programming through more than one medium might be extremely important for attaining the scale necessary to operate efficiently.

187. In addition, if a new network had the option of supplying either a broadcast station or a cable system in a given locality, competition between the two outlets for programming would improve the terms on which the network could sell the programming. Preventing cable networks from serving broadcast stations in effect protects cable system operators from competition for programming.

188. In the long run, as the foregoing suggests, an effect of the rules, as presently drafted, could be to create incentives that cause new networks to use non-broadcast means of distribution. If so, conventional broadcasters will be deprived of sources of programming that might otherwise be available, and audiences will increasingly turn to cable, DBS, and other media. To the extent that the rules affect the choice of media they prevent the broadcast networks from competing fairly with the emerging media. They also distort the market in ways that prevent programming from being distributed in the most efficient manner and by the means preferred by viewers. These effects of the rules were unforseen, indeed unforeseeable, at the time of their adoption. It would not be surprising if the rules had additional unintended and unforeseen effects reducing the efficiency of the market and service to viewers.

IV. *CONCLUSIONS AND NEW REGULATIONS*

189. In adopting the financial interest and syndication rules, the Commission stated that the rules could "readily be changed or rescinded" if they failed to achieve their intended purpose.[96] We have sought in this proceeding to determine if in fact these rules have achieved their intended purpose and have concluded that, in many respects, they have not.

190. When the rules were adopted, the Commission indicated its belief that this form of regulation would contribute to both the diversity of programming available to the viewing public and the competitiveness of the television program production and distribution systems. At that time, the Commission focused almost all of its concern on the relationships between the networks and the packagers and producers of network entertainment programming. In the present proceeding, it is also argued with considerable force that regulation is necessary to structure the relationship between the networks as potential program syndicators and the independent television segment of the broadcasting industry. Because the concerns addressed when the rules were adopted and the new rationales for their continuation are in many respects substantially different, it is appropriate that they be addressed separately.

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[96] 23 FCC 2d at 397.

Regulation of Network/Producer Relationships

191. The set of concerns principally focused on in adopting these rules had to do with redistributing economic power from the three national television networks to that group of companies that produce and package television entertainment programs. In adopting the restrictions imposed by the rules, the Commission indicated its belief that the economic strength and ability of the program suppliers "profitably to operate" would thereby be "greatly enhanced"[97]; that the rules would insure the availability of independently produced, first-run syndicated prime time programming[98]; that a "conflict of interest" would be eliminated that had caused the networks to select for exhibition programs in which they had a financial interest, presumably in place of superior programs in which they had no interest[99]; and that diversity and competition in the program supply markets would be fostered.[100] It has also been argued that the rules were intended, in some measure, to shift creative control over programs exhibited on the networks to the program suppliers.[101]

192. Shortly after the rules were adopted, independent scholars began to criticize various aspects of the economic reasoning that led to their adoption.[102] One study of the rules, published in 1978, concluded that "the Commission seriously misunderstood the economic realities of the program procurement process, and as a result,

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[97] 23 FCC 2d at 398.

[98] 23 FCC 2d at 389, 397.

[99] 23 FCC 2d at 398.

[100] 23 FCC 2d at 398.

[101] 23 FCC 2d at 397. *But see*, n. 107, *infra*.

[102] Two articles by R.W. Crandall focused directly on the rule, while work by various others suggested that the market conditions assumed by the Commission did not in fact obtain. Crandall's research suggested that when networks purchased syndication rights to programming, they paid program producers the market value of those rights. He also found that networks made their decisions on retaining series without "favoring" programs in which they retained a financial interest. Finally, Crandall found no evidence of monopsony power in the program acquisition market. See R.W. Crandall, "The Economic Effect of Television-Network Program 'Ownership'", 14 *Journal of Law and Economics* 385–4–2 (1971) and "FCC Regulation, Monopsony, and Network Television Program Costs," 3 *Bell Journal of Economics* 483–508 (1972). Additional information on syndication markets is provided in R.G. Noll, M.J. Peck, and J.J. McGowan, *Economic Aspects of Television Regulation* (Brookings Institution: Washington, DC, 1973), pp. 63–67. They show that before the rule the networks' share in syndication profits was low, and they estimate that program producers extract approximately one-half of the "rents" associated with their product. The latter point suggests that any network monopsony power is limited. Finally, B.M. Owen, J.H. Beebe, and W.G. Manning, Jr., *Television Economics* (D.C. Health and Company: Lexington, MA, 1974), pp. 28–31 examined the program production market and found it characterized by easy entry and an ample supply of programming inputs. This suggests that whatever mix of programming is demanded will be produced, without regulatory intervention being needed.

adopted rules which had no chance whatsoever to achieve their intended result."[103] In the mid-1970's, the Commission had also come to believe that its network regulations were in need of a thorough review and therefore commenced the proceedings in Docket 21049 to complete that process.[104]

193. In the course of that proceeding a detailed analysis of the network/program supplier relationship was undertaken. Numerous participants in the process were interviewed, extensive data relating to the development of network programming was reviewed, and the contract files for a large number of network programs were examined. At the conclusion of this inquiry, a staff report was prepared and released for public comment. This report, generally agreeing with the earlier scholarly research, concluded that the rules were based on incorrect perceptions of the nature of the economic markets involved, would be ineffective in accomplishing their stated goals, and should be eliminated.

194. With respect to the Commission's attempt to readjust bargaining power between the networks and the suppliers of programming, the *Report* made the following comment:[105]

> One allegation is that networks employ bargaining power to exact "unfair" or "excessive" terms or "low" prices from program suppliers.[a] Such allegations should not be of concern to the Commission, for they raise only the question whether program suppliers have been sufficiently compensated for their work. The networks, even if exercising complete monopsony power, cannot pay less for a program than the value the suppliers' resources have in their best alternative use. The assertion that networks can or will acquire programs for less than their costs simply will not withstand scrutiny. Once it is understood that networks, no matter how powerful, cannot purchase programs at rates that are unprofitable for suppliers, contentions that contract terms harm suppliers can be seen for what they are—allegations that suppliers are not paid as much as they would prefer. Most importantly, the public interest—the interest of viewers in receiving numerous, diverse, quality programs from which to choose—is not implicated by such contentions. Moreover, even if viewers were aided, in some indirect manner, by increasing producers' income at the networks' expense, this redistribution of profits cannot be achieved without regulating substantially all terms, including the license fee, of network program supply contracts.
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> [a] This allegation is often expressed in the form of a complaint that networks favor those programs in which they obtained . . . [financial interests]. Unless some policy is violated by the acquisition of these rights, however, there is no reason to fear or prohibit networks favoring programs in which they have been obtained. Thus, networks presumably favor programs for which they obtained low license fees or which they expect to attract large audiences. One cannot urge

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[103] T. Schuessler, "FCC Regulation of the Network Television Program Procurement Process: An Attempt to Regulate the Laws of Economics?" 73 *Northwestern U.S.L.R.* 227 at 229 (1978).

[104] *Notice of Inquiry in Docket 21049*, 62 FCC 2d 548 (1977); *Further Notice of Inquiry in Docket 21049*, 69 FCC 2d 1524 (1978).

[105] Network Inquiry Staff Report, Vol. II, p. 793 (footnote omitted).

that this favoritism be prohibited without demonstrating that public policy is violated by networks obtaining low license fees or large audiences.

195. Neither in the responses to the Final Report of the Network Inquiry Special Staff[106] nor in the responses to the present proceeding was there any significant new evidence or analysis presented to rebut the conclusions reached by the network inquiry staff. Indeed our review in the present proceeding persuades us that the earlier criticisms of the rules, in terms of their impact on network/supplier relationships, were essentially correct. In our analysis of the responses to this proceeding we have found no credible evidence that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market. We have found no credible argument presented as to why network financial interests in programs would lead to an improper or inappropriate selection of programs for network broadcast. While it is difficult to evaluate the impact of the rules on creative control, it is apparent that, as the principal purchasers of network programming and as licensees of stations using this programming and as responsible agents for affiliated stations that broadcast this programming, the networks have continued to maintain a significant and not improper control over the programming obtained for network exhibition.[107] Finally, we do not believe that the Commission has a proper role to play in allocating revenues or profits between the networks and those who supply programming for network use, in the absence of evidence or reason to believe that by doing so the value of the television service received by the public will be increased. Not only do we fail to find evidence that such a shift would benefit the public but it is unclear that the existing rules would cause such a shift to occur even if it were desirable. As long as program supply markets remain competitive, and it is undisputed that they were competitive before the rules were adopted and remain competitive today, the possibility of rules of this type lifting profit levels among the program suppliers and packagers above the normal competitive level is remote. To the extent the rules, by excluding efficient sources of financing from the market, create barriers to market entry or create pressures for smaller producers to join with larger firms, the rules are operating in a manner contrary to their stated purpose and serve no valid public purpose.

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[106] See *Id.* at pp. 805–809 for a review of the response to the Report of the Network Inquiry Special Staff.

[107] With respect to the issue of creative control, it should be noted that, in initially proposing these regulations, the Commission stated directly that "Nothing in the proposed rule is intended or should be construed to limit or modify the overall program responsibility of licensees for all matter broadcast through their facilities." *Notice of Proposed Rulemaking in Docket 12782*, 45 FCC 2146, 2163 (1965).

196. We appreciate that the market into which entertainment television programming must be sold is a concentrated one and that for some particular types of programming there historically have not been more than three significant buyers. Nevertheless, the regulations in question cannot fundamentally change the bargaining power between the parties.[108] And, while the number of purchasers is limited, competition for programming is intense and no evidence of collusive conduct among the buyers is evident.

197. In sum, the rules, as they affect relationships between the networks and the suppliers of programming, appear to fail as mechanisms to increase network or first-run syndicated program diversity and fail to foster competition in the program supply and distribution markets. Furthermore, the rules risk creating incentives for greater concentration in the supply markets and introduce possible inefficiences into the creation and distribution process which could result in reduced total investment in programming. Although there are other reasons for our decision to retain some control over network participation in the syndication of off-network series programs, which are discussed below, we no longer find any reason for limiting non-controlling or passive financial interests that the television networks may obtain in the programming they acquire for network exhibition. Further, no rationale appears to remain, given the analysis above, for any restrictions on network participation in the syndication of programming in foreign markets or for other kinds of restraints on ancillary rights which the networks may invest in and receive a return from in connection with programs they exhibit.

Network Participation in Program Syndication

198. The above discussion, relating to the regulations as they impact on the network/supplier relationship, addresses most of the concerns that moved the Commission to adopt both the financial interest and syndication rules. Another rationale for the rules, touched on only briefly when the rules were adopted[109], but now the central focus of much of the current debate, relates to the question of whether the networks through participation in the syndication of programming could competitively damage independent television

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[108] The logic of the observation that the rules cannot fundamentally alter the bargaining power between the parties appears to have received grudging acceptance even on the part of those who argue for continued regulation. The massive ICF, Inc. study, prepared for the Committee for Prudent Deregulation, begins by taking note, without disagreement, of the previous studies which concluded that, given the competitiveness of the supply markets, "rules governing the network relationships with suppliers are not likely to have significant economic effects *in the program supply market*." (Emphasis in original) (paper 2, p. 1–1). *See also* oral proceeding transcript p. 204.

[109] 23 FCC 2d at 394.

stations' operations in order to protect their affiliates and their own stations from competitive injury or otherwise cause public injury through manipulation of the syndication market.

199. The most refined argument in this regard is that presented by the Committee for Prudent Deregulation, which not only contends that growth of the independents in the last decade is a direct result of the rules, but also presents a complex theory of how repeal of the syndication rule could lead to a situation detrimental to the continued prosperity or even viability of independent stations. That so-called "warehousing" theory essentially postulates that networks would withhold certain off-network series, of a type that is normally broadcast by the independents during the 4–8:00 p.m. daypart, their most lucrative period, in order to increase the price of those programs which are aired or advertising rates.

200. CPD's theory is based on an intricate series of assumptions, which we have already described in detail. For the reasons set forth earlier, we find it unlikely that the postulated scenario would occur. For example, the networks would have to acquire syndication rights in virtually all off-network series programming. If the networks remain competitive buyers of television programming, however, the chance of this happening is small. Nothing in the record of this proceeding suggests that this outcome is plausible. In addition, the theory requires that each network possess monopsony power or that they be able to collude and maintain a collusion. For the host of reasons discussed earlier, we conclude that it is unlikely that the networks could do so. Further, networks would have to be able to control the prices of recent off-network series without fear that buyers would switch to alternative programming. In fact, however, surveys of broadcasters indicate that older series, sports, feature films, and locally produced programs can serve to some extent as alternatives, thereby exerting a constraining influence on the price of recent off-network series. Finally, CPD's warehousing theory rests, in part, on the assumption that television advertising rates are unconstrained by other advertising media. That assumption is, at best, unproven and is becoming less viable with the increase in alternative video services. In short, each necessary assumption is questionable, and when taken together—as they must under the theory posited—the probability of warehousing occurring becomes slight.

201. It is noteworthy that this theory is concerned only with the networks' conduct as syndicators. The networks' financial interest or lack thereof plays no part in this scenario. Accordingly, since the viability of the independents is the only vestigial justification for retaining the rules, we conclude that this provides no justification for a continuation of the financial interest rule. The financial interest rule has failed to increase the independent program supply, has no effect on program diversity or quality, has not decreased

network control over program content or creativity, does not represent an inherently undesirable conflict, and appears to present no threat to the well-being of the independents.

202. We believe there is room for significantly reducing the coverage of the present rule, without jeopardizing any public interest concern. As noted above, there is no reason to exclude networks from the foreign syndication market. With respect to the domestic syndication market, we have tentatively concluded that some restrictions may be necessary because we cannot be completely certain network participation in the syndication market would not result in competitive injury to the independent television segment of the industry and thus to the viewing public. While the chances of such injury, based on the above analysis, do not appear to be large, we are entering a period in which the increasing economic strength of the non-network segment of the television industry is making the television industry significantly more competitive and increasing the programming options available to the public. It is extremely important that progress in this direction not be impeded. If the CPD scenario occurs, it is possible that networks, acting as syndicators of off-network programming would fail to support these developments as vigorously as unaffiliated syndicators. While our economic analysis suggests that this would generally not be a profit maximizing course of conduct to follow, it is nevertheless a matter of sufficient concern to warrant some continued regulatory involvement. We accordingly believe a focused restriction on network participation in the syndication of off-network prime time entertainment programming should be maintained to address the residual concerns that continue to exist in this area, as well as to provide a transition to a less regulated, while at the same time more competitive, environment.

203. The revised syndication rule, which is patterned in large part after the proposal of the Department of Justice[110], is limited in scope. It covers only those programs and practices that could conceivably be employed to harm the independents if the activities predicted by CPD's warehousing theory were actually to take place. Thus, the rule is expressly limited in application to the three major national networks.[111] It applies only to prime time entertainment

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[110] *See* Reply Comments of Department of Justice at 30. We note that, because the antitrust consent decrees that bind the three networks are generally more restrictive than the Commission's rules, the networks will remain constrained until changes in these decrees are made. The analysis developed in this proceeding suggests that changes in them ought to be made. We do not believe, however, that the consent decrees should constrain this Commission in carrying out its own responsibilities. *Cf. Second Computer Inquiry*, 77 FCC 2d 384, 492 (1982). ("Our basic premise is that the consent decree should not constrain this Commission in the adoption of regulatory policies necessary for carrying out our mandate under the Communications Act.")

series, upon which the independents rely for off-network stripping. And it applies only to domestic distribution of these series to television broadcast stations for non-network television exhibition. Participation in the distribution of programming, other than off-network programming, is not restricted since here the potential benefits of additional competition and program sources would appear to far outweigh any potential concerns relating to increased network influence.

204. To reduce any possibility of warehousing, a network will be required, within six months of a series completing its network exhibition run, to transfer all rights in that series it may hold relating to its syndication, to an unaffiliated[112] syndicator. In addition, no later than the end of the fifth year of a network series run, the network will have to transfer all syndication rights for programs in that series to an unaffiliated syndicator. The language of the rules, as proposed is set forth in Appendix A. Our objective here is not to attempt to cover every conceivable aspect of network participation in non-network distribution but to draw a line between those interests that are reasonably necessary to participation in network broadcasting and which may lead to greater investment or efficiency and those interests that are most likely to lead to injurious activities. In disposing of all rights related to syndication, the network shall retain no active interest in the syndication of the program and shall be prohibited from imposing any conditions, terms, or restrictions over the manner by which a program is syndicated.[113] For example, the networks are forbidden to choose a

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[111] The existing rules (§73.658(j)(4)) cover all networks that offer "an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States." The rule was intended to cover mainly the three major networks. See 25 FCC 2d at 333. The actual language of the rule, however, was more inclusive, and is therefore being revised here to be clearer in its coverage. For some of the background concerning why these revisions are considered desirable, see *Christian Broadcasting Network, Inc.*, 50 RR 2d 359 (1981).

[112] In using the term "unaffiliated" we intend a complete separation of ownership and control. Other than the passive interests that the networks may maintain, there should be no common ownership. This would not, however, preclude the transfer of syndication rights to a firm that is both a syndicator and the owner of a broadcast station distributing network programming and thus considered a network "affiliate." In general, however, we intend a strict separation of interests. *Compare, for example*, 47 C.F.R. §64.601, note 1 (rule regulating cable TV-telephone company relationships).

[113] Passive financial interests may be retained by the networks when their active syndication rights are disposed of in accordance with the requirements of the rules. It is critical that any interests retained be passive in nature so that the rule limiting network participation in program syndication is an effective barrier to any activity that might raise "warehousing" concerns. Such passive interests have been described as comparable in nature to the interest of a limited partner in a limited partnership, the interest of a nonvoting preferred stockholder in a corporation, or a contractual interest in a residual payment, in that a financial return is received but no general management power exists. At

syndicator on the basis of the time or day part in which the program will be broadcast, the frequency with which it is broadcast, the price that licensees will be charged, or the stations which will be broadcasting the programs. To ensure that these requirements are met, the networks will be required to file, within 30 days after each sale or transfer, a notice of such sale or transfer with the Commission.[114] The network shall be required to certify, in this notice, that the sale was consistent with the requirements of the Commission's rule. It is the Commission's intent that the networks comply with the spirit and purpose as well as the letter of the rule.

205. We recognize that rules of this type are subject to various types of technical criticisms for their potential inability to address every market practice or situation that might be hypothesized as well as for their constraints on practices that are otherwise reasonable and non-threatening. Clearly, definitional and coverage issues could be resolved by simply making the regulations significantly more or less inclusive. Because there are market factors which themselves present obstacles to warehousing and create incentives that weigh against many of the anticompetitive strategies postulated, what we seek here is a narrow rule to provide only an additional measure of protection. Some have argued that the programming involved is too varied in its characteristics for a rule to trigger a sale of the syndication rights either by reference to some fixed time period (i.e., as in the five year rule) or by reference to some discretionary act by the network (i.e., the six month rule).[115] In this regard, the rule proposed appears to us to fairly target the area of concern. The six month period specified would appear to provide adequate time for the requisite syndication arrangements to be consummated after a program has completed its network run and the five year period sets an outer bound by which rights in the more popular programs would have to be made available for syndication. In neither instance, however, do we anticipate that all or even many of the transactions required would be consummated in the "fire sale" atmosphere of the last days permitted by the rules.[116] Parties disagreeing with our view that the coverage of the rules is correct,

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this point, we see no need to prohibit or require the use of any particular form of interest or limit the percentage of ownership as long as such interests conform to the basic requirement that they be passive in nature and preclude network control or participation in the syndication process itself. What we do seek here is the most effective means of ensuring a separation between "interest" and "control" consistent with the above described rule.

[114] This will permit the Commission to monitor the forced sales and will give the Department of Justice the opportunity to monitor the networks' behavior for any anticompetitive practices.

[115] See CPD reply comments p. 82.

[116] Particularly with respect to the five year provision of the rules, it is important to note, as a number of the commenting parties do, that "after the third year or so, if the show is still successful, and despite the original terms of the contract . . . the balance of power shifts considerably to the producer." ICF, Vol. 1, 1-16.

however, are encouraged to provide constructive criticism so that if alterations are necessary they can be incorporated before the rules are finally adopted.

206. Our decisions to rescind the financial interest rule and to modify the syndication rule are based on consideration of whether each rule serves the public interest. Each has been tested against the relevant criteria of fostering diversity and competition and with a view to how the service received by the public will be affected. Altering the distribution of profits among private parties is not, and never has been, a proper or desirable function of the Commission. Thus, to characterize increased profitability of producers as a goal of the rule is to misconstrue our true objective. We agree with the Network Inquiry Special Staff when it stated: "Indeed, neither the statutory nor the constitutional mandates under which the Commission operates can fairly be construed to authorize intrusion into the program supply business solely for the purpose of enhancing the profits of suppliers."[117]

207. However, the three networks are in a posture different from that of other participants in the market because programming must pass through them to enter the off-network syndication market. Consequently, they are uniquely positioned to affect their competitors' access to the off-network prime time entertainment programs which have played a major role in enhancing the viability of independent stations. While it now appears unlikely that this special position provides the power or incentive for anticompetitive conduct that could harm independent stations, it is impossible to rule out entirely.[118] The very nature of this special position warrants a cautious Commission approach to deregulation in this area. Thus, we are adopting a revised rule that is narrowly drawn to protect against any network effort to capitalize on their special position but which will not impose significant costs in foregone market efficiency.

208. It is the potential harm to the independents which is the Commission's concern. The independent television sector of the broadcasting industry is an important video service to the public. The very significant growth in the number of independent stations in recent years has contributed greatly to making local video markets more competitive and has increased the public's viewing choices greatly. Not only have these stations provided more entertainment for the public but they have multiplied the voices speaking on issues of public importance. Because we are particularly concened

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Thus, there are market factors that will make the five year period an outer bound rather than a norm.

[117] Network Inquiry Staff Report, Vol. II, 293, at 725–31. The Special Staff found no evidence that the interests of television viewers had been furthered by the rules' effort to redistribute revenues.

[118] See Reply Comments of United States Department of Justice at 15–18 and paragraph 152 *et seq., supra.*

that this progress continue, we believe that the public interest would be served by retaining a modified version of the syndication rule. However, because the networks' financial interest in programs has no direct relationship to the possible warehousing strategies, we find no justification for retaining even a modified version of the financial interest rule. Our modified syndication rule expressly prevents the networks from using their financial interest to act as syndication "brokers," an original concern of ours in 1970.[119] Under our modified rule, a network's continued financial interest in off-network distribution of prime time entertainment series can only be a passive profit-sharing interest, without regard to or control of the terms and conditions of syndication. A network's financial interest and syndication rights are thus entirely separable. Accordingly, so are the rules.

209. Our modified syndication rule is designed to be as minimally intrusive into the program process and as low-cost as possible, while at the same time resolving all fears of network warehousing. As our summary description of the economic context in which these rules operate, which is set forth above, indicates, there are clearly going to be significant changes taking place in the years ahead. These will result in there being more buyers of original programming, more distribution outlets, and more alternatives to either off-network or, indeed, original network programming available for broadcast station use in the years ahead. In a context in which these additional alternatives exist, the rationale for the rules will be eliminated as the warehousing scenarios become increasingly unrealistic. At that point it is appropriate that the rules themselves not continue. By 1990 we believe that this modified rule can be repealed, without any danger to the independents. By then, the independent stations will be much stronger, the networks' audience share will be much lower, and the expanding communications marketplace will make anticompetitive activities in the syndiction market significantly more difficult. Hence, unless the Commission makes a determination that the public interest warrants continuation of the syndication rule, the rule will "sunset" and cease to exist on August 4, 1990.

Comments Requested on Tentative Decision

210. Given the long history of our review of these rules we are confident that our analysis of the effect of the rules in terms of the network/supplier relationship is correct. The studies on this question are numerous. The evidence collected by the Network Inquiry Special Staff is exhaustive and the opportunities for comment on the issue have been abundant. Our conclusions with respect to the proposed revised syndication rule are less definitive, however, and we are particularly concerned that, if regulation is necessary, the mechanical aspects of whatever form of regulation is adopted be

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[119] 23 FCC 2d at 398.

workable. For this reason we are issuing this document as a *Tentative Decision* and providing an additional opportunity for comment on it. We recognize that potential problems of application may exist that are not yet resolved or identified by the rules. We ask the commenting parties to help us identify these areas and to propose solutions. For example, we seek suggestions on the question of how to define the end of the network exhibition period. We are also, to this extent granting the petitions requesting further proceedings filed by the Office of Communication of the United Church of Christ, the Communication Commission of the National Council of the Churches of Christ in the U.S.A., Paulist Productions, and the Committee for Prudent Deregulation. Although parties are free, of course, to address any point they want to, our interest and focus at this point is with the syndication issues and the proposed syndication rule. A resubmission or reiteration of arguments already made will not be useful.

211. Authority for adoption of the rule proposed herein is contained in Section 4(i) 301, 303(b), (f), (g), (i), and (j), 307(d), 308(b), 309(a), 310, 312, 313, and 314 of the Communications Act of 1934, as amended.

212. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised the *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the time a public notice is issued stating that a substantial disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments, pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comment must prepare a written summary of that presentation; on the day of the oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1201 of the Commission's rules.

213. Pursuant to the procedures set out in Section 1.415 of the Commission's rules, interested parties may file comments on or before September 20, 1983. All relevant and timely comments will be

considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments.

214. In accordance with the provisions of Section 1.419 of the Rules, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally may do so by submitting 1 copy. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

For further information concerning this proceeding, contact Judith Herman or Marcia Glauberman (202) 632–6302.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Proposed Rule Amendments

Part 73 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Section 73.658 is amended by revising subparagraphs (j)(1) through (j)(4) and adding new subparagraphs (j)(5) through (j)(7) to read as follows:

73.658 Network Syndication and program practices

* * * * *

(j) ***

(1) No television network shall sell, license, or distribute television prime time entertainment series programs that have previously been exhibited on a television network to television station licensees within the United States for non-network television exhibition or otherwise.

(2)(i) A television network shall, no later than 180 days after a network exhibition of a prime time entertainment series is completed, make that complete series available for non-network broadcast exhibition or syndication within the United States.

(ii) In addition, a television network shall, no later than the end of the fifth year after a network exhibition of a prime time entertainment series has commenced, make all programs in that series available for non-network broadcast exhibition or syndication within the United States. On or before the anniversary of that date each year thereafter, all additional programs in the series shall be made available for non-network broadcast exhibition or syndication within the United States.

(iii) All programs shall be made available for non-network exhibition or syndication by transferring all rights held by the network that relate to syndication to an unaffiliated party that is not in any way commonly owned or controlled with the network. The terms of the transfer agreement may permit the network to receive a continuing financial return from the non-network use of such programs but shall otherwise preclude all network control or influence over the terms of license for non-network exhibition, including the specific price charged for non-network exhibition.

the scheduling of the programs and the entities to whom non-network exhibition licenses are granted.

(3) Not more than thirty days following the transfer of non-network exhibition or syndication rights pursuant to the requirement of this paragraph, the network shall notify the Commission of that transfer. That notice shall contain the name of the series, identify the programs involved, identify the party to whom the non-network exhibition or syndication rights were transferred and shall certify that the terms of the transfer comply with the requirements of this paragraph. All agreements relating to such transfers shall be provided to the Commission at the Commission's request.

(4) [*N.B.* This subparagraph is essentially unchanged from the existing rule and was not the subject of this proceeding.] If a network does not timely avail itself of any license or other exclusive right to network exhibition within the United States, the grantor of such license or right to network exhibition may, upon making a timely offer reasonably to compensate the network, reacquire such license or other exclusive right to exhibition of the program.

(5) For purposes of this paragraph and paragraph (k) of this section, the term "network" includes only the major national advertiser supported broadcast television networks (ABC, CBS, and NBC).

(6) For purposes of this paragraph a prime time entertainment series program is an entertainment program which is one of a sequence of 22 or more programs with interconnected plot or substantially the same cast of principal characters any regular episode of which has had network exhibition during the hours of 7–11 p.m. eastern time.

(7) The provisions of §73.658(1), (2), (3), and (6) shall remain in force until August 4, 1990 and shall thereafter be of no further force or effect.

August 4, 1983

Separate Statement of
FCC Commissioner James H. Quello
Concurring in Part and Dissenting in Part

In re: BC Docket No. 82–345 relating to network television, financial interest and syndication rules.

I wish to make it immediately clear that the Commission's action in this docket does not reflect a decision on my part, tentative or otherwise, that the Commission should adopt this particular proposal. Therefore, I dissent to the characterization of this document as a tentative decision. Nevertheless, I fully concur in seeking public comment on this specific proposal.

I would like to note that in reviewing the comments I shall particularly look for guidance in determining whether a narrow rule such as the one proposed here would adequately ensure that independent television stations continue to have unencumbered access to off-network syndicated programming. Such programming is a staple source of revenue for independent stations, and as such it is an important part of their ability to provide the public with a diversity of viewpoints through their news and public affairs programming.

As I made explicit when the Commission heard oral presentations on this subject, I support the concept of a compromise where the networks are not unduly restricted from participation in any market so long as the Commission continues to protect the valid interests of the independent stations. Putting this proposal out for comment will, in my view, help the Commission focus on whether a narrow approach such as is presented here can meet that goal. My support of this action should not be interpreted as suggesting that my further consideration of these matters will be limited to the boundaries of this proposal.

SEPARATE STATEMENT AND PARTIAL DISSENT OF COMMISSIONER HENRY M. RIVERA

RE: BC DOCKET 82-345—Network Financial Interest and Syndication Proceeding.

With the exception of the sunset provision, I support the Commission's tentative decision to narrow the existing financial interest and syndication rules. The substantial record compiled to date persuades me that the primary public interest goal furthered by present restrictions is the continued growth and vigor of the independent television stations. These stations are an integral component of the television diversity presently available to the American public; unimpeded access to lifeblood programming by the independents ensures their continued strength, thereby promoting the widest possible dissemination of ideas from diverse and antagonistic sources.[1]

At this juncture, I believe the proposed new syndication rules, with their associated structural restrictions on network financial interests and special reporting requirements, are reasonably calculated to preserve the independent stations' open and unrestrained access to necessary off-network programming. Given the serious consequences that would flow from a misstep in this complex area, however, subjecting the proposed rule revisions to the crucible of public comment is critical to a sound resolution of this proceeding. While reasonable people may differ about the magnitude of the risk posed by liberalization of the existing rules—indeed, I am not convinced that the potential for anticompetitive conduct is as slim as projected by the theoretical analysis herein—there is a substantial consensus that if such conduct does occur, the impact on the independent stations could be devastating and irreversible. Further public comment and analysis will provide a necessary extra measure of assurance that the rules we finally adopt will optimally serve their purpose.

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[1] Since this proceeding began, much has been made about the extent to which the existing rules promote diversity in the program production market. My great concern about fostering diversity of broadcast ownership facilities is a matter of record and I am equally concerned about diversity in the program production market. However, based on the record before me, I do not believe a persuasive case has been made that these rules have promoted greater diversity in the program production market.

My position on the sunset proposal is unequivocal and negative. If the Commission is committed to the continued well-being of the independents, and believes that oversight of the syndication process is necessary to assure that well-being, it is illogical to decide now based on nothing more than a "guesstimate" of future competition that such oversight will no longer be required at an arbitrary future date. The independents' lifeline should not be severed in this manner. As with any other agency rule, when the conditions that lead us to regulate in this proceeding no longer exist, the rules should then be revisited.[2]

In sum, there is considerable record evidence that the financial interest and syndication rules should be revised. However, we must be certain that the basis for a recrafted rule is well-founded and that the rules ultimately adopted will work smoothly and efficiently. I therefore await with keen interest the public's comment on this tentative decision and the draft rules so that we may responsibly conclude this proceeding.

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[2] As the Justice Department put its: "the growth of the new technologies is likely to reduce the need for a prophylactic rule at some point. [But] even the best projections can only approximate the effects of technological change on the programming marketplace [and on] the networks' position as gatekeepers in the market for syndicated programming." *See Reply Comments of the United States Department of Justice"* at 28.

Reconsideration, Petition for, Denial of
Tariff, Cost Support Material

Petition for reconsideration of recent amendments to Section 61.38 of Rules, governing cost support material required to be filed with tariffs, denied. Petitioner offered no basis for assertions that information no longer required is needed for Commission review of tariffs, nor for its contention that notice and comment were required by Administrative Procedures Act.
–Amendment of Section 61.38

FCC 83-399

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Amendment of Section 61.38 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

(Adopted: September 9, 1983; Released: September 23, 1983)

BY THE COMMISSION:

1. Before the Commission is Satellite Business Systems' (SBS) petition for reconsideration of our Memorandum Opinion and Order (Order) amending Section 61.38 of the Commission's Rules, 91 FCC 2d 1074 (1982).[1] There, we concluded that changes in industry conditions and tariff filing practices since the adoption of Section 61.38 in 1970 warrant reduction of the cost support materials that dominant carriers are required to submit with their tariff filings. Specifically, we eliminated the requirement that such filings include a "backcast" estimating what the effects of proposed revisions on a carrier's traffic and revenues would have been if the revisions had been effective during a recent 12-month period of actual operations. We also reduced from three years to one year the required cost projections and traffic and revenue forecasts. These changes were adopted by the Commission on its own motion, without notice and comment,[2] because they relate to Commission practice and proce-

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[1] We have also considered American Telephone and Telegraph's opposition and SBS' reply.

[2] To comply with the Regulatory Flexibility Act of 1980, 5 U.S.C. §601 et seq., the Commission published a notice in the Federal Register, 46 Fed. Reg. 56466 (1981), listing the Parts of its Rules to be reviewed over the next 12 months. This general

dure. SBS contends the amendments will compromise the Commission's ability, and that of interested persons, to evaluate the underlying cost justification for tariffed service offerings. It also asserts the Commission violated the rulemaking provisions of the Administrative Procedures Act (APA), 5 U.S.C. §553, because the amendments were not preceded by notice and comment. For the reasons set forth below, we deny the petition.

2. The imposition of the Section 61.38 support requirements in 1970, explained fully in our Order, was to provide a better base of information in tariff filings to assist Commission evaluation of such filings.[3] Our experience with tariff filings at the time had convinced us that requiring standardized cost support materials would save Commission staff time by minimizing the need for frequent supplemental information requests. Over a decade later, our more recent experience with tariff administration suggested the need to modify this rule. We determined that backcasts and extended forecasts were of questionable value in a rapidly changing telecommunications marketplace. Carriers are filing tariff revisions much more frequently as they respond to technological developments, changing customer demand, and competitive offerings. In these circumstances, Commission reliance on backcasts and extended forecasts as predictive aids to our evaluation of tariffs would not significantly inform the tarif review process and would burden carriers with unnecessary costs. Rather than continue to require the routine submission by all dominant carriers of these support materials, the cost of which is ultimately borne by ratepayers, we concluded that in most cases reduced submissions would still enable effective tariff review. We emphasized, however, that we could require more extensive support materials where particular circumstances suggested their usefulness.

3. Petitioner has not explained or supported its contention that Commission evaluation of tariff filings will be compromised by the revised standards. Petitioner does not suggest that the Commission's underlying characterization of the industry and of tariffing practices is mistaken, nor does it specify why the Commission will be unable to discharge its tariff review function. The rule, as revised, still requires the submission of economic data to support new or changed tariff offerings. As noted, we retain the discretion to require supplemental information as needed. Moreover, the formal complaint process remains available under Sections 206–209 of the Communications Act, to address allegations of unjust, unreasonable, or unreasonably discriminatory provisions in effective tariffs. In any

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notice of intent to review Part 61 occasioned specific comments suggesting and opposing possible changes in Section 61.38, but we do not reach the question whether that Notice constitutes sufficient notice for purposes of the Administrative Procedure Act, 5 U.S.C. §553.

[3] Tariffs-Evidence, 25 FCC 2d 957 (1970).

event, the requirements of Section 61.38 are not intended to charter independent tariff oversight by third parties. This section exists primarily to assist the Commission in exercising its discretion whether to suspend and investigate proposed tariffs, rather than to confer "important procedural benefits upon individuals." *Aeronautic Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 (D.C. Cir. 1980), *quoting American Farm Lines v Black Ball Freight Service*, 397 U.S. 532, 538 (1970). Thus, information supplied under Section 61.38 may be sufficient to aid the Commission in its exercise of discretion, without necessarily establishing the *prima facie* lawfulness of the proposed revisions. *Associated Press v. FCC*, 448 F.2d 1095, 1104 (D.C. Cir. 1971).

4. Petitioner has also failed to present any basis for reconsidering our determination in the Order that this rule is procedural and, therefore, exempt from the notice and comment requirements of the APA.[4] As just explained, Section 61.38 exists simply to provide the Commission a data base with which to evaluate tariff filings.[5]

5. Moreover, the forecast and backcast information eliminated from Section 61.38 was not being relied upon as a useful or practical tool in most instances of tariff review. In light of this practical experience, no purpose would have been served by soliciting public comment on whether such information is useful to the Commission in performing its tariff review functions.[6] To have employed a notice and comment proceeding under such circumstances would have created unnecessary delay, and further extended the burdens of furnishing materials not generally useful to nor utilized by the staff. Accordingly, the petition for reconsideration filed by Satellite Business Systems IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[4] In its reply, SBS asserts that paragraph 5 of the Order constitutes recognition that Section 61.38 is substantive in nature. However, the referenced passage states explicitly that the effective date provisions of the APA (§553(d)) are inapplicable because the action taken affects a procedural rule.

[5] "A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." Batterton v. Marshall, 648 F2d 694, 702–703, 707 (D.C. Cir. 1980).

[6] Petitioners' reliance on Pickus v United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974) is misplaced. That decision construed the APA exemption for procedural matters to exclude actions "likely to have considerable impact on ultimate agency decisions." In the present context however, the requirements for cost support material were moderated precisely because the more extensive materials are highly unlikely to have such an impact on the tariff review process. Further, Section 61.38 does not purport to establish actual standards for decision. *Pickus*, in contrast, involved formula-like standards used to calculate an inmate's remaining time in prison.

Common Carrier, Service, Resale and Shared Use of
Declaratory Ruling

Petition for declaratory ruling granted to an extent and otherwise denied. Resale or shared use restrictions may not be lawfully applied to physically intrastate WATS used in interstate communications. Commission declined to order BSOCs to offer service at particular rates or terms.
–*AT&T Co.*

FCC-83-40

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

American Telephone and Telegraph
Company and the Bell System Operating
Companies Restrictions on the Resale and
Sharing of Switched Services used for
Completion of Interstate Communications

MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1983 Released: February 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

1. Before the Commission is a petition by Satellite Business Systems (SBS) asking us to declare that resale and sharing prohibitions in intrastate Wide Area Telecommunications Service (WATS) tariffs of the Bell System Operating Companies (BSOCs) have no lawful application to the use of "physically intrastate" WATS to complete interstate calls. SBS urges us, moreover, to order the BSOCs to provide "physically intrastate" WATS to it and other OCCs for use in interstate communication at the same rates as appear in the BSOCs' state tariffs for intrastate WATS to non-reselling customers.[1] For reasons indicated below, we are granting the

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[1] The following have filed comments in support of the petition: the Western Union Telegraph Company; MCI Telecommunications Company; U.S. Telephone Communications, Inc.; Aeronautical Radio, Inc. (a private interstate carrier); and Lexitel Corporation, Combined Network, Communications Equipment Corporation, ATS Long Distance Network, Inc., Business Telephone Systems, Inc., LDX, Inc., and Telesphere Network, Inc. all certificated interstate resale carriers filing jointly as "Resellers". The American Telephone and Telegraph Company (AT&T) (on behalf of the BSOCs); the National Association of Regulatory Utility Commissioners

petition to the extent of ruling that resale or shared use restrictions may not be lawfully applied to "physically intrastate" WATS used in interstate communication. We decline at this time, however, to order the BSOCs to offer service at particular rates or terms.

The Petition

2. SBS contends that resale restrictions in intrastate WATS tariffs adversely affect the availability, cost, and quality of interstate services by preventing interstate carriers from using resold WATS to distribute interstate calls to points within the state where access to the WATS network is obtained. It then proceeds to explain how these restrictions ostensibly affect its own offering of switched voice services. Specifically, SBS asserts that it must resell telephone company services, including private line, ENFIA, and WATS, in order to compete successfully with AT&T because it is unable, for practical reasons, to extend its own facilities throughout the United States. It states that it generally terminates MTS/WATS - equivalent calls in local exchange areas in which its earth stations are located by means of ENFIA trunk connections obtained under BSOC Tariff F.C.C. No. 9. To terminate all calls via ENFIA connection, however, would assertedly require ENFIA access lines to each of the seventeen thousand local exchanges nationwide. This, SBS maintains, would be economically infeasible. Because it has not been able to obtain direct WATS connections between its earth stations and points within the same state, SBS asserts that it usually completes calls to points outside the exchange areas where its earth stations are located by routing to earth stations in other states in order to use interstate WATS, which is not subject to resale restrictions.[2] According to petitioner, the use of direct intrastate WATS connections would result in more efficient utilization of AT&T's public switched network facilities by eliminating unnecessary use of long haul interexchange circuits.

3. SBS next maintains that this Commission clearly has jurisdiction to rule as requested. In support of its contention in this regard SBS refers to Commission and judicial decisions which hold that even though a carrier's facilities may be located within a single state,

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(NARUC); the United Telephone System, Inc. (United); and the public utilities commissions of the states of California, Michigan, New York, Kansas, and Alabama have filed comments in opposition.

[2] For example, in order to complete calls from New York to Flagstaff, Arizona—where it has no earth station—SBS states that it first routes traffic to Los Angeles, the site of its closest earth station outside Arizona. The calls are then "backhauled" the 400 miles to Flagstaff via resold WATS obtained under the interstate WATS tariff (AT&T's Tariff F.C.C. No. 259). SBS maintains that this "backhauling" over an extended terrestrial link introduces unnecessary deterioration in transmission quality, most of which could be avoided if a WATS connection could be established directly from the Phoenix earth station, which is only 110 miles from Flagstaff.

when the facilities are used as an integral link in the transmission of communications by wire or radio between points in different states the service thus provided is jurisdictionally interstate.[3] SBS sees good cause for the Commission to assert its jurisdiction where, as here, the provisions in the BSOCs' intrastate WATS tariffs are said to operate in effect to restrict the resale and sharing of jurisdictionally interstate service. SBS emphasizes in this regard that the Commission has held that restrictions on the resale and sharing of interstate private line and public switched network services are unjust and unreasonable, in violation of Section 201(b) of the Communications Act[4] and unreasonably discriminatory, in violation of Section 202(a).[5] *Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T* v. *F.C.C.* 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *Resale and Shared Use of Domestic Public Switched Network Services*, 83 FCC 2d 167 (1980). These determinations, SBS notes, derive from the Commission's perception that a number of public and private benefits might ensue from resale and sharing of interstate services, among them the fostering of innovation and new technology, better network management, and a wider variety of services. The benefits which the Commission sought to bring about by requiring the elimination of interstate resale and sharing restrictions will remain partly unfulfilled, according to SBS, so long as local carriers can prevent the use of resold physically intrastate services for the distribution of interstate communications.

Summary of Comments

4. In opposition to the petition for declaratory ruling, United and the public utilities commissions of California, Michigan, Kansas, and Alabama argue that the Commission lacks jurisdiction to rule as SBS requests. They contend that "physically intrastate" WATS service, even when used in connection with other facilities to terminate interstate communications, is explicitly exempt from FCC regulation by operation of Section 2(b) of the Communications Act.[6]

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[3] United States v. Southwestern Cable Co., 392 U.S. 157, 168–9 (1968); Idaho Microwave v. F.C.C., 352 F.2d 729, 732 (D.C. Cir. 1965); Pacific Telephone and Telegraph Company, 88 FCC 2d 934 (1981); New York Telephone Company, 76 FCC 2d 349, 352, *aff'd sub nom.* New York Telephone Co. v. F.C.C., 631 F.2d 1059 (2d Cir. 1980); Telerent Leasing Corp., 45 FCC 2d 204, 219 (1974), *aff'd sub nom.* North Carolina Utilities Commission v. F.C.C., 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); and Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 FCC 2d 417, *aff'd sub nom.* Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974).

[4] 47 USC § 201(b).

[5] 47 USC § 202(a).

[6] 47 U.S.C. § 152(b). In pertinent part, Section 2(b) provides:

> [N]othing in this act shall be construed to apply or to give the Commission

5. NARUC and AT&T, on the other hand, do not dispute petitioner's contention that "physically intrastate" WATS service used in the manner described is subject to Commission jurisdiction. Instead, they contend that the Commission should decline to exercise jurisdiction at this time to avoid disrupting the orderly processes of state regulation. Since a number of states have already approved resale of intrastate WATS and many others have taken the issue under investigation NARUC asserts that it would be premature for the FCC to preempt state regulation in this area now. For its part, AT&T asserts that existing intrastate WATS rates are insufficiently usage-sensitive; in consequence, AT&T contends, to require resale of intrastate WATS under current rate structures would result in serious net contribution losses for intrastate services.[7] AT&T therefore urges the Commission to accord state authorities a reasonable time to review and implement revised intrastate WATS rates that would be compatible with full resale and shared use. To this end, AT&T asserts that restructured "tapered" WATS schedules have already been filed in twenty-five states, and that similar filings will be made in the remaining states by the end of the first quarter of 1983. AT&T asserts, moreover, that most of the BSOCs expect to file additional revisions to permit resale and sharing of intrastate WATS, once restructured rates have been implemented.[8] Thus, AT&T maintains, the issue which SBS is raising is moving toward resolution at the state level without the necessity for Commission intervention. Moreover, according to AT&T, other common carriers will not be prejudiced in the interim since there are several means by which the OCCs can presently complete interstate calls within any state: *e.g.*, ENFIA, ENFIA with intrastate MTS toll completion, dedicated connections to customer locations obtained under the BSOC OCC facilities tariffs, and interstate WATS.

6. As a separate matter, AT&T contends that even if the Commission declares the resale restrictions unlawful, it cannot prescribe the provision of physically intrastate WATS to reselling interstate carriers at existing intrastate rates, as SBS requests,

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jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

[7] AT&T does not explain why resale at current "non-usage sensitive" rates would allegedly lead to "serious net contribution losses." Presumably, its assertion to this effect is based on the assumption that if resale were permitted at the current relatively low rates, a substantial amount of arbitrage would occur, leading many customers to substitute resold intrastate WATS for other AT&T services.

[8] AT&T notes that resale and sharing of intrastate WATS is now permitted under recently - implemented state tariff revisions in Idaho, Ohio, and New York, and that resale and sharing is permitted on measured WATS in Iowa and South Dakota.

without first finding that the resulting state rates under resale would each be just and reasonable[9] Moreover, AT&T maintains that if "physically intrastate" WATS termination of interstate communications were required to be offered to resellers at the regular intrastate rates, it would become difficult if not impossible to enforce lawful resale restrictions on purely intrastate uses of WATS.

7. The remaining commenters express general agreement with SBS's contentions, but advocate a broader ruling. ARINC contends that the Commission should be concerned with the detrimental impact of these resale and shared use restrictions on private system operators as well as on carriers and accordingly asks us to declare the restrictions void as applied to physically intrastate WATS connected to any interstate communications system, whether of a common carrier or private entity. Further, the collective resellers urge us to declare all resale restrictions in state tariffs—not merely those pertaining to WATS—unlawful for all purposes inconsistent with the Commission's interstate resale objectives, and to preempt state certification requirements for resellers of intrastate facilities.

Discussion

8. It is by now well-established that communication service provided by means of wire or radio facilities located within a single state is subject to the jurisdiction of this Commission when serving as a link in an interstate channel of transmission established through interconnection. *See, e.g., U.S. v. Southwestern Cable Co.*, *Telerent*, and *New York Telephone Company, supra*. Simply put, jurisdiction turns on the nature of the communications, rather than the location of the facilities links through which they pass. *Id.* In this case, it is undisputed that the intrastate WATS connections sought here would be used to terminate communications which originate in other states. Thus, the question confronting us is whether the BSOCs should be permitted to continue to invoke resale and sharing restrictions in their intrastate WATS tariffs where the effect is to bar resale and shared use of interstate communications.

9. This Commission recently issued a prescription concerning resale and shared use restrictions on the provision of interstate communications. *See* Report and Order in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network service*, Docket No. 80-54, 83 FCC 2d 167 (1980). There, we declared tariff provisions restricting resale and shared use of domestic public switched network services to be unjust, unreasonable, and unjustly discriminatory under Sections 201(b) and 202(a) of the Act. Moreover, we ordered all carriers subject to our

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[9] As authority for this proposition, AT&T cites AT&T v. F.C.C., 449 F.2d 439, 450-1 (2d Cir. 1971); Nader v. F.C.C. 520 F.2d 182, 204 (D.C. Cir. 1975); and MCI Telecommunications Corp. v. F.C.C., 627 F. 2d 322, 337 (D.C. Cir. 1980).

jurisdiction to file revised tariffs eliminating all such restrictions from their domestic public switched network services. In the case of AT&T in particular, we ordered it to withdraw Section 2.2.1 of Tariff FCC No. 259 (WATS) and Section 2.2.1 of Tariff No. 263 (Message Telecommunications Service), and to file appropriate tariff revisions. 83 FCC 2d at 194.

10. In the course of our general discussion in the Report and Order in Docket No. 80–54, we did not explicitly consider the case of resale and sharing restrictions on intrastate WATS used to terminate interstate communications. Moreover, because these restrictions do not appear in tariffs on file with this Commission they were not technically subject to the filing directives of the Report and Order. Nonetheless, it was not our intention that resale and sharing restrictions would continue to be imposed on any form of domestic public switched network service used in interstate communication. Indeed, none of those commenting here argue that the stated grounds for our holding in Docket No. 80–54 are any less applicable in the case of resale and sharing restrictions on WATS used for intrastate termination of interstate calls than in regard to restrictions of this kind on other interstate public network services. So as to remove any doubt on this point, however, we now affirm that our policy encompasses resale and sharing restrictions on WATS used for the intrastate distribution of interstate communications, whether by a common carrier or a private entity.

11. This brings us, then, to the contention by AT&T and NARUC that we should in effect defer application of the policy we adopted in Docket No. 80–54 in these circumstances by permitting resale and sharing restrictions to continue to be imposed on intrastate WATS termination of interstate calls until the BSOCs have implemented restructured intrastate WATS rates. It is important to bear in mind here that in Docket 80–54 we concluded that extensive public benefits could reasonably be anticipated from resale and sharing of public switched network services, without significant adverse consequences. 83 FCC 2d at 193. We also concluded that our policy favoring unlimited resale and sharing of such services should be implemented swiftly after a short adjustment period. To defer ruling here pending implementation of restructured intrastate WATS rates pursuant to diverse state proceedings would entail an indeterminate delay in full realization of the benefits which we anticipated from the resale and sharing of interstate services, and hence would be contrary to the public interest. While AT&T suggests that alternative means are presently available to the OCCs for completing interstate calls, it has not controverted the petitioner's contention that within-state WATS terminations are superior from the standpoint of efficiency and economy. No convincing showing has been made, on the other hand, that the resale and sharing of WATS used in this way would harm the network as a whole. Although AT&T and

NARUC assert in this regard that eliminating these restrictions on WATS used to terminate interstate calls would render it difficult to prevent resale and sharing of jurisdictionally intrastate WATS at the current non-usage-sensitive rates, in consequence of which intrastate revenues would diminish drastically, they fail to adequately state and support their reasons for supposing that this would prove to be the case.[10] These assertions do not warrant a delay in implementation of our important federal policy determination that unrestricted resale and sharing of interstate services would serve the public interest objectives which this Commission is mandated by statute to foster. *See North Carolina Utilities Commission v. F.C.C., supra.* In any event, if it does develop that resale and sharing of interstate services occurring as the result of our policy initiatives have incidental consequences of concern to those charged with regulating jurisdictionally intrastate services, we have no reason to suppose that state commissions would be unable to take prompt curative action.

12. Since SBS' proposed use of physically intrastate WATS is jurisdictionally interstate, we would under normal circumstances expect FCC tariff provisions to be filed for this service. In this way we would ensure that the interstate character of this WATS usage is recognized by the separations process (47 CFR Part 67) and that interstate costs are fully recovered by the rates which customers pay. On the other hand, it would likely be some months before FCC tariff revisions could be expected to take effect, in view of the time required for tariff preparation, public comment, staff review, and possible suspension. This course would delay the implementation of our resale policy and deprive SBS of this service for an even longer period. Furthermore, the Modified Final Judgment and our recent prescription of an access charge plan in Docket No. 78–72 require that any such tariff would soon after have to be reformed to reflect the new method of compensating local telephone companies for exchange access. In any case, because of the Joint Board's decision to freeze the Subscriber Plant Factor at 1981 levels for all factors in the formula[11] it is of little consequence how this usage of physically intrastate WATS is treated for separations purposes.

13. Accordingly, IT IS ORDERED, That the petition for declaratory ruling filed by Satellite Business Systems filed on June 7, 1982 IS GRANTED to the extent indicated, and is otherwise DENIED.[12]

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[10] We emphasize in this regard that our ruling here does not extend to restrictions which pertain solely to the provision of WATS used in intrastate communication. The request by the collective resellers that we preempt state regulation to the extent of outlawing resale restrictions on purely intrastate services and abrogating state certification requirements will be denied, as it is beyond the scope of the matters on which comment was sought.

[11] See, In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Docket No. 80–286, 89 FCC 2d 1 (1982).

14. IT IS FURTHER ORDERED, That this order will take effect thirty days from the release date.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[12] We decline to grant relief to the extent of ordering the BSOCs to provide "physically intrastate" WATS to OCCs and resellers at the currently effective intrastate rates, no justification having been shown here for departing from the procedure normally contemplated under Title II of leaving it to providing carriers to develop rates in the first instance.

Common Carrier, Cost Accounting Methodology
Common Carrier, Cost Justification
Common Carrier, Costs, Allocation of
Common Carrier, Interstate
Costs, Allocation of

This item revises the Interim Cost Allocation Manual used by AT&T to allocate costs among its interstate services.
-AT&T Co.
CC Docket No. 79-245

FCC 83-374

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH Co. Manual and Procedures for the Allocation of Costs	CC Docket No. 79-245

ORDER

(Adopted: August 4, 1983; Released: August 22, 1983)

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

I. Introduction

1. On May 18, 1983, the Commission released a Notice of Proposed Rulemaking in this proceeding. 48 F.R. 23854 (May 27, 1983). That Notice contained our proposals to modify the *Interim Cost Allocation Manual* (*ICAM*) for AT&T's interstate services so that the *ICAM* would reflect changes brought about by our Access Charge Order[1] and the divestiture of the Bell Operating Companies.[2] This proceeding is intended to make changes to the *ICAM* necessitated by those events. As we stated in the Notice, there are other issues pending in this docket which are not addressed here. Our intention is to reach those issues later. This Order makes adjust-

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[1] MTS/WATS Market Structure Inquiry, Third Report and Order 48 F.R. 10319 (March 11, 1983).

[2] Modification of Final Judgment (MFJ), United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982) aff'd sub nom. Maryland v. United States, 51 U.S.L.W. (March 1, 1983).

ments to the *Manual* to enable the American Telephone & Telegraph Co. (AT&T) to file new interstate tariffs in October 1983, to be effective at divestiture proposed for January 1, 1984.

II. Summary of the Comments

2. Comments and replies were received from seven parties. AT&T agreed for the most part with the changes in the *ICAM* described in the *Notice*. It observed, however, that it does not believe that *ICAM* is an appropriate long-term regulatory tool. AT&T further stated that even for the October 3, 1983 filing the Commission may have to consider not holding AT&T to the strict equalized rate of return requirements associated with the *ICAM*. These "equalization" requirements require AT&T to attempt to earn the same rate of return from MTS, WATS and private lines. The Commission may have to consider a "permissable zone of reasonableness" for the rates of return of the individual services because changes in the *ICAM* and changes resulting from the divestiture may affect the allocations of cost in unexpected ways.

3. AT&T states that with one major exception (premium access) it has chosen the same allocation methodology for its October 3, 1983 filings as that proposed in the Notice. Further, because of time constraints, if the *ICAM* amendments finally adopted differ substantially from AT&T's assumptions, it will have to take account of such changes in early 1984.

4. AT&T has argued against the premium access charge in *Access Reconsideration*. Regarding the allocation of the premium access charge, AT&T states that there is "no method that is not arbitrary for allocating an expense which is itself determined in an uneconomic manner." AT&T Comments, p. 6. The use of conversation minutes proposed in the *Notice* as an allocator for the premium access element will cause major shifts in the allocation of costs between MTS and WATS thus compounding the premium access problem as viewed by AT&T. If the requirement to equalize the rates of return of MTS and WATS is enforced by the Commission, the major shift in cost allocation would give improper and transitory price signals. To avoid such an abrupt shift in the cost allocation, AT&T recommends the use of the relative number of MTS and WATS messages as a basis of allocation. AT&T says that the use of messages would give the desired result by not changing significantly the relative allocation of costs to these services, ameliorating customer impact related to the premium access expense. The use of minutes would cause a "temporary but dramatic shift in cost assignments and rates, if an inflexible equialization requirement is imposed." AT&T Comments, p. 8. AT&T further argues that, to the extent that there are differences in access provided to it and the OCCs, these differences deal with call "setup," not a call's duration,

thus arguing for the use of messages as an allocator rather than minutes.

5. AT&T asserts that the Exchange Contract Services Category proposed in the Notice is not appropriate to the *ICAM*. The revenues and costs of the services and facilities provided to the divested Bell Operating Companies will not be part of AT&T interstate common carrier operations and thus will not be part of the interstate rate base or cost of service. These revenues and costs will be identified on its books of account, AT&T declares, and the FCC may monitor those amounts through means other than the *ICAM*.

6. AT&T then presents arguments supporting its position that *ICAM* "will serve no useful purpose in 1984 and beyond." AT&T Comments, p. 11. AT&T cites what it calls "pervasive competition" and low entry barriers to bolster its arguments.

7. GTE Sprint Communications Corporation, formerly Southern Pacific Communications Corporation, points to a "lack of clarity in a number of access expense allocation procedures [which] will inevitably lead to an overallocation of costs to the MTS category and an under allocation of costs to the WATS category." In particular GTE Sprint points to the lack of a reason for using only the open-end minutes of WATS in the allocation of the premium access charge. GTE Sprint contends that MTS will be burdened with greater expenses while the WATS rate base would be artificially decreased, thus eventually increasing the rate differential between the two services. This would be "inimical to promotion of full and fair competition." GTE Sprint Comments, p. 6. GTE Sprint recommends that the Commission either count both the open and closed ends of WATS lines or allocate the premium access amount based on the number of MTS and WATS calls.

8. GTE Sprint also argues that the allocation of common and dedicated transport expenses do not account for the distance factor discussed in the *Third Report and Order* in CC Docket No. 78-72 (Access Charge decision). GTE Sprint Comments, p. 8. It also asserts that the allocation of billing and collection costs is not specific enough. GTE Sprint believes that the "obscure language" will allow AT&T "to interpret the allocation procedures in a variety of ways which subsequently would allow it to vary the share of expenses allocated among the three service categories." GTE Sprint Comments, p. 9. In addition, GTE Sprint claims that the allocation procedure for transitional surcharges is more general than it should be and the difference in detail between their descriptions in the *Notice* in this proceeding and the *Third Report and Order* could lead to inconsistent allocations. "The Commission should consider allocating directly according to the percentages of credit card, collect calls and 800 Service to AT&T's respective service categories," argues GTE Sprint. Comments, p. 11.

9. United States Transmission Systems, Inc. (USTS) argues that

this proceeding is misconceived, noting that it may prejudice outstanding issues in the Access Charge proceeding. Further, if changes need to be made in the *ICAM* because of reconsideration of access charges, another Notice would be needed here. This is a procedure the Commission said it will not follow, declares USTS. The interim procedures are flawed and amending them to aid divestiture is uncalled for, says USTS. USTS argues that AT&T can file new tariffs effectuating divestiture without changing the *ICAM*. USTS asserts that the Commission should apply accounting and costing procedures to the BOCs. USTS characterizes the FCC's proposal as "treacherous" and urges that the Notice be dropped.

10. ABC, CBC and NBC (the Networks) note that the program transmission facilities provided to them by AT&T are treated separately in the access charge plan and point out that they have asked that a separate category for those costs be created in the access rules "to eliminate the possibility of confusion" concerning the Commission's intent. Networks' Comments, p. 4. The *ICAM* should conform to the Commission's intent in the *Third Report and Order* and the Commission should "ensure that only the costs which are actually attributable directly to program transmission are allocated to these services." Networks' Comments, p. 7, footnote omitted.

11. Satellite Business Systems (SBS) "strongly urges the Commission to provide for continued reporting by the divested BOCs as to their interstate access-related investments, expenses and revenues." SBS Comments, p. 1. It urges the Commission to promptly issue a Notice in this matter.

12. SBS argues for the collection of data on time-of-day (peak/off-peak) network utilization to support and evaluate the FCC's network efficiency-related decisions. Expenses, investments, revenues and rates of return should be calculated by the time of day in any permanent cost manual and in the *ICAM* if possible.

13. SBS argues that AT&T will end up paying a premium access charge that is actually far less than the nominal $1.4 billion amount stated in the Access Charge Order. SBS suggests that AT&T report, parenthetically, the actual amount of a premium charge it is paying over what it would otherwise pay. Also, the FCC should not anticipate Joint Board action as it does in the *Notice*, says SBS. Only actual, not planned separations, changes should be dealt with. Finally, SBS argues that more detailed rules should be promulgated for Exchange Contract Services.

14. The Ad Hoc Telecommunications Users Committee (Committee) generally agrees with the changes proposed with three major exceptions. First, the FCC should include any material changes from the access charge reconsideration in the *ICAM* and not accept the *Third Report and Order* as "given" as the Committee interprets the *Notice*. Second, the *ICAM* language should be more precise concerning Local Switching, Dedicated Transport and Special Access. Third,

"General Services and Licenses" cost procedures should not be changed as they were in the *Notice*.

15. The Committee suggests that the revised *ICAM* should specify that LS-1 switching "should be allocated among all *ICAM* services that utilize such switching in proportion to the relative incidence of line termination costs among those same services." The Committee also believes that the *ICAM* should recognize that an open-end private line service may someday be offered over a higher feature trunk-side type switching arrangement. This would require the reallocation of some LS-2 costs, the Committee asserts. Finally, the Committee argues that the "General Services and Licenses" changes sacrifice detail, and suggests that they should be retained at least as they are now. In fact, the Committee declares the *ICAM* should be amended to require AT&T "to allocate such costs to the service categories and specific service offerings on the same cost causative basis and level of disaggregation as exist in AT&T's internal cost allocation systems." Committee Comments, p. 17.

16. In its Reply, the Committee writes that it agrees with the allocation of the premium access charge based on messages rather than minutes. The Committee remarks that while it "firmly is of the view that NTS costs are best recovered through flat rate charges, premium access does relate more directly to the costs of establishing an individual message than to the duration of the message." Committee Reply, p. 2. The Committee also observes that AT&T's "facts" concerning the "competitiveness" of the interexchange transmission services market are not undisputed at this time. The Committee opines that the Commission needs to continue to rely on the *ICAM* and other aspects of tariff regulation of AT&T well into any transition period toward freer pricing.

17. MCI Telecommunications Corporation (MCI) points out that no matter what the Commission adopts, "apparently AT&T will ignore any Commission action resulting from this proceeding." Reply, p. 2. The FCC "must resist AT&T's attempt to steamroll it into actions that clearly benefit AT&T and AT&T alone . . . [N]o new policies should be adopted in this docket at this time." MCI Reply, p. 3. The FCC did not adopt an allocation procedure for premium access in the Access Charge Order. MCI argues that adopting one here would be proposing a new policy despite the FCC's statement in the *Notice* that no new policies are being adopted here. MCI urges the FCC to first decide the size and components of the premium access charge on reconsideration in CC Docket No. 78–72 and thereafter seek public comment on the method of its allocation between MTS and WATS.

18. MCI wants the FCC to scrutinize AT&T's earnings ratios to minimize cross-subsidies despite AT&T's arguments that uncertainty over the outcome of the cost allocation process should cause the FCC to use a "permissable zone of reasonableness." Not only shoul

the FCC strictly enforce the *ICAM* requirements now but MCI suggests that the FCC develop a cost manual for exchange communication in the future. Finally, MCI argues against institution of any proceeding looking toward deregulation of AT&T's basic transmission services.

19. In its reply, GTE Sprint objects to the AT&T proposal for continued use of message minute miles to allocate Interexchange Central Office Equipment. GTE Sprint believes that the number of circuits dedicated to MTS and WATS at the peak period should be used as a means of allocation. It also argues for a separate cost allocation manual for the Bell Operating Companies (BOCs), and claims that AT&T's market power in the interexchange industry makes a cost allocation manual necessary for the future.

20. AT&T, in its reply, begins by noting the similarity between its position and that of GTE Sprint concerning allocation of the premium access charge. It disagrees with GTE Sprint's proposal to include a distance factor in the allocation of common and dedicated transport expenses. AT&T argues that this is an unnecessary complication and the bills rendered to AT&T will not identify common or dedicated access by reporting category. AT&T could do this after the fact, but it would be complex. Besides, these costs will be "only about four percent of total reporting category costs in 1984" according to AT&T.

21. AT&T interprets the *ICAM* provision for billing and collection services costs to mean that these expenses should be directly assigned to the categories identified for AT&T by the exchange carriers (i.e., MTS, WATS, or private line). AT&T believes this answers GTE Sprint's objection concerning that access expense element. As for transitional surcharges, AT&T claims that it interprets the proposed *ICAM* language consistently with GTE Sprint's suggestion.

22. As for the Networks, AT&T alleges that they want a new reporting category for program transmission services. AT&T declares that the FCC rejected this approach before and that the questions raised by the Networks are better addressed in individual tariff filings and not the *ICAM*.

23. AT&T's reply says the SBS suggestion concerning time-of-day reporting should be rejected because it would contribute nothing to *ICAM's* purpose as a regulatory tool. AT&T dismisses SBS's suggestion concerning the parenthetical reporting of "actual" premium access expenses, noting that the *ICAM* deals only with actual amounts paid.

24. AT&T agrees with the Committee's recommendations dealing with LS-1 and LS-2 access facilities. On the other hand, AT&T faults the Committee's proposal to disaggregate dedicated Transport to distinguish between interface and conditioning costs that may apply differentially to MTS and WATS. This is inappropriate, AT&T

asserts, because dedicated Transport facilities will be shared by MTS and WATS and no interface or conditioning costs in the dedicated Transport element will be associated only with MTS or WATS. AT&T also argues that the Committee's suggestion to segregate private line special access by individual types of private lines should be rejected because disaggregation below the broad private line category is inconsistent with the intent and structure of the *ICAM*.

25. With respect to the Committee's arguments regarding General Services and Licenses, AT&T observes that it will "disaggregate these amounts into categories based on directly incurred expenses and investments in a manner similar to the current procedure." AT&T Reply, p. 13. AT&T asserts, though, that it is premature to propose a detailed list of new categories which reflect the divestiture. AT&T believes that the proposed language gives it the flexibility to handle this problem, writes AT&T.

DISCUSSION

I. *Investments and Reserves*

General Instructions

26. In the Notice, we deleted references to the BOCs to reflect the divestiture of these entities from AT&T. This prompted several questions in the comments. The main issue was the applicability of the *ICAM* to the divested companies. See the Comments of SBS, for example. MCI also raised the possibility of a future exchange company cost allocation manual.

27. This proceeding is designed for the sole purpose of modifying the *ICAM* for use by the AT&T interexchange entity. While we recognize that the BOCs will also offer some interstate service, we are not prepared now to promulgate a manual for their interstate services. Persons who believe that such a manual would be desirable may file a petition for rulemaking. Our immediate need is to prepare for the October 1983 tariff filings of AT&T which will reflect the divestiture and the institution of interstate access charges.[3]

Reporting Categories

28. AT&T argues against the new category for "Exchange Contract Services to Divested Companies" which we proposed in the *Notice*. AT&T claims that none of the costs will be in the interstate rate base and that the revenues and costs associated with these will be accounted for separately, thus meeting the FCC's information needs for monitoring these relationships. See comment summaries above.

29. It appears likely that most AT&T revenues from such

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[3] MCI stated that an exchange manual should be developed at some time next year. We will handle that question if and when MCI files a petition seeking such action.

contract services relating to regulated operations will be intrastate revenues. If this is the case, we do not need a separate reporting category in the *ICAM* for exchange contract services. The separate accounting for these services by AT&T will allow for our review of these agreements as we now understand them. We note that our staff is now examining these sharing arrangements in connection with the divestiture-related Section 214 proceeding.[4] We will not require AT&T to report these as a separate *ICAM* category at this time. If we determine after further investigation of the post-divestiture arrangements that separate reporting is required, we will act to change the *ICAM*.

30. GTE Sprint and AT&T have both commented on the proposed change in the allocation of interexchange COE circuit equipment. We proposed that this investment would be allocated on the basis of the allocation of interexchange circuits rather than message minute-miles. GTE Sprint supports the change with the understanding that the relative number of circuits assigned to each service would be determined at the peak. AT&T claims that the change could not be implemented because there is no way to differentiate between MTS and WATS interexchange circuits.

31. The proposed change in the allocation of the interexchange COE circuit equipment has certain appeal from the standpoint that circuit equipment costs should be related to (and allocated according to) the assignment of those circuits to specific uses to provide certain services. For the purposes of this proceeding, we will accept AT&T's statement that there is no method to differentiate between the MTS and WATS circuits. However, further changes in the *ICAM* may be necessary in the future. We reserve the right to revisit this issue and pursue the use of surrogate measures at that time.

32. References to the allocation of certain BOC switchboard investment were deleted in the *Notice* with the idea that AT&T would not do its own billing. AT&T observes that some switchboards will be transferred from the BOCs to AT&T whether AT&T does its own billing or not. We agree that the wording should be restored to account for the transferred switchboards which were originally covered under that wording in the *ICAM*. AT&T also notes that the deletion of references to the BOCs left only references to Long Lines in this section of the *ICAM*. This wording change apparently will exclude certain interstate costs which will reside in the AT&T interexchange companies (IXCs). These IXCs, according to AT&T, "will be formed to receive the BOC interLATA services." Besides omitting certain costs, the deletion of specific BOC or Long Line references also misallocates certain investments. For example, deleting the reference to Long Lines message switchboard invest-

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[4] See the letter from the Chief of the Common Carrier Bureau to Alfred Green of AT&T dated July 8, 1983, p.3.

ment, which is used to provide overseas MTS, inadvertently would have the effect of allocating all interstate message switchboard investment to MTS, even that used for WATS. This was certainly not the effect we wanted to achieve. We will adopt the specific language changes proposed by AT&T to remedy this oversight.

II. *Allocation of Access Expenses*

33. Since we issued the *Notice* in this proceeding, we have reconsidered the access charge decision set out in the *Third Report and Order* in CC Docket 78–72. While many changes were made on reconsideration, certain ones are especially relevant to this revision of the *ICAM*. First, we have changed the nature of the premium access charge. Our original proposal would have levied a $1.4 billion premium on AT&T. In *Access Reconsideration*, we have determined that the premium access amount will be implemented on the basis of a per minute differential in Carrier Common Line charges between AT&T[5] and Other Common Carriers. By accounting for premium access in this way, there is no longer a discrete premium amount which must be allocated among AT&T's services. Therefore, no further action is required for purposes of the *ICAM* except to delete the premium access charge as a separate expense category. All Carrier Common Line expenses will be allocated to AT&T services on the basis of relative access minutes.[6] We are also eliminating the assignment of the Operator Assistance charges because that rate element has been eliminated in the *Reconsideration Order*.[7] The *Access Reconsideration Order* also creates a category called "Coinless Pay Phones" for which a rule of allocation has to be developed. We understand that these phones are used almost exclusively for MTS calls. For the purposes of the October filing, we will have AT&T allocate this access expense exclusively to MTS because of the nature of the use of these coinless pay phones.

34. It will also be necessary to apportion the Special Access surcharges, which have been created by the Access Reconsideration

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[5] The differential applies to users of certain services. For the purpose of the *ICAM*, we are concerned with the differential that applies to AT&T's services.

[6] In Access Reconsideration, we have defined "access minutes of use" as the usage attributable to interexchange carriers for the purpose of calculating chargeable usage. In connection with the originator of an interstate foreign call, usage is to be charged from the time the originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier's facilities in the originating exchange area. In connection with the terminator of an interstate or foreign call, usage is to be charged from the time the call is received by the end user in the terminating exchange. Timing of usage at both the originating or terminating end of an interstate or foreign shall terminate when the calling or called party disconnects, whichever event is first recognized in the originating and terminating end exchanges.

[7] The merger of the Dedicated Access Line and Special Access elements does not require any change in the apportionment of AT&T Special Access expense.

Order, between the Private Line and WATS categories. This does not present a difficult problem because such surcharges will be assessed to a private line or a WATS access line and can be directly assigned to those categories.

35. Now we turn to specific suggestions made by the parties concerning various aspects of access expense allocation. The Networks have proposed that we create a new access category for program transmission in the access reconsideration. We did not create such a category on reconsideration. Alternatively, the Networks asked that we create a new *ICAM* category for program transmission if no separate access category is established. We reject this request. The *ICAM* is intended to reflect broad service categories. Any subdivision of the private line category such as that proposed by the Networks can be considered when we conduct further proceedings to determine whether a different Manual would be appropriate for the long run. This is not the proceeding in which to make such a determination.

36. GTE Sprint argues that the proposed allocation of common and dedicated transport expenses does not conform with the access charge scheme because the proposed *ICAM* rule does not account for the distance weighting used in the development of the transport charges. While GTE Sprint's point is well taken, we must point out that it is unlikely that bills from local exchange carriers will specify this distance information. While the exchange carriers will use such information in developing their tariffed access charges, we have no requirement that they identify the transport billings by *ICAM* categories. We did not institute such a requirement because the exchange carriers cannot identify the service nature of the traffic being carried over what are truly "common" lines. However, if an appropriate, easier method can be suggested for the allocation of this expense, we will consider such a change for the future.

37. The GTE Sprint objection to what it characterizes as the "obscure language" directing the allocation of the "billing and collection" element is unfounded. If exchange carriers perform billing for MTS and WATS or MTS, WATS and private line, we understand that access charges for each will be separately stated where possible. Therefore, such expenses can be directly assigned to each category.[8] The cause of confusion here or any suggested method of correcting it is not immediately apparent from the GTE Sprint presentation.

38. GTE Sprint also requests that the transitional surcharge allocation be made more specific and directly allocated according to the percentages of credit card, collect calls and 800 Service to AT&T's respective service categories. The Access Reconsideration

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[8] In the event that the access charges are not separately stated, they will be allocated as expressly stated in the *ICAM*.

Order eliminates those surcharges and therefore GTE Sprint's arguments on this point are moot.

39. The Committee made a recommendation for changes to the local switching 1 (LS-1) and local switching 2 (LS-2) elements. It observes that, unlike the current situation, future "MTS" offerings might use line side connections and future "private line" offerings might use trunk side connections. Such offerings would require changes in the proposed methods of allocation. LS-1 for example is allocated only to private line today because the only A&T service using them is private line. Such contingencies conceivably might warrant changes in access charge classifications at some point in the future, but these suggested changes would not be consistent with the access charge rules as modified in the Reconsideration Order. Therefore, we are not adopting those suggestions.

40. The Committee's suggestions for (1) disaggregating the Dedicated Transport element, (2) segregating Special Access WATS and private line and (3) segregating the Special Access Costs of individual types of private line are inappropriate here. The first two recommendations are topics for consideration in the formulation of access categories, not the allocation of already aggregated expenses. The third suggestion is appropriate for the tariff process. These revisions to the *ICAM* are concerned with the broad, existing categories. Future disaggregation may be desirable, but for now we leave this to future proceedings.

41. AT&T also notes that the definition of minutes of use in footnote 2 on page 3 of the Manual should only apply to carrier common line; that is, the computation of minutes of use which counts only open-end WATS. We are deleting that footnote because changes in the access charge rules adopted in the Reconsideration Order provide the necessary clarification.

42. AT&T further says that Dedicated Transport can apply to private line as well as MTS and WATS. That statement is incorrect. Private line facilities that perform a parallel function are classified as Special Access under the access charge rules. Therefore, we reject the proposed revision.

43. While the nature of the premium access charge has changed, we recognize that there is still concern over the ultimate relative allocation of MTS and WATS costs. The *ICAM* methodology has yet to be tested in the divestiture and access environment. It is conceivable that the procedures that were adequate during relatively stable periods may not easily adapt to the new industry structure and associated changes in the way interstate costs are incurred. Consequently, until we are provided with concrete information about the effects this methodology has on service category costs, and particularly on rates, we shall keep an open mind about the suitability of these procedures and, more generally, the future of *ICAM* as a regulatory tool. For purposes of its October tariff filings,

should AT&T find that application of the Manual will cause unacceptable delay in preparing tariffs, or produce distorted results or undesirable rate impacts as it learns more about the cost shifts associated with divestiture and access charges, it may wish to seek a waiver of the Manual or the earnings equalization requirement. Of course, other parties are not precluded from petitioning this Commission to voice their concerns.

III *Expenses Not Related to Access and Income - Description of FDC Methodologies*

44. In the Notice, we deleted many portions of this final section of the *ICAM* which in our view at that time would not apply to AT&T after divestiture. There are some which should not have been deleted, and at AT&T's suggestion we are restoring them. The major deletion of the methods for allocation General Services and Licenses was criticized by the Committee. We proposed to delete dozens of very specific allocation rules and replace them with a general instruction which would have indirectly allocated these expenses to the categories in the same way as directly incurred expenses. We did not mean to reduce the specificity of the allocations, only to give AT&T the opportunity to provide such a listing which reflects those activities which are actually undertaken at the time it files rates and in the June reports. We agree with the Committee that such detail is important. We will retain the language proposed in the *Notice* in view of AT&T's statement in its replies that "Any annual FDC reports filed by AT&T allocating GS&L expenses will disaggregate those amounts into categories based on directly incurred expenses and investments in a manner similar to the current procedure." If AT&T's filings do not contain sufficient detail, we can amend the *ICAM* at a later date to require more detail.

Other Matters

45. There are some suggestions made in the comments which we have not addressed yet. SBS recommended that time-of-day data be developed in the *ICAM*. This suggestion is inappropriate to our limited purposes of updating the *ICAM* to reflect access charges and the divestiture. For this reason, we reject the suggestion. SBS also stated that we should not anticipate Joint Board actions in this item. MCI also said that changes to the *ICAM* are premature until the premium access question is settled. The changes which we are making in the Manual will make it consistent with access charges and the AT&T divestiture. We believe these changes are appropriate and necessary to permit timely filing of access charges. As a final matter, AT&T has argued for an end to *ICAM* after 1984 and also begins making a case for deregulation. Whether such arguments are valid or not, they do not fit into the narrow focus of this proceeding and, therefore, merit no further discussion.

46. Accordingly, IT IS HEREBY ORDERED, pursuant to 47 U.S.C. §§154(i), 154(j) and 201–205, That the AT&T Cost Allocation Manual IS AMENDED as noted above and in the attachment to this *Order*.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Cost Allocation Manual

This manual contains general instructions for allocating the annual interstate investment and expense costs less any amounts for exchange contract services to divested companies to the following reporting categories for AT&T.

Private Line
Message Telecommunications Service (MTS)
Outward WATS and 800 Service (collectively, WATS)

For each of the reporting categories, an earnings ratio will be developed according to this formula:

$$\text{Earnings Ratio} = \frac{\text{Revenues minus (expenses and taxes)}}{\text{Gross investment minus reserves}}$$

These earnings ratios, plus supporting documents, will be filed with the Commission during June following the reporting year ("central submission"). These earnings ratios will be subject to final interpretation by the Commission.

The process for making changes to this manual shall be determined by the Chief, Common Carrier Bureau. Minor changes (such as changes in account names) may be made providing these changes are approved by the Chief, Common Carrier Bureau prior to filing of the central submission. Substantive changes, which may be requested by any party, will require appropriate procedures.

I. *Investments and Reserves*

Instructions in this section are to be used to allocate interstate investments and reserves to the reporting categories.

A. *General Instructions*

Using Jurisdictional Separations Process (JSP) data, principles and AT&T accounting records, investment and reserves for the company and any wholly owned carrier subsidiaries will be divided between private line and message categories. Message investments will be grouped into interexchange and "other" categories to be used in further allocation to MTS and WATS. Those portions of investment associated with the switching function will be allocated separately as described below.

B. Reporting Categories

Private Line

This category contains investments and reserves associated with private line services.

MTS and WATS

Investment and reserve amounts for the message category, as developed above, will be allocated to MTS and WATS. Message telephone plant (defined here as Account 100.1 less private line investment, land, buildings, furniture and office equipment, and vehicles and other work equipment) will be identified. Interexchange Toll Dial Switching and Switchboard investment will also be separately identified. Interexchange outside plant and COE amounts will be allocated between MTS and WATS based on network message minute miles. Toll Dial Switching investment will allocated on the basis of switched message minutes. The determination of investment in the various switchboard types will be based on JSP data. Investment in overseas/international message switchboards will be directly assigned to the MTS reporting category. Investment in switchboards used to provide 800 Service information will be assigned to the WATS category. Investment in other switchboards will be identified as serving billed or non-billed messages, using traffic unit data. Investment serving billed messages will be allocated between MTS and WATS based on the relative number of MTS and WATS messages served by such investment. Investment serving non-billed messages will be allocated based on the relative number of total MTS and Outward WATS messages. International satellite associated earth station investment (Account 100.5) and its associated depreciation and amortization account (Account 175) will be allocated on the basis of international satellite rents.

Interexchange, international satellite and switching telephone plant developed separately for MTS and WATS will be added together to form total message telephone plant amounts for MTS and WATS. The percentage which MTS and WATS telephone plant each makes of total message plant (as defined above) will be used as a distributive ratio to allocate all remaining investment ("other") and reserve accounts between MTS and WATS.[1]

II. *Allocation of Access Expenses*

Procedures in this section are used to allocate the expenses associated with payments to local exchange carriers for access to their local facilities. The allocation of all other expense accounts is contained in Section III, below. "Private line" use referred to in categories allocated directly or indirectly among MTS, WATS and private line on a message or minute basis means FX, CCSA, SCAN and CCSA equivalent Open End traffic.

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[1] Included in these remaining investment and reserves portions are the following accounts: Land and Buildings; Furniture and Office Equipment; Vehicles and Other Work Equipment; Telephone Plant Under Construction; Property Held For Future Telephone Use; Materials and Supplies; Customer Deposits; Organization, Franchise and Patent Rights; Depreciation Reserve and Accumulated Deferred Income Tax Reserve; Amortization Reserve; and Cash Working Capital.

Access Expense	*Allocation Procedures*
Carrier Common Line Usage	Apportion among MTS, WATS and Private Line on the basis of the relative access minutes attributed to each category for purposes of such access charge billings.
Line Termination	Apportion among MTS, WATS and Private Line on the basis of the relative access minutes attributed to each category for purposes of such access charge billings.
Local Switching 1	Assign to the Private Line category.
Local Switching 2	Apportion between MTS and WATS in the same proportions as Line Termination charges apportioned to such categories.
Intercept	Apportion among MTS, WATS and Private Line in the same proportions as Line Termination charges apportioned to such categories.
Information	Assign to MTS and WATS on the basis of the relative proportion of total MTS and OUT-WATS calls.
Common Transport	Apportion among MTS, WATS and Private Line on the basis of the relative access minutes attributed to each such category for purposes of such access charge billings.
Dedicated Transport	Apportion between MTS and WATS in the same proportions as Line Termination charges apportioned to such categories.
Special Access	Apportion between WATS and Private Line in the same proportions as such access charge billings attributed to each category.
Billing and Collection	Apportion among MTS, WATS and Private Line in proportion to access charge billings attributed to each category.
Coinless Pay Phone	Assign to MTS.
Special Access Surcharge	Assign to WATS or private line on the basis of lines assessed.

III. *Expenses Not Related to Access and Income—Description of FDC Medhodologies*

Procedures in this section are to be used to distribute all interstate expenses not related to access expenses (600 series accounts) and income to the reporting categories. Expenses are directly assigned where applicable or allocated on the basis of the procedures described below. Certain accounts are allocated on the basis of "total attributable expenses." This factor represents each reporting category's percentage share of expenses derived through direct assignment and allocation procedures (except local, state and federal income taxes).

Expenses and Revenues-FDC Methods

Operating Expense Accounts	*Allocation Procedures*
602.1–602.8 Repairs of Outside Plant (OSP)	Allocate to reporting categories based on associated OSP in service (Accounts 241 through 244).
	Allocate maintenance of overseas facilities to reporting categories based on the number of associated circuits in service.
603-02 Service Order Testing	Directly assign the portion indentified in JSP data as Private Line to the Private Line reporting category. Allocate amounts identified in the JSP as Message interexchange to the MTS and WATS categories based on the distribution outside plant and interexchange central office plant in service.
603-04 Trunk Testing	Allocate circuit testing to reporting categories using an analysis of reported testing hours.
	Overseas testing allocated to reporting categories based on number of circuits in service.
	Allocate facilities testing to reporting categories based on associated interexchange (IX) OSP and COE plant in service, excluding overseas.
604 COE Repairs	Directly assign the Service Engineering portions of Account 604 to the private line reporting category.
	Directly assign #4ESS international generic program costs to MTS.
	Allocate the circuit rearrangements and change portions of Account 604-07 and Account 604-08 (less Service Engineering) to reporting categories based on number of IX circuit sections.

Operating Expense Accounts	*Allocation Procedures*
	Allocate overseas facility terminal equipment maintenance to reporting categories based on associated number of circuits.
	Allocate the remainder of Account 604 to reporting categories based on associated COE plant in service.
605 Station Equipment Maintenance	Allocate Account 605 to reporting categories based on station equipment plant in service (Accounts 231, 232 and 234).
606 Buildings and Grounds	Allocate to reporting categories based on investment in buildings.
610 Maintaining Transmission Power	Allocate to reporting categories based on COE plant (Account 221) separately for domestic and overseas.
612 Other Maintenance	Allocate to reporting categories based on combined Accounts 602 through 606 and 610.
	Allocate Accounts 621-231 (network administration staff) to reporting categories based on the combined attribution of Accounts 624-222, -622 and -722.
	Allocate the remainder (training and other staff) of Account 621-03 based on the combined attribution of Accounts 621-231, -331 and -431.
608 Depreciation	Allocate to reporting categories based on the depreciable classes of plant in service using applicable depreciation rates. (Ocean cable depreciation is allocated separately based on the ocean plant in service in each category.)
609 Extraordinary requirements	Allocate to reporting categories based on special analysis of accounting records.
613 Amortization of Intangible Property	Allocate to reporting categories based on total attributable expenses.
614 Amortization of Plant Acquisition Adjustments	Directly assign to reporting categories based on special analysis of accounting records.
621-01 General Traffic Supervision (Except Accounts 621-311 and 316.)	Allocate to reporting categories based on Account 624 less 624-22 and 624-25.
621-311/316/05 622-02/03, 624-25/629-08, 631-38 and 631-48 Business Services	Allocate to reporting categories using data from a Business Service time reporting system.

Operating Expense Accounts	*Allocation Procedures*
621-03, 624-22, 629-07 631-37/47 Network Administration	Allocate Accounts 621-431, 624-222, 624-422 and 624-622 (switching and line and number administration) to reporting categories based on toll dial switching equipment plan in service. Allocate Accounts 621-331 and 624-322 (traffic load data administration) to reporting categories based on toll dial switching and switched services IX central office equipment and OSP plant in service, excluding dedicated overseas IX central office equipment and outside plant. Allocate Accounts 624-722 (Trunk Administration) to reporting categories based on switched services IX central office equipment plant and OSP plant in service, excluding dedicated overseas IX central office equipment and outside plant. Allocate Accounts 621-231 (network administration staff) to reporting categories based on the combined attribution of Accounts 624-222, -622 and -722. Allocate the remainder (training and other staff) of Account 621-03 based on the combined attribution of Accounts 621-231, -331 and -431. Allocate the remainder (supervision, training and other) of Accounts 624-22, 629-07, 631-37 and 631-47 based on the combined attribution of Accounts 624-222, -322, -422, -622 and -722.
622-01 Service Observing	Allocate to reporting categories based on Account 624 less 624-22 and 624-25.
624 (Except Accounts 624-22 and 624-25), Operators Wages less Network Administration and Business Services	Directly assign Private Line and overseas/international expenses to Private Line and MTS. Directly assign expenses incurred at 800 Service Switchboards to WATS. Determine expenses incurred at other switchboards associated with billed messages on the basis of traffic units. Allocate expenses associated with billed messages based on the relative number of MTS and WATS messages served by such switchboards. Allocate expenses associated with nonbilled messages based on the relative number of total MTS and OUTWATS messages.
626 Rest and Lunch Rooms	Allocate to reporting categories based on Account 624 less 624-22, and 624-25. (Network Administration and Business Service portions of these accounts are treated above).

Operating Expense Accounts	*Allocation Procedures*
627 Operator's Employment and Training	Same as Account 626.
629 less -07 and -08 Co Stationery and Printing	Same as Account 626.
630 Co House Service	Same as Account 626.
631 less -37, -38, -47 and -48 Miscellaneous Co Expenses	Same as Account 626.
633 Other	Same as Account 626.
634 Joint Traffic–Debit	Same as Account 626.
635 Joint Traffic–Credit	Same as Account 626.
640 General Commercial Administration	Directly assign Service Management expense to reporting categories. Allocate remainder of Account 640 to service categories based on Account 643 for Long Lines and 645 for IXCs.
642 Advertising	Directly assign Long Distance Residence Sales, Long Distance Business Sales, Long Distance International, Long Distance Public, and Long Distance DIAL-IT to MTS. Allocate remainder based on total attributable expenses.
643 Sales	Allocate to reporting categories using the results from a sales time reporting system.
644 Connecting Company Relations	Allocate to reporting categories based on allocation of Independent Company settlements for interexchange facilities.
645 Commercial Operations	Allocate expenses to reporting categories using results from a work measurement plan and a sales time reporting system.
649 Directory	Allocate to MTS and WATS based on a count of MTS and WATS messages.
650 Other Commercial Expenses	Allocate expenses based on Account 643 for Long Lines and 645 for IXCs.
661 Executive Department	Allocate based on total attributable expenses.

Operating Expense Accounts	*Allocation Procedures*
662 Accounting Department	Allocate Revenue Accounting to reporting categories based on analysis of Revenue Accounting Offices. Allocate remainder to reporting categories based on total attributable expenses.
663 Treasury Department	Allocate to reporting categories based on plant in service.
664 Law Department	Directly assign overseas legal expenses to overseas services based on analysis of records.
	Directly assign outside legal consultant fees and associated costs based on analysis of applicability to a category.
	Allocate remainder to reporting categories based on total attributable expenses.
665 Other General Office Salaries and Expenses	Allocate Personnel, Account 665-03, to reporting categories based on Maintenance, Traffic, Commercial and Revenue Accounting salaries.
	Directly assign Service Engineering expenses (Portion of 665-09) to the private line category.
	Allocate Account 665-29, Customer Services, to categories based on reported hours.
	Allocate Account 665-149, Central Office Planning and Engineering, based on toll dial switching equipment plant in service.
	Allocate remainder based on total attributable expenses.
668-669 Insurance and Accidents and Damages	Allocate to reporting categories based on plant in service.
670 Earth Station Expenses	Allocate to reporting categories based on Account 100.5.
671 Operating Rents	Allocate circuit and miscellaneous rents to reporting categories based on interexchange OSP and Circuit equipment and toll switching equipment plant in service.
	Allocate rents paid to affiliates to Message and the Private Line reporting category based on number of circuits. Message rents are allocated to MTS and WATS based on number of minutes.
	Directly assign international satellite rents incurred for services that can only be provided on satellite facilities directly to reporting categories. Allocate remaining international satellite

Operating Expense Accounts	*Allocation Procedures*
	rents to reporting categories based on total international voice-grade circuits in use.
	Allocate domestic satellite rents to reporting categories based on domestic satellite circuits in use.
	Allocate building space rents to reporting categories based on the combined Accounts 643, 645 and Revenue Accounting portion of 662.
672 Relief and Pensions	Allocate to reporting categories based on Maintenance, Traffic, Commercial, and Revenue Accounting Salaries.
673 Telephone Franchise Requirement (dr)	Allocate based on the total investment in Account 100.1.
674 and 691 General Services and Licenses	Payment for services rendered by an affiliated company shall be assigned to expense categories in the same manner as expenses that are incurred directly by AT&T or a carrier subsidiary and shall be apportioned in the same manner as such directly incurred expenses.
675 Other Expenses	Allocate to reporting categories based on plant in service.
676 Telephone Franchise Requirements (cr)	Allocate based on the total investment in Account 100.1.
677 Expenses Charged Construction (cr)	Same as Account 675.

Income Accounts–FDC Methods Subsection

Income Accounts	*Allocation Procedures*
Gross Service Revenues (Accounts 510-516)	Directly assign to reporting categories based on accounting records.
Earth Station Revenue (Account 522)	Allocate to reporting categories based on the allocation of international satellite rent expense.
Directory Advertising and Sales	Directly assign to MTS.
Rent Revenues (Account 524)	Directly assign to reporting categories based on accounting records.
Other Operating Revenues (Account 526)	Allocate to reporting categories based on gross revenues (Accounts 510-526) less Account 526.
Uncollectibles (Account 530)	Allocate to reporting categories based on an analysis of accounting records.

Income Accounts	*Allocation Procedures*
Independent Company and Foreign Settlements	Allocate based on revenue account charged.
Miscellaneous Income Charges (Account 323)	Allocate based on plant in service (Account 100.1).
Interest on Customer Deposits	Allocate based on total investment in Account 100.1.

Taxes–FDC Methods

Type of Tax	*Allocation Procedures*
Gross Receipts Taxes	Allocate based on the allocation of reporting category revenues.
Social Security Taxes (Account 307-05)	Allocate based on the apportionment of Maintenance, Traffic, Commercial, and Revenue Accounting salaries.
Ad Valorem Taxes (Account 307-01)	Allocate based on the allocation of plant in service.
Income Adjustments for Income Tax Determination	Allocate depreciation of capitalized items, Relief and Pensions, and Social Security Taxes capitalized based on plant in service. Allocate Operating Fixed Charges based on the allocation of net investment.
State and Local Income Taxes (Account 307-02)	Allocate the actual tax incurred based on the state and local taxable income for each reporting category (net revenue less expenses, income charges, taxes excluding Federal Income Taxes, and income adjustments).
Amortization of Investment Credits	Allocate based on the allocation of plant in service.
Federal Income Tax	Allocate to reporting categories by multiplying the statutory rate times the Federal taxable income for each reporting category (net revenue less expenses, income charges other taxes, and income adjustments).

SEPATATE STATEMENT OF COMMISSIONER. MIMI WEYFORTH DAWSON

re:

American Telephone and Telegraph Co. Manual and Procedures for the Allocation of Costs
CC Docket 79–245

The "proper" allocation of the costs of AT&T's interstate services has been a regulatory issue before the Commission for more than two decades. The Commission's concern with AT&T's allocation of costs was a direct result of its decisions authorizing both private and public transmission systems in competition with AT&T's existing interstate transmission services.[1] In particular, the Commission instituted Docket 14251 in 1961 to investigate AT&T's TELPAK tariff, a bulk private line service offering substantial discounts to large users. In effect, TELPAK was AT&T's pricing response to the anticipated competition from private microwave systems authorized by the Commission in its *Above 890* decision in 1959. The TELPAK tariff underscored a potential weakness of the Commission's policy authorizing the construction of private telecommunications facilities, namely, AT&T's reaction to competitive threats to its private line market. For the first time, the Commission was confronted with assessing the lawfulness of AT&T's interstate rate *structure* rather than simply the lawfulness of AT&T's aggregate interstate revenue requirement.

The TELPAK tariff represented a new and paradoxical issue for the Commission. Prior to its nascent policy of "selective competition," the Commission's common carrier regulatory responsibility focused, in theory, on the avoidance of monopoly pricing by AT&T. Through the informal regulatory technique of "continuing surveillance," the Commission attempted to offset the profit-maximizing incentive of a monopoly firm to raise rates and restrict output. The TELPAK tariff represented just the opposite problem, namely, private line rates that may be too *low*. While users who qualified for TELPAK rates would clearly benefit from TELPAK's substantial discounts, the Commission was forced to determine whether AT&T's large private line customers were being cross-subsidized by users of switched network services or other private line users who could not qualify for TELPAK's reduced rates. Thus began the Commission's fifteen-year odyssey in search of a "costing standard" that would allow it to assess the lawfulness of AT&T's rate structure for its interstate services. The Commission's quest for such a costing standard finally ended in 1976 after merging the records of a number of related dockets and issuing a *Memorandum Opinion and Order* in Docket 18128.[2]

The decision in Docket 18128 was controversial when it was adopted and has remained so in subsequent years. In brief, the decision prescribed "fully distributed cost" (FDC) as the Commission's benchmark for lawful rates for AT&T's interstate services. In particular, Method 7, based on the principle of "historical cost causation," was prescribed as the costing method that AT&T must follow in setting rates for its interstate switched and private line services. The decision, however, only established "guidelines for a 'proper methodology,'" not a set of detailed procedures implementing the principle of historical cost causation. The decision ordered that AT&T (and Western Union) consult with the staff of the Common Carrier Bureau to revise FDC Methods 1 and 7. The current proceeding in Docket 79-245, which began in September, 1979, was initiated to develop a FDC implementation manual that would establish final rules and procedures for implementing the principles of Docket 18128.

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[1] See *Above 890* decision, 27 FCC 359 (1959); *Domsat* decision, 35 FCC 2d 844 (1972); and *Specialized Common Carrier* decision, 29 FCC 2d 870 (1971).

[2] *Private Line Services (TELPAK)*, 61 FCC 2d 587 (1976).

The "Interim Cost Allocation Manual" (ICAM) adopted by the Commission in December, 1980, differed in a number of fundamental ways from the principles established in the Docket 18128 decision.[3] Nevertheless, the *Report and Order* stressed that the ICAM was only an interim methodology that the Commission would accept to satisfy an order of the U.S. Court of Appeals for the District of Columbia Circuit to adopt a cost allocation manual by December, 1980. The Commission stressed, however, that the search for a longer term cost allocation manual in Docket 79-245 would continue.

The Commission has yet to adopt a longer term or "permanent" cost allocation manual in Docket 79-245. The order just adopted by the Commission in this docket is simply another in a series of "adjustments" to the ICAM, required in the present instance by the Commission's reconsideration of the *Access Charge* decision in Docket 78-72. The Commission, however, should begin now to focus on the longer term aspects of this proceeding. In brief, the Commission should decide very soon what role FDC methodologies in general and cost allocation manuals in particular should play in the post-divestiture regulation of AT&T. While the Commission should make its decision on the appropriate longer term cost allocation manual after developing an appropriate record, I believe that the Commission should be prepared to entertain and potentially support as an appropriate option the possibility that a longer term cost allocation manual should *not* be adopted by the Commission.

The logic for not adopting a longer term cost allocation manual can be appreciated by reviewing briefly the Commission's goals in Docket 18128. In this proceeding, the Commission held that

> . . . our statutory mandate and our rules manifest our paramount responsibility to ensure carrier accountability for the rates, charges, practices and rules prescribed by the carrier.[4]
>
> Ensuring carrier accountability is one of our primary objectives and responsi-

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[3] AT&T Manual and Procedures for the Allocation of Costs, 84 FCC2d 384, *recon. denied*, 86 FCC2d 667 (1981), *affirmed sub nom.* MCI Telecommunications Corp. v. FCC ("ICAM"), 675 F.2d 408 (D.C. Cir. 1982).

[4] 61 FCC 2d at 610.

> bilities. All parties appear to agree that an established carrier should be held accountable for its pricing and investment decisions.[5]
>
> . . . we find that accountability should be implemented across all services and for anticipatory (continuous surveillance) as well as retrospective purposes. Thus, accountability is the touchstone of the 'just and reasonable' provision of Section 201.[6]

Carrier accountability, therefore, was the major goal of the Docket 18128 proceeding. By prescribing a FDC methodology, the Commission hoped that AT&T's managerial discretion in the assignment of costs to its interstate services could be controlled and unlawful interservice cross-subsidization could be avoided.

While carrier accountability was the major Commission objective in Docket 18128, other objectives were also identified including

> . . . ensuring equitable and non-discriminatory treatment of all service users (generally referred to herein as 'equity'), promoting efficiency and providing a precise and clear set of market rules for planning and decision making purposes.'[7]
>
> We find our obligation to promote efficieny [sic] and innovation to encompass cost definition, minimization, and allocation. Furthermore, we recognize the interdependence of efficiency and costing. We do not limit our considerations of efficiency only to measurable transactions, but realize that the public interest may be served by recognizing factors not directly traceable to the marketplace. Thus, our concept of efficiency incorporates such considerations as equity and social welfare. It is, therefore, broader than that espoused by economists or individual carriers. Accordingly, our selection of a proper costing methodology from this standpoint will be determined by defining the term 'optimal' in a fashion quite apart from the 'relevant ratemaking factors' used by Bell.[8]
>
> A final major objective of the Commission is clarification of market rules. In general, these concern market entry and exit, proper supporting material for tariffs, rate level floors and ceilings, interservice rate relationships, and the myriad of other marketplace specifications needed by suppliers for proper decision making and planning. The Commission's prior decisions encouraging competition in certain markets were made to attract those firms which will prove over time to be viable and effective alternative sources of supply. Such firms should be able to accurately gauge the attractiveness of communications markets with full knowledge of the rules pertaining to their own and the established carriers' opportunities, responsibilities, and limitations. For example, in other proceedings, we have endeavored to provide rules regarding interconnection and service and equipment definitions. In this proceeding our attention is directed to ratemaking principles. Our findings and conclusions herein are intended to provide the rules necessary to properly relate costs and both relative rates and rate levels. They should dissuade both incipient and established suppliers from participating in a particular service area because of the presumption that 'protective umbrellas' will offset any patent inherent economic shortcomings.[9]

The goals of Docket 18128 were maintained when Docket 79-245 began. In its initial *Notice of Inquiry* in Docket 79-245, the Commission held that

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[5] Ibid.

[6] Ibid., p. 612.

[7] Ibid.

[8] Ibid, p. 615.

[9] Ibid.

> We continue to believe . . . that it is appropriate and necessary for the Commission to prescribe a set of rules and procedures to be followed in allocating costs of service in accordance with the broad principles of Docket 18128.[10]
>
> We would like the parties to comment upon the validity of the overall procedures set forth in the existing cost manuals and used by AT&T to allocate its costs. In particular, the parties might address whether the inherent complexity of AT&T's cost allocation process—when considered as a whole—makes it inconsistent with the Commission's regulatory objective of 'carrier accountability.'[11]

I believe that any further proceedings in Docket 79-245 focused on the eventual prescription of a long term or permanent cost allocation manual should begin by re-examining the goals that the Commission has established for this proceeding. The goal of "carrier accountability" may have been an important goal of regulatory policy in 1976 when competitive entry was restricted to the interstate private line market and MTS/WATS was a de facto monopoly service. The Commission's experience with the TELPAK tariff certainly appears sufficient to warrant concern that AT&T's pricing of interstate private line services may burden the MTS/WATS ratepayer and frustrate the market entry of competing carriers. But much has changed since 1976. The interstate MTS/WATS market has been opened to competitive entry; additional facilities-based carriers and resellers have entered the private line and switched services market; satellite capacity has grown substantially; private networks and bypass technologies have proliferated; a new mechanism for recovering the interstate costs of local exchange plant will be implemented next year; and the divestiture of the Bell operating companies from AT&T in 1984 will radically alter the structure of the Bell System and its incentives. Given such changes in technology, regulatory policy, and industry structure since 1976, it is not obvious to me that carrier accountability implemented by cost manual regulation should remain the focal point of the Commission's regulatory policy towards AT&T.[12]

In theory, cost-of-service or cost manual regulation is a regulatory tool designed to detect and prevent unlawful cross-subsidy among the tariffed services of a regulated firm offering both *monopoly* and "competitive" services. As I have already suggested, it is increasingly difficult to characterize the interstate MTS/WATS market as an

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[10] *Manual and Procedures for the Allocation of Costs*, 73 FCC 2d at 631 (1979).

[11] Ibid., pp. 633-634.

[12] Carrier accountability may remain an important goal of regulatory policy at the state level where local telephone companies remain de jure monopolies and competition with the local exchange carrier is not highly developed.

AT&T "monopoly market" that should remain fully subject to all forms of classic public utility regulation.[13] Any aspect of the regulation of AT&T should, in my opinion, closely track both the actual state of market development and its likely path of evolution. From this perspective, the goal of carrier accountability achieved through cost manual regulation of AT&T seems somewhat out of focus as the target of regulatory policy for the 1980s. The emergence of actual and potential competition seems, in my view, much more likely to compel carrier accountability by AT&T than FDC pricing rules or cost manual regulation.

If cost manual regulation of AT&T were essentially "costless" to both ratepayers and AT&T shareholders, then such regulation may not be objectionable if significant public interest benefits can also be identified. If the trend toward growing competition in the interstate transmission market continues and if equal access becomes available to all intercity carriers in the next several years, the public interest benefits of cost manual regulation, a surrogate for competition, seem increasingly doubtful. Even worse, FDC pricing rules impose costs on both carriers and customers in addition to the direct costs of regulatory compliance. For example, a FDC methodology that allocates "shared costs," i.e., common and joint costs taken together, on the basis of relative use may lead to equal prices for all subperiods despite peak loads that should be reflected in time-of-day rates.[14] To offset this result, regulators may be forced to extend their regulatory reach and prescribe on an ad hoc basis the actual rate structure for a given service.[15]

Many additional criticisms of FDC as the basis for public utility ratemaking have been explored in regulatory proceedings over the years.[16] There is little need, therefore, to review these criticisms at any length here. Suffice it to say that FDC pricing distorts the allocation of resources and thwarts the realization of economic efficiency by ignoring marginal cost; may produce "umbrella pricing" that protects inefficient competitors; and prevents the rapid adjustment of prices to changing demand and costs. Moreover, the concept of interservice cross-subsidy as defined in terms of FDC is controversial, i.e., equal rates of return on the allocated costs of each service may bear little relationship to rigorous notions of "subsidy-free" prices.[17] Furthermore, it is no longer self-evident that regulatory policy centered on the elmination of *all* interservice cross-subsidy is necessarily in the best interests of consumers in all circumstances. Even "Ramsey optimal" pricing, i.e., public utility pricing that maximizes a static measure of consumer welfare subject to a revenue requirements constraint,[18] may itself involve interservice cross-subsidy.[19] Thus, regulators attempting to eliminate all interservice cross-subsidy may wind up actually reducing aggregate ratepayer welfare.[20] It is also possible that FDC pricing, absent strategic behavior by the regulated entity, may create an incentive for a partially regulated firm to set prices in its unregulated markets or markets with low allowed rates of return that exceed the prices that would prevail in the absence of regulation.[21]

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[13] AT&T clearly retains a substantial share of the current interstate MTS/WATS market. Nevertheless, if competition continues to develop, such dominance need not mandate ongoing public utility-type regulation of AT&T any more than IBM's dominance in the computer mainframe industry warrants rate base regulation. For further discussion of this point and an analysis of the appropriate regulation of AT&T following divestiture, see Michael L. Katz and Robert D. Willig, "Deregulation of Long Distance Telephone Services: A Public Interest Assessment," *Discussion Papers in Economics* No. 7, Woodrow Wilson School of Public and International Affairs, Princeton University, 1983. The removal of regulatory entry barriers and the actual entry of fringe competitors in the interstate MTS/WATS market have enhanced the "contestability" of this market and diluted to some extent AT&T's market power in this market, despite only a modest reduction in AT&T's market share. For a recent discussion of the relationship between market share and market power, see Landes & Posner, "*Market Power in Antitrust Cases*," 94 *Harv. L. Rev.* 937–96 (1981).

[14] See Gerald R. Faulhaber, "Peak-Load Pricing and Regulatory Accountability" in *Problems in Public Utility Economics and Regulation*, 133–42 (M. Crew, ed., 1979).

[15] The Commission did precisely this in ordering a time-of-day rate structure for WATS. See *AT&T Wide Area Telecommunications Service (WATS)*, 86 FCC 2d 820 (1981).

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[16] A summary of some of the major problems is provided by Braeutigam, *An Analysis of Fully Distributed Cost Pricing in Regulated Industries*, 11 *Bell J. of Econ.* 182–96 (1980).

[17] Most rigorous concepts of interservice cross-subsidy have been framed as problems in game theory and the recent theory of sustainability. For an introduction to this approach to cross-subsidy analysis, see *W. Sharkey, The Theory of Natural Monopoly* 102–09 (1982). *See also W. Baumol, J. Panzar & R. Willig, Contestable Markets and The Theory of Industry Structure* (1982); Faulhaber & Levinson, *Subsidy Free Prices and Anonymous Equity*, 71 *American Econ. Rev.* 1083–91 (1981).

[18] The elements of Ramsey pricing are summarized by Brock, *Pricing, Predation, and Entry Barriers in Regulated Industries*, in *Breaking Up Bell: Essays in Industrial Organization and Regulation*, (D Evans, ed., 1983).

[19] *See* Baumol, Fisher, & ten Raa, *The Price-Iso Return Locus and Rational Rate Regulation*, 10 *Bell J. of Econ.* 648–58 (1979).

[20] Much of the formal analysis of the limitations of FDC is couched in terms of static economic analysis and may set an unrealistic standard for criticism of real-world applications of FDC methodologies. Even Ramsey-optimal pricing, a common benchmark for analyzing the infirmities of FDC pricing, is itself usually cast in a static theoretical framework. The essential point of these static economic analyses of FDC pricing rules is that such rules *may* imply substantial reductions in economic efficiency and ratepayer welfare and that regulators should be especially mindful of the social costs that ratemaking based on FDC may imply. Implicit in such criticisms is the view that regulators should consider less costly, alternative mechanisms for pursuing their public interest objectives.

[21] Sweeney, *Welfare Implications of Fully Distributed Cost Pricing Applied to Partially Regulated Firms*, 13 *Bell J. of Econ.* 525–33 (1982).

I am not optimistic that further proceedings in Docket 79–245 will produce conceptual breakthroughs that will neutralize the perverse incentives and economic inefficiencies inherent in FDC pricing. Moreover, attempts to develop cost-based tests for predatory behavior for unregulated firms and markets have proven to be controversial both in theory and application.[22] Consequently, I propose that further proceedings in this docket, if any, should focus not on the goal of carrier accountability via FDC rules but on the delineation of "market rules," a subsidiary goal of Docket 18128.

A reorientation of the Commission's regulatory objectives away from carrier accountability via cost manual regulation of AT&T and toward a market rules approach is fully consistent with the Commission's pro-competitive policies.[23] A market rules approach is also fully supportive of the Commission's concerns that AT&T may have dominant firm incentives to delay the evolution and development of a competitive market in long distance telecommunications.[24] In brief, if competition in the interstate transmission market continues to develop, then a market rules approach could be substituted for cost manual regulation of AT&T's interstate services. Until the Commission is confident that competition in the interstate market for long distance telecommunications is developed sufficient-

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[22] At a conceptual level, the definition of predatory pricing for just a single-output firm has resulted in an extensive debate among economists. See, for example, the debate between Areeda and Turner, who articulated a cost-based test for predatory pricing in 1975, and Scherer. (Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 *Harv. L. Rev.* 697–33 (1975) and the comment by F.M. Scherer and reply by Areeda & Turner, 89 *Harv. L. Rev.* 869–903 (1976).) Cost-based tests for multioutput firms would be more complex conceptually and more difficult to apply empirically.

[23] The market rules approach to the transitional regulation of AT&T is briefly discussed by Duvall, *The Conceptual Framework of Common Carrier Policymaking at the Federal Communications Commission in Recent Years: An Economist's Perspective*, in *University of Missouri Extension Publications, Proceedings of the 1981 Rate Symposium on Problems of Regulated Industries* 351–74 (1981). A more complete exposition is provided by Preece & Morris, *A Roadmap For Deregulating AT&T*, a paper presented at the Eleventh Annual Telecommunications Policy Research Conference, Annapolis, Maryland, April 26, 1983.

[24] Models of dominant firm conduct relevant to the telecommunications industry have been developed by Gerald W. Brock and William A. Brock. See *G. Brock, The Telecommunications Industry: The Dynamics of Market Structure* (1981); *W. Brock, Pricing Predation, and Entry Barriers in Regulated Industries.* These models analyze the incentives for a regulated dominant firm to invest in "barrier-to-entry" capital, i.e., investment in such activities as protracted regulatory proceedings that impose substantial sunk costs on potential competitors so that market structure can be influenced to the advantage of the incumbent regulated firm. These dynamic models stress the policy significance of barrier-to-entry capital rather than interservice cross subsidization as potential threats to the emergence of competitive telecommunications markets. Indeed, under certain assumptions, it can be argued that interservice cross-subsidization is generally not a highly-attractive predatory strategy for a rate base regulated firm. On this controversial point, see Brock, "Pricing, Predation, and Entry Barriers in Regulated Industries," pp. 205–213.

ly to warrant complete deregulation of AT&T, market rules would *directly* constrain certain aspects of AT&T's dominant firm behavior that may, intentionally or not, threaten the development of competition.[25] For example, AT&T could continue to file tariffs for services that the Commission has determined that AT&T still retains substantial market power.[26] However, *all* tariffs would allow unlimited resale and sharing. Cost-support data as presently prescribed by Section 61.38 of the Commission's Rules could be waived, and no FDC methodology for justifying tariffs would be required. Price discrimination based on the *identity* of the user could be prohibited.[27] Thus, all tariff distinctions designed to segment users by service classification would be unlawful. Time constraints on the offering and terminating of tariffed services could be imposed to prevent AT&T from generating price uncertainty ("price randomization") that may increase the risk of entry by resellers and other potential competitors.[28] In brief, the prescription of easily monitored and enforced market rules would *directly* constrain AT&T's pricing conduct that may deter entry by competitors or otherwise retard the rapid development of competition.

A major infirmity of cost manual regulation is clearly illustrated in the instant ICAM order. Abrupt variations in the allocation of costs to the Private Line, MTS, and WATS reporting categories may result in substantial rate increases or decreases for AT&T's interstate services, although the underlying *economic* costs of either switched or private line services may have changed only slightly. For example, changes in the ICAM resulting from the Commission's *Access Charge Reconsideration* Order, such as the inclusion of only open-end WATS minutes for apportioning interstate non-traffic sensitive local exchange investments between MTS and WATS and the allocation of surcharges on private lines, will have an impact, possibly substantial, on the "allocated costs" of AT&T's interstate services. Such arbitrary change in the allocation of costs may result in new switched and private line rates that may exacerbate the economic dislocations for some user groups. Moreover, such arbitrary reallocations of AT&T's interstate costs may have unintended effects on the emergence of intercity transmission competition. For example, to the extent that many non-dominant carriers rely on resold WATS to complete their nationwide switched services, abrupt changes in the allocation of costs to WATS may have unintended effects on non-dominant carriers that may thwart the rapid development of competition in the intercity transmission market. Similarly, carriers providing WATS-equivalent services may be suddenly disadvantaged as a result of a change in the apportionment of costs, even though the underlying economic costs may not justify the new rates based on the reallocated embedded costs. These, among other adjustments to the ICAM resulting from the *Access Charge Reconsideration* Order, may result in "rate churning" if AT&T is still required to target the earnings of each service category to the authorized interstate rate of return. To relax, however, the ICAM's service-specific rate-of-return constraint to avoid sudden rate dislocations undercuts the very rationale for cost manual regulation, i.e., carrier accountability for the investment and expenses allocated to each service category and avoidance of interservice cross-subsidy as defined in terms of the ICAM.

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[25] FDC pricing rules are, in effect, *indirect* methods for regulating the prices of the regulated firm, i.e., extensive cost support materials must be organized and presented to the regulatory agency to "justify" the tariffed rates.

[26] The Commission may determine at some point that AT&T lacks market power in certain of its interstate transmission services. The Commission could then detariff such services and treat them as if they were provided by a non-dominant carrier.

[27] Price discrimination based only on the volume of usage would not be prohibited, however. If subject to resale (which constrains the amount of price discrimination to the costs of performing arbitrage), such volume-based pricing may have beneficial effects for ratepayers in the aggregate. An overview of the theory of volume-sensitive pricing is provided by *L. Philips, The Economics of Price Discrimination* 166–75 (1983).

[28] This problem is briefly discussed in Duvall, "The Conceptual Framework of Common Carrier Policymaking . . .," p. 373. A formal model of entry-deterring price randomization is proposed by Brock, "Pricing, Predation, and Entry Barriers in Regulated Industries," pp. 220–226. *See also*, Baumol, *Quasi Permanence of Price Reduction: A Policy for Presentation of Predatory Pricing*, 89 *Yale L.J.* 1–26 (1979).

This current dilemma of cost manual regulation of AT&T need not require the Commission to invest heavily in improved techniques of cost manual regulation. Indeed, I believe there will be little return on the investment. In all probability, the time has passed for such a protracted regulatory investigation. A market rules approach is an appealing alternative. I hope the Commission will explore the possibility of eliminating cost manual regulation of AT&T either in a later phase of Docket 79–245 or as a part of the forthcoming *Notice of Inquiry* concerning the post-divestiture regulation of AT&T.

COMSAT, Financing

Memorandum Opinion and Order adopted concerning the consolidated capitalization plan Communications Satellite Corp. for the period 1983–1985.
–*COMSAT*

FCC 83–273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
The Consolidated Capitalization Plan for 1983–1985 of the Communications Satellite Corporation (Comsat)
I-S-P-83–002

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released June 13, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING

1. On January 24, 1983, the Communications Satellite Corporation (Comsat) submitted for our consideration the above-captioned consolidated capitalization plan (Capitalization Plan) to finance the activities of the parent company[1] and its subsidiaries[2] from 1983 to

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[1] The term "parent company" refers to the Communications Satellite Corporation. The activities of the parent company include, but are not limited to, those undertaken by its World Systems Division in furtherance of the purposes and objectives of the Communications Satellite Act of 1962, as amended, 47 U.S.C. 701 *et seq.* (1962) and the International Maritime Satellite Telecommunications Act, 47 U.S.C. 751 *et seq.* (1979); research and development performed by or conducted under contract for Comsat Laboratories pursuant to Section 305(b)(1) of the Satellite Act, 47 U.S.C. 735(b)(1); and those general and administrative activities engaged in at Comsat's corporate headquarters in furtherance of statutory mandates. As the above activities are subject to our regulatory jurisdiction, we shall refer to them as "regulated". The parent company also engages in activities not subject to our regulatory oversight. We shall refer to such activities as "nonjurisdictional".

[2] COMSAT General Corporation (COMSAT General), Comsat General Integrated Systems, Inc. (CGIS), Comsat Technology Products, Inc., Comsat General Telesystems, Inc. (TSI), Amplica, Inc., Environmental Research & Technology, Inc. (ERT), Satellite Television Corporation (STC), and Comsat General Business Communications, Inc. (BCI). BCI is the vehicle through which COMSAT General participates as a one-third partner in Satellite Business Systems (SBS). STC is the subsidiary through which Comsat is engaged in the development of a direct broadcast satellite (DBS) service. Comsat's organizational chart is included here as Appendix I.

1985. Comsat seeks authority to implement its Plan pursuant to Section 201(c)(8) of the Satellite Act.[3] Public notice of this request was given on February 2, 1983. Report No. I-2035. No comments opposing it have been filed.

Background

2. *The Capitalization Plan Concept*. Comsat indicates that heretofore its requests to engage in financing activities under Section 201(c)(8) have been submitted and treated on an application-by-applications basis. Comsat now asserts that a capitalization plan subject to our approval under Section 201(c)(8) represents a more appropriate vehicle for the conduct of its financial operations. Comsat argues that while the *ad hoc* approach to the treatment of its Section 201(c)(8) requests to issue capital stock and to obtain external financing generally has been satisfactory in the past, such an approach will become increasingly burdensome for both Comsat and the Commission in the future. Recently, Comsat has begun to expand rapidly its activities in competitive markets. Comsat asserts that although it continues to build its existing satellite communications business through INTELSAT and INMARSAT and to sustain its commitment to these traditional rate-base-regulated international businesses, the Corporation's market strategy for the 1980's involves the application of its "expertise in satellite technology to develop selected new [satellite-based] services and enlarge the proportion of non-regulated activities in its overall business mix."[4]

3. Comsat indicates that, as it has expanded and diversified its business activities, its requirements for external financing have increased. Concomitantly, in order to take advantage of optimal market conditions and to obtain debt or equity at the lowest possible cost, Comsat has found it necessary to enter capital markets on relatively short notice. In Comsat's view, the individual requests for Section 201(c)(8) authority it would be required to submit during the 1983–85 period in the absence of a more comprehensive approach would likely exceed in number and frequency all those filed to date. Further, Comsat states that "consistent with the realities of today's financial markets, it can be expected that these applications will contemplate a number of creative financing options which will be effective only if accomplished within a limited 'window of opportunity'."[5]

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[3] Under Section 201(c)(8), the Commission shall "authorize [Comsat] to issue any shares of capital stock, . . . or to borrow any moneys, or to assume any obligation in respect of the securities of any other person, upon finding that such issuance, borrowing, or assumption is compatible with the public interest, convenience, and necessity and is necessary or appropriate for or consistent with carrying out the purposes and objectives of this Act by the Corporation." 47 U.S.C. 721(c)(8).

[4] Comsat 1982 Annual Report to Shareholders, p. 7.

[5] Capitalization Plan, p. 3.

4. These new circumstances form the basis of Comsat's concern with the *ad hoc* approach to Section 201(c)(8) matters. Comsat considers *ad hoc* determinations to have two major drawbacks. First, Comsat argues that the amount of time generally required for Commission action on individual Section 201(c)(8) requests may not always permit Comsat to acquire capital in a cost-effective manner. Consequently, to the extent that Comsat is unable to minimize its cost of acquiring capital, the ratepayer is burdened with the additional costs incurred. Second, to the extent that the *ad hoc* approach does not enable the Commission to consider the overall framework in which Comsat is conducting its financial operations, it frustrates the Congressional intent of Section 201(c)(8).[6]

5. Moreover, Comsat believes that there are public interest benefits to be derived from the Capitalization Plan concept. First, Comsat maintains that the Capitalization Plan provides the Commission with detailed information about Comsat's prospective activities in time to properly dispatch its statutory responsibilities. Second, the Plan provides the broad overview of Comsat's jurisdictional and nonjurisdictional activities and their impact on the ratepayer which generally is unobtainable under current practice of *ad hoc* review. Finally, Comsat submits that its Capitalization Plan will enable it to respond rapidly to fluctuations in capital markets, thereby providing it with sufficient flexibility to meet its consolidated financing needs on a cost-effective basis. For these reasons, Comsat considers its multi-year, comprehensive capitalization plan a viable concept worthy of Commission approval under Section 201(c)(8).

6. *Summary of the Plan*. As explained above, Comsat's Capitalization Plan encompasses the regulated INTELSAT/INMARSAT-related activities undertaken by the parent company's World Systems Division, the non-jurisdictional components of the World Systems Division and the non-jurisdictional activities of Comsat's various subsidiaries.[7] Projections of revenues, expenses, assets and

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[6] In support of this contention Comsat cites the Senate Report's section-by-section analysis of H.R. 11040, the bill ultimately enacted as the Satellite Act:

> [Section 201(c)(8] is considered important in carrying out the stated policy and purposes of the act of insuring that the benefits of this new technology are reflected in both the quality of communication services to be rendered by the corporation and the charges for such services. It is imperative that the corporation's capital structure be carefully regulated and controlled to avoid excessive capitalization or disproportionate amounts of equity or debt capital which could have adverse effects upon the corporation's revenue requirements and the changes for its services, and impair its ability to provide efficient and adequate service. S. Rep. No. 1584, 87th Cong., 2d Sess. 19 (1962).

[7] Comsat indicates that for the purposes of the Plan, other satellite systems operated by Comsat corporate elements and subject to Commission oversight (*e.g.*, services via the MARISAT and COMSTAR systems) are designated as "non-jurisdictional," as is Comsat's investment in the SBS partnership. Plan, Attachment 2, p. 1.

liabilities, sources and uses of funds and cumulative financing requirements are based upon the following assumptions: (a) that the projections set forth for STC reflect the two-satellite, Eastern Time Zone DBS system authorized by the Commission; (b) that Comsat's ownership interest in INTELSAT will decline from 24.1% in 1981 to 21.4% in 1985[8]; (c) that projections of the amount of additional debt financing needed do not include "non-recourse" financing by non-consolidated corporate affiliates, such as SBS; (d) that such projections do, however, include debt placed by the parent company and financing by consolidated corporate subsidiaries, such as STC; and (e) that Comsat's aggregated debt to total capital ratio will not exceed 35%.

7. Comsat has submitted three sets of actual and projected financial data for the years 1981 to 1985. One set, comprised of seven charts, was submitted on January 24, 1983 as Attachment 2 of the Capitalization Plan.[9] At the request of the Common Carrier Bureau's staff, Comsat submitted additional financial information on March 16, 1983.[10] After further discussions with the staff, Comsat submitted revisions of the March 16th materials on May 2, 1983. These revised materials consist of two sets of charts dated April 27, 1983. The first set, which includes six charts containing actual and projected financial information[11] and a chart depicting Comsat's current organizational structure, has been placed in the public file. The second set, consisting of seven charts,[12] represents a recasting of the March 16th materials for which confidential treatment was granted. Consequently, protection from general disclosure was also

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[8] Comsat anticipates greater usage of the system by others during the 1983–1985 time frame.

[9] These include a Balance Sheet-Consolidated; Assets & Liabilities-World Systems Division; Sources & Uses of Funds-Consolidated; Capital Requirements-Consolidated; Capital Spending-World Systems Division; Key Statistics-Consolidated.

[10] Part of this data was accorded protection for public disclosure as "commercial or financial information obtained from a person and privileged or confidential" under §§0.457(d) and 0.459 of the Commission's Rules, 47 C.F.R. §§0.457(d), 0.459, and exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4) (1976 & Supp. V 1980). Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; April 11, 1983.

[11] These include an Income Statement, World Systems Division; Assets & Liabilities, World Systems Division; Sources & Uses of Funds, World Systems Division; Inter-company Transactions; Inter-company Transactions-1981; Estimated Non-jurisdictional Components of World Systems Division.

[12] These include an Income Statement-Consolidated; Income Statement-Non-World Systems Division; Detailed Balance Sheet-Consolidated; Assets & Liabilities-Non-World Systems Division; Sources & Uses of Funds-Consolidated; Sources & Uses of Funds-Non-World Systems Division; Key Statistics-Consolidated.

extended to these materials, and the superseded March 16th charts were returned to Comsat.[13]

8. In these submissions, Comsat indicates actual 1982 capital expenditures of $136 million for its jurisdictional activities, and $89 million for non-jurisdictional ones. Comsat projects major capital investments in the regulated segment of the business of $179 million in 1983, $126 million in 1984 and $115 million in 1985. In addition, Comsat projects capital investments in non-jurisdictional businesses and activities, including progress payments on the purchases of satellites for STC and the construction of STC's Nevada operating center, of $178 million in 1983, $136 million in 1984 and $118 million in 1985. Taking the difference between these capital expenditures, the actual 1982 jurisdictional and non-jurisdictional cash flows[14] and the projected cash flows for regulated and non-jurisdictional activities, Comsat derives the following cumulative financing requirement (in $millions):

1982	*1983*	*1984*	*1985*	*Total*[15]
$151	$116	$111	$46	$424

9. Comsat indicates that while the substantial capital spending requirements in 1982–83 result in a sizable need for external financing during this period, this trend will reverse itself in 1984 and 1985; that is, regulated cash flows will exceed regulated capital spending during the period. Therefore Comsat will have additional stockholder profits derived from its jurisdictional operations which can be utilized to support its non-jurisdictional businesses and endeavors. Nevertheless, Comsat asserts that while approximately $75 million has been raised from its sale of one million shares of Comsat Common Stock in December of 1982,[16] an additional $125 million in new equity must be raised in the 1983–85 time period.

10. Comsat is confident that the company is sufficiently sound to engage in this and other undertakings described below without adversely affecting the ratepayer. This confidence is based in large measure on Comsat's projections of its total "capital capacity" and its "unused debt capacity." Comsat defines "capital capacity" as "the sum of the amount of debt that could be supported at each year-end,

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[13] Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; May 13, 1983.

[14] Comsat defines "cash flow" as net income, depreciation, deferred items and amortization. Capitalization Plan, Attachment 2, p. 5.

[15] All figures in this paragraph have been derived from Attachment 2, Chart 4 of the Capitalization Plan and Public Chart 3, dated April 27, 1983.

[16] Section 201(c)(8) authorization to conduct this stock offering was granted in a letter, dated November 19, 1982, from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President, Communications Satellite Corporation.

assuming a maximum debt to total capital ratio of 35% . . . and the assumed stock proceeds in 1983–85."[17] Taking these variables into consideration, together with projected increases in revenues, cash flow and net income, Comsat estimates that its capital capacity will rise from $364 million in 1982 to $377 million in 1983, $588 million in 1984 and $607 million in 1985. To derive its "unused debt capacity"—which it defines as "the amounts [it] could borrow in addition to the present equity and debt in place (including treasury stock) while remaining within a 35% debt to total capital ratio"[18] — Comsat subtracts its projected cumulative year-end financing requirements from its capital capacity. Thus:

Unused Debt Capacity ($millions)

1982	*1983*	*1984*	*1985*
$213	$110	$210	$183

Comsat argues that this unused debt capacity protects its regulated businesses (and therefore the ratepayer) against a wide range of contingencies, adverse market conditions and the like. Further, Comsat argues that this "cushion" of protection could be further inflated through the issuance and sale of additional Comsat Common Stock.[19]

11. *Comsat's Proposed Guidelines and Procedures*. Comsat suggests that certain procedures be established to ensure that we will receive on a periodic basis sufficient information to enable us to determine that its individual financial transactions fall within the framework of the Plan. These procedures concern the updating of the Plan, periodic reporting and compliance with suggested financial guidelines.

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[17] Capitalization Plan, p. 6.

[18] *Id.*

[19] On April 18, 1983, Comsat was authorized to issue a maximum of 350,000 shares of Common Stock, without par value, pursuant to the exercise of options under its 1982 Employee Stock Option Plan. FCC File No. I-S-P-83–003; Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; April 18, 1983. On May 12, 1983, this authorization was modified to increase the number of exercisable stock option shares to 700,000, pursuant to our grant of authority under Section 201(c)(8) for Comsat to issue a sufficient number of additional shares of no-par-value Common Stock to effectuate a 2-for-1 split of each issued share. FCC File No. I-S-P-83–004; Letter from Gary M. Epstein, Chief, Common Carrier Bureau, to William H. Berman, Senior Vice President and General Counsel, Communications Satellite Corporation; May 12, 1983. On May 20, 1983, Comsat's shareholders approved the stock-split and amended Comsat's Articles of Incorporation to increase from 25 million to 40 million the number of shares of Common Stock authorized for issue. As a result of these actions, the Corporation now has 18,000,028 shares of Common Stock issued and outstanding, 2,000,000 shares which it holds in its treasury and 19,999,972 shares authorized but unissued.

A. *Annual Update of the Plan.* Comsat offers to submit on an annual basis actual financial information for the planning year just completed, projections for one additional planning year, and, if appropriate, adjustments to previously submitted projections. In terms of the Plan currently before us, Comsat would submit at the end of its annual budget cycle (early 1984), actual financial data for calendar year 1983, any adjustments to its current 1984–85 projections and new projections for 1986.

B. *Periodic Reporting.* Comsat will also submit periodic updates of actual financial transactions made during the planning period. These updates will consist of information presently submitted in Comsat's monthly FCC Forms 901 and quarterly Forms 10-Q filed with the Securities and Exchange Commission.

C. *Financial Guidelines.* While emphasizing its need to retain flexibility in terms of its ability to sell stock, raise debt, initiate new programs or delete existing programs, Comsat nonetheless accepts that these activities must be conducted within the parameters of its Capitalization Plan, should we choose to approve it. Consequently, Comsat has proposed guidelines by which its activities should be appraised. First, Comsat would seek external financing through 1985 in an amount not to exceed $440 million. Second, although it does not expect its debt to total capital ratio during the 1983–85 period to exceed that of 25.9% for 1983,[20] Comsat believes that, given everchanging market conditions, we should establish a maximum guideline of 35% debt to total capital. Comsat indicates that its investment bankers consider this to be a prudent ratio for the consolidated corporation.[21] Third, Comsat suggest that its maximum interest coverage under the Plan be set at 3.0.[22] This guideline would be applied prospectively, in the context of potential debt placements. Comsat believes that the use of a 3.0 ratio for the consolidated corporation is sound and conservative. Finally, Comsat has offered to provide notice of its plans to implement specific financing actions, the nature of these actions, the amount, and the principal terms thereof. In addition, Comsat will demonstrate that such activities are in compliance with the Plan and the guidelines as approved by the Commission.[23]

12. Although Comsat projects cumulative external financing needs of $424 million, the Corporation requests authority to raise up to $440 million from external sources during the 1983–85 period.[24]

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[20] Capitalization Plan, Attachment 2, Chart 7.

[21] Capitalization Plan, p. 10.

[22] *Id.* Comsat defines "interest coverage" as the ratio of pre-tax income to total investment requirements.

[23] Comsat also acknowledges that if it seeks to engage in any activities not contemplated in the Capitalization Plan or which may result in its exceeding any of the aforementioned guidelines, it must seek Commission review of the situation prior to undertaking such actions. Capitalization Plan, pp. 9–11.

Comsat seeks to utilize the additional $16 million as a contingency reserve to provide for what it characterizes as minor changes in capital requirements.[25] In support of this request, Comsat argues that since its proposed "contingency reserve" represents only a 4% increase over its projected financing needs, utilization of these additional funds would not significantly reduce the "cushion" of protection for its jurisdictional businesses described above.

13. Comsat believes that the data, and projections and descriptive information contained in its Plan are sufficiently comprehensive and accurate to enable us to make a finding that there will be no adverse impact on the ratepayer or on operations from the non-jurisdictional activities proposed for the 1983–85 period. Therefore, in Comsat's view, approval of the Plan will serve the public interest.

DISCUSSION

14. There are two issues raised by Comsat's proposal to finance its operations pursuant to its Capitalization Plan. The first is whether, in a general sense, the capitalization plan approach constitutes an acceptable alternative to our practice of *ad hoc* review under Section 201(c)(8). If we resolve this issue in the affirmative, we must determine whether to authorize the Capitalization Plan which Comsat has submitted.

15. In the *Comsat Study*,[26] we undertook a comprehensive examination of Comsat and its operations at the direction of Congress. One of our major tentative conclusions in the *Comsat Study* was that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT activities so long as such participation is not inconsistent with its statutory responsibilities. We affirmed this view in our decision in the *Comsat Structure* rulemaking,[27] a proceeding that we had initiated in order to provide for public comment on the proposals set forth in the *Comsat Study* for changes in Comsat's corporate structure and operations.[28]

16. One of the issues raised in the rulemaking proceeding was whether we should require Comsat to file a comprehensive capitalization plan for its existing and planned non-INTELSAT/INMARSAT activities. Upon review of the comments addressing this issue, we declined in our subsequent *Structure Order* to make such a requirement mandatory because we found that prior approval

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[24] The total of $440 million includes $100 million in short-term debt previously authorized by the Commission, COMSAT, 88 FCC 2d 931 (1982); Comsat, 91 FCC 2d 859 (1982), and the $75 million realized from Comsat's December 1982 sale of treasury stock (n. 16 and accompanying text, *supra*).

[25] Capitalization Plan, p. 7.

[26] Communications Satellite Corporation, 77 FCC 2d 564 (1980) (Comsat Study).

[27] Communications Satellite Corporation, 90 FCC 2d 1159 (1982) (Structure Order).

[28] Communications Satellite Corporation, 81 FCC 2d 287 (1980) (Structure Rulemaking).

of such a plan was not the only way to meet our statutory responsibilities. We indicated that we could fulfill our responsibilities through *ad hoc* oversight of Comsat's individual investment decisions; that is, through review of Comsat's Title II and Title III applications and Section 201(c)(8) requests for authority to engage in financing activities. We emphasized, however, that Comsat was free to file a comprehensive capitalization plan if it so desired.[29]

17. The capitalization plan approach is not precluded as a matter of law under Section 201(c)(8). Nothing in that provision or in the Satellite Act as a whole and its legislative history mandate our practice of *ad hoc* review.[30]

18. The capitalization plan approach is also sound as a matter of policy. On the basis of Comsat's showing in the Plan before us, we are convinced that neither Comsat nor the public benefits from the delays inherent in the application-by-application approach to financing the activities of Comsat and its corporate affiliates. The capitalization plan approach better utilizes the agency's resources. Furthermore, it provides the Commission with a broad overview of Comsat's regulated and non-jurisdictional activities and is therefore useful for analytical purposes. Moreover, the capitalization plan approach to financing corporate operations is consistent with the manner in which businesses are run today. It is also consistent with our actions with respect to AT&T's capitalization plans, although the two situations are not completely analogous. *AT&T Co.*, 90 FCC 2d 404 (1982); *AT&T Co.*, 91 FCC 2d 578 (1982). Thus, we accept the comprehensive capitalization plan concept as a viable mechanism by which to fulfill our statutory oversight responsibilities under the 1962 Satellite Act.

19. Having approved the capitalization plan concept, we now turn to the issue of whether we should authorize the Plan as presented. Comsat submitted the Plan on January 24, 1983. The Plan was placed on public notice on February 2, 1983; no opposing comments were filed. Since that date, the staff of the Common Carrier Bureau has suggested that Comsat file additional information and revise the format of its financial projections. Comsat has

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[29] 90 FCC 2d at 1197.

[30] To the extent that review of Comsat's financing activities under the capitalization plan approach would obviate the need to review Comsat's individual Section 201(c)(8) applications on an *ad hoc* basis, we find the capitalization plan approach consistent with those provisions of the Communications Act of 1934 related to the manner in which we may conduct our affairs. Section 4(i) of the Communications Act provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. 154(i) (1976). Section 4(j) provides, *inter alia*, that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." *Id.* at 154(j).

responded with the materials requested. In addition, Comsat has proposed guidelines for the implementation of its Plan, as well as reporting procedures designed to enable us to monitor its compliance with the Plan. Moreover, Comsat has acknowledged that should it propose to take a specific financing action that exceeds one or more of its suggested guidelines, the Corporation would be obliged to seek Commission review of the situation prior to initiating the action in question.

20. Having assessed the record developed in connection with Comsat's Capitalization Plan proposal, we conclude that Comsat's Plan is consistent with prior Commission determinations and the purposes and objectives of Section 201(c)(8). In particular, we find that Comsat's debt to total capital guideline of 35% is within the 45% level of debt we imputed to Comsat's capital structure in the 1975 *Comsat Rate Case*.[31] Second, on the basis of Comsat's projections of its capital and unused debt capacities during the 1983–85 period, we find that Comsat should be authorized to acquire external financing to meet its projected cumulated capital needs of $424 million through 1985. Third, we conclude that Comsat's request to acquire an additional $16 million to be used as a "contingency reserve" is not unreasonable.

21. The Commission is aware that as Comsat enters new competitive ventures, an element of risk is introduced into its business planning that did not exist when Comsat's main activity was the offering of monopoly, rate-base regulated services. Much of the Commission's effort in evaluating the Capitalization Plan was devoted to determining that Comsat's regulated responsibilities not be adversely impacted by its financing of unregulated ventures.[32] For this reason, the staff has requested and received from Comsat, during this period of review, financial data on both Comsat's jurisdictional and non-jurisdictional activities. Our review of this data permits us to authorize the Capitalization Plan under Section 201(c)(8), with the conditions outlined below. By this authorization, we are satisfying our statutory responsibilities under this provision with respect to all actions contemplated in the Plan. We believe that the continued oversight provided for by the Plan, coupled with these conditions, should enable us to protect the ratepayer should Com-

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[31] We are not here altering our prior decisions in the Comsat Rate Case regarding the Corporation's capital structure and rate of return. Communications Satellite Corporation, 56 FCC 2d 1101, 1157–1160 (1975); Communications Satellite Corporation, 68 FCC 2d 941, 950–51 (1978). Rather, we are accepting Comsat's recommendation of 35% debt to total capitalization for the purpose of determining whether a specific financial transaction falls with the Plan.

[32] Furthermore, we are concerned that the ratepayer not assume as a "risk premium" any additional risk which Comsat must assume in capital markets to finance its competitive ventures. We shall address this concern in an appropriate proceeding.

sat's performance deviate significantly from the projections set forth in its Plan.

22. Therefore, we accept Comsat's Capitalization Plan subject to the following conditions: (1) that Comsat's cumulative external financing for the years 1982 to 1985 shall not exceed $440 million; (2) that Comsat shall acquire external financing on an annual basis consistent with its projected annual financing needs; (3) that Comsat's consolidated debt to total capital ratio during the period shall not exceed 35%; (4) that Comsat's interest coverage capacity during the period shall not fall below 3.0; and (5) that, on a yearly basis, Comsat shall submit actual financing data on the planning year just completed, projections for one additional planning year, and, if appropriate, revised projections for the two interim planning years.[33] We emphasize here that our acceptance of the Capitalization Plan does not prejudge any accounting issues outstanding in the *Comsat Structure* proceeding or alter the limitations placed on Comsat and its subsidiaries in *In re Application of Satellite Television Corporation*, 91 FCC 2d 953 (1982). We also accept Comsat's proposed reporting requirements. Therefore, Comsat shall submit FCC Form 901 on a monthly basis, and Form 10-Q on the same quarterly basis as it currently submits this information to the SEC. In addition, however, we shall also require Comsat to inform us immediately if at any time over the planning period it determines that any actual financial data which it has generated deviates from its submitted projections by more than 10%,[34] or if any contemplated financing activity may result in Comsat's deviating from the guidelines and projections outlined in its Plan.[35] Any such deviation would require separate Section 201(c)(8) approval. Finally, Comsat shall provide us with 10 calendar days' prior notice of all specific financing actions it plans to undertake in the implementation of its Plan.

Conclusion

23. Comsat's Capitalization Plan provides us a comprehensive overview of the operations of the parent company and its subsidaries. Our acceptance of it is for the initial three year period. Comsat must request Commission approval to obtain additional financing for

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[33] This information shall be submitted in the precise format of the materials dated April 27, 1983 which Comsat filed with this Commission on May 2, 1983.

[34] For example, we expect Comsat to inform us promptly if its internally-generated data suggests that its capital spending for regulated activities in 1984 is likely to be $140 million, rather than $126 million as indicated in Attachment II, Chart 4 of the Capitalization Plan.

[35] For example, Comsat must inform us if its projected needs for external financing would be altered as a consequence of its use of internally-generated funds to support the SBS venture, or other "non-recourse" financing as described in paragraph 6, above.

subsequent planning years. In passing on such requests, the Commission undoubtedly will be influenced by its experience under this Plan as Comsat implements it over the initial period. Subject to the conditions we have set forth, the Plan should enable us to better monitor Comsat's financing activities and the effects of these activities upon the rates of its regulated services, in furtherance of the public interest. However, we emphasize that our acceptance of the 1983–85 Capitalization Plan in no way prejudges or prejudices our statutory right to conduct a rate or rate of return hearing at any time during the planning period if we deem it necessary or desirable.

Ordering Clauses

24. In view of the foregoing, IT IS ORDERED, that, pursuant to Sections 4(i) and 4(j) of the Communications Satellite Act of 1934, as amended, 47 USC 154(i) and 154(j) (1976), and Section 201(c)(8) of the Communications Satellite Act of 1962, 47 USC 721(c)(8) (1976), the Communications Satellite Corporation IS AUTHORIZED to implement its Capitalization Plan, presented on a consolidated basis, for the years 1983 through 1985.

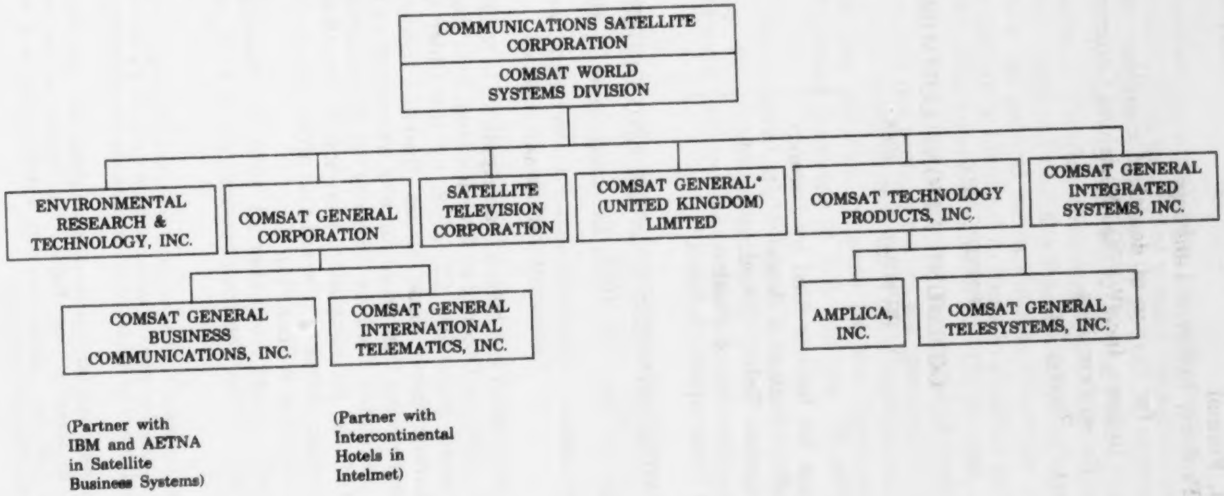
25. IT IS FURTHER ORDERED, that the Communications Satellite Corporation, in the implementation of its Capitalization Plan, shall report to the Commission and adhere to the directives and conditions as set forth herein.

26. IT IS FURTHER ORDERED, that all proceeds derived from Comsat's December 1982 treasury stock sale and currently held in escrow by Comsat pursuant to prior Commission orders may be utilized in the implementation of its Capitalization Plan.

Federal Communications Commission
William J. Tricarico, *Secretary*

APPENDIX I

COMMUNICATIONS SATELLITE CORPORATION AND ITS WHOLLY OWNED SUBSIDIARIES AT APRIL 1, 1983


COMMUNICATIONS SATELLITE CORPORATION
COMSAT WORLD SYSTEMS DIVISION
ENVIRONMENTAL RESEARCH & TECHNOLOGY, INC.
COMSAT GENERAL CORPORATION
SATELLITE TELEVISION CORPORATION
COMSAT GENERAL* (UNITED KINGDOM) LIMITED
COMSAT TECHNOLOGY PRODUCTS, INC.
COMSAT GENERAL INTEGRATED SYSTEMS, INC.
COMSAT GENERAL BUSINESS COMMUNICATIONS, INC.
COMSAT GENERAL INTERNATIONAL TELEMATICS, INC.
AMPLICA, INC.
COMSAT GENERAL TELESYSTEMS, INC.
(Partner with IBM and AETNA in Satellite Business Systems)
(Partner with Intercontinental Hotels in Intelmet)

*To be renamed COMSAT (U.K.) Limited upon requisite action by appropriate United Kingdom authorities.

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Application for Review
Complaint, Formal
Obscene, Profane, Indecent Language

Application for review of denial of complaint against Rahall B/cing of Indiana, Inc. (WFBQ-FM) denied. Commission found no error in Bureau's actions.
–Decency In B/cing, Inc.

FCC 83-260

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Application for Review filed by Decency in Broadcasting, Inc., of a denial of its complaint against Rahall Broadcasting of Indiana, Inc., licensee of Station WFBQ(FM) Indianapolis, Indiana.[1]

MEMORANDUM OPINION AND ORDER

(Adopted: May 26, 1983; Released: June 3, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER SHARP ABSENT.

1. The Commission has before it an Application for Review, filed December 27, 1982, by Decency in Broadcasting, Inc., seeking review of a letter dated November 23, 1982, by the Chief of the then Broadcast Bureau (now Mass Media Bureau), under delegated authority, determining that no action was warranted on the matters raised in a complaint filed by Decency in Broadcasting, Inc. on August 2, 1982. In its complaint, Decency in Broadcasting, Inc., alleged that certain obscene, indecent and profane material had been broadcast over Station WFBQ(FM).

2. In its letter dated November 23, 1982, the Bureau explained that Section 326 of the Communications Act of 1934, as amended provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by

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[1] Decency in Broadcasting, Inc. captioned its complaint and Application for Review against Gulf Broadcasting, Inc. Rahall, the licensee, is the wholly owned subsidiary of Gulf Broadcasting Company which in turn is a wholly owned subsidiary of Gulf United Corporation.

> the Commission which shall interfere with the right of free speech by means of radio communications.

The letter further explained why the information provided by Decency in Broadcasting, Inc., failed to meet the judicial standards of obscenity and indecency, prohibited by 18 U.S.C. § 1464, as specified in *Miller v. California*, 413 U.S. 15 (1973), and *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). The Bureau further explained that the *Pacifica* decision, *supra.*, affords the Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast. See also *WGBH Education Foundation*, 69 FCC 2d 1250, 1254, 43 RR 2d 1436, 1441 (1978). The staff also concluded that the language complained of was not profane within the meaning of that word as described in court opinions and, based upon current case law, it was unlikely that any sanction imposed by the Commission for the broadcast of profane language in this situation would be judicially upheld.

3. We have reviewed the Bureau's actions and find no error. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed by Decency in Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Acceptance of

Application for review denied. Since the applicant's proposed service area receives signals from three full-service stations and located less than 55 miles from 142nd largest television market, applicant's status as an existing licensee of a full-service UHF television station does not warrant a waiver of the Commission's freeze on the acceptance of new television translator applications and the application is therefore dismissed.

–Family Television, Inc.

FCC 83-363

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
FAMILY TELEVISION CORPORATION, INC.
For Construction Permit for a New UHF Television Translator Station at Fort Myers, Florida

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1983 Released: August 4, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration a petition filed by the applicant, Family Television Corporation, Inc. (Family) for review of the Mass Media Bureau's return of the above-captioned application on July 30, 1982. The application was returned because it was filed after the imposition of the Commission's freeze on the acceptance of new translator and low power television applications and it failed to meet any of the exemptions to that freeze in effect at the time it was filed.

2. By way of background, on April 9, 1981, with insufficient staff and computer capability to handle the approximately 5,000 translator and low power television applications already on file, the Commission stopped accepting new applications. However, exceptions were made for: existing translators operating on Channel 70 through 83 seeking to change frequency to a lower channel; existing translators seeking to change channels to eliminate interference to full service stations; or new proposals to serve areas currently receiving fewer than two full-service stations. *Order Imposing Freeze*, 46 Fed. Reg. 26062, published May 11, 1981, 49 RR 2d 433. In effect, the Commission stopped accepting additional applications, except in

areas where the need for service outweighed the administrative burdens. In its *Report and Order* in BC Docket No. 78–253, 49 Fed. Reg. 21468, published May 18, 1982, 51 RR 2d 477, establishing a low power television service, the Commission did not lift the freeze, but did eliminate the freeze exemption for proposals to serve areas receiving fewer than two full-service stations. Instead, applications were grouped into categories by market size. Those applicants proposing to locate their transmitting antennas more than 55 miles from the coordinates of any of the top 212 television markets are placed in Tier I, *i.e.*, the most rural markets, and are now freeze exempt. Applicants other than those in Tier I are grouped in Tiers II and III by market size. Under the tiered system, processing of the first tier must be completed before processing of the second tier begins, and so on. In the interim, the freeze will be lifted only for the limited purpose of receiving competing applications to the applications published on cut-off lists. Only after the backlog of pending applications and freeze-exempt applications has been eliminated, in three phases, will the Commission lift the freeze on the filing of applications. The Commission believed that its adoption of such a processing hierarchy would facilitate the expeditious authorization of service in unserved or lesser-served rural areas, which was one of the Commission's principal goals in the establishment of a low power television service.

3. In its application for review, Family acknowledges that its proposed antenna will be located less than 55 miles from Fort Myers and Naples, Florida, which are each listed as the 142nd largest television market.[1] It is also noted that Fort Myers, Family's proposed community of license, already receives the signals of three full-service television stations. Therefore, Family concedes that its application could not be acceptable for immediate filing, since it is a Tier II application, absent a grant of its requested waiver of the Commission's freeze policy.

4. In support of its waiver request, Family notes that its application does not seek local origination authority; but, instead, proposes to retransmit the signal of a UHF full-service facility already licensed to Family, Station WFTS, Tampa, Florida. Family then makes an unsupported claim that it would be unjust not to accept an application for a translator filed by a full-service television station. Family's other arguments are of a similar general nature. Family also contends that the acceptance of its application will further the development of the UHF television service by enhancing the competitive comparability of Family's UHF facilities with existing VHF television stations. It is next asserted that Family's

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[1] Data complied from "Television Channel Utilization," mimeo number 3331, dated April 16, 1982, as republished in Public Notice, FCC 82–297, released June 23, 1982, as corrected by Public Notice, mimeo number 5324, released July 23, 1982.

provision of a source of independent programming to Fort Myers will serve the public interest. Finally, Family notes that its proposed translator facility will create no interference with any other television facility nor preclude other applicants from applying for other low power facilities in Fort Myers.

5. In our low power *Report and Order*, at footnote 19, we noted that we would dismiss any requests for waiver of our freeze "that do not raise a novel or compelling public interest ground for waiver in a particular unique situation." Here, Family has failed to provide any such justification for a grant of its waiver request. In view of the three existing full-service television stations currently providing service, the Fort Myers area cannot be characterized as underserved. Moreover, Family has not alleged, nor can we perceive, and public interest benefit to be derived from treating applications for translators filed by existing licensees different than those filed by any other applicants in the implementation of the Commission's freeze policy. In view of the increasing vitality of the UHF service generally, as noted in our low power *Report and Order*, we are not persuaded that Family's status as an existing UHF licensee constitutes a ground for which a waiver can be granted. We anticipate that the other alleged benefits that Family alludes to, in the event its application were granted, would be substantially the same as those that could be provided by other would-be Tier II and Tier III applicants also affected by our freeze.

6. Our tiered processing system is not designed to foreclose applications for Tier II and III areas, but to facilitate the expeditious authorization of local outlets to the nation's most rural and underserved areas first and, then, less rural areas in later stages. The reason for imposing our April 1981 freeze on the acceptance of low power applications was to establish an orderly and effective procedure for the processing of the unanticipated large volume of applications. Since that time, we estimate that an additional 7,000 applications have been filed under our existing freeze exemptions. In view of the steady influx of Tier I low power applications and the commensurate burdens imposed on our staff, we believe it is in the public interest to continue to maintain a freeze on the acceptance of low power applications. Therefore, we believe that Family has failed to justify a waiver of the Commission's freeze on the filing of translator and low power television applications. Accordingly, we find that the Bureau's dismissal of the Family application was proper and we hereby affirm that action.

7. Accordingly, IT IS ORDERED That the request for waiver of the Commission's freeze on the acceptance of translator and low power applications filed by Family Television Corporation, Inc. IS DENIED.

8. IT IS FURTHER ORDERED That its application for review of

the Mass Media Bureau's action returning its application IS DENIED.

9. IT IS FURTHER ORDERED That the Mass Media Bureau send a copy of this Memorandum Opinion and Order by Certified Mail- Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Contour Overlap
Field Intensity, Contour Measurement,
Measurement, Reliability or Accuracy of

Review Board grants summary decision on prohibited contour overlap issue, involving Section 73.37(a) of the Rules, and denies application for new AM station. Joint field intensity measurements demonstrated overlap, which was confirmed by data averaging methodology used to evaluate all available sets of data except certain highly suspect data.
–GSM Media Corporation
BC Docket 81–606

FCC 83R-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of GSM MEDIA CORPORATION Ontario, Ohio For Construction Permit	BC Docket No. 81–606 File No. BP-20,202

Appearances

Richard Hildreth, Vincent J. Curtis, Jr., and *Dan J. Alpert*, on behalf of GSM Media Corporation; *Lauren A. Colby*, on behalf of Greater Mansfield Broadcasting Company; and *Charles E. Dziedzic, Brian P. Kilbane*, and *Lawrence Bernstein*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: August 30, 1983; Released: September 6, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. Review Board involvement in this proceeding began with Memorandum Opinion and Order, 53 RR 2d 1207, released April 22, 1983,[1] in which we ordered GSM Media Corporation (GSM) and Greater Mansfield Broadcasting Company (GMBC) to take joint field engineering measurements to locate certain pertinent AM signal contours. GSM is an applicant for authority to construct a new AM

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[1] *Recon. dismissed*, FCC 83R-34, released May 5, 1983.

station at Ontario, Ohio, and GMBC is the licensee of Stations WCLW and WCLW-FM, Mansfield, Ohio, and a petitioner to deny GSM's application.

2. GMBC has steadfastly maintained since March 1977, when it filed its petition to deny, that GSM's proposed 0.5 mV/m contour would overlap with the 0.025 mV/m contour of AM Station WPGW, Portland, Indiana, in violation of Section 73.37(a) of the Commission's Rules, 47 CFR 73.37(a), and GSM's application was originally designated for hearing on that issue, among others, by Memorandum Opinion and Order, Mimeo No. 003113, 46 Fed. Reg. 45188, published September 10, 1981. Prior to commencement of that hearing, Administrative Law Judge James F. Tierney (ALJ) issued a Summary Decision (S.D.) granting GSM's application upon a finding that the pleadings before him left no genuine issue of material fact for determination at hearing. FCC 82D-78, released December 15, 1982. We ordered joint field measurements to be taken because GMBC's exceptions to the S.D. and the reply briefs of GSM and the Mass Media Bureau made it abundantly clear that valid engineering measurements were critical to a reasoned analysis and decision in this case, and almost all of the measurements already in the record were disputed either as unusually distorted by seasonality or as invalid because of improper locations or techniques. 53 RR 2d at 1209.

3. The joint measurements were taken on May 31, June 1, and June 2, 1983, and, according to GMBC's Report, filed July 6, 1983, at 2, "There were no disagreements and the measurement data is undisputed." We also have before us comments and reply comments by GSM, GMBC, and the Bureau related to these measurements; GMBC's original exceptions and the reply briefs of GSM and the Bureau; and a petition to enlarge issues filed by GMBC on July 7, 1983, and responsive pleadings. The Board has reviewed the S.D. in light of these documents, the oral argument held March 25, 1983, and our examination of the record. We adopt the findings of fact in the S.D., except as modified herein, but reverse the ALJ's ultimate conclusion and hold that summary decision on the contour overlap issue should be granted in GMBC's favor and that the public interest, convenience and necessity therefore requires that GSM's application be denied.

4. GMBC's original exceptions focused solely on the overlap issue. GMBC contended that summary decision was inappropriate because there were sharp differences in the relevant engineering data and the expert affidavits interpreting that data, which could not be resolved without an evidentiary hearing. In response, GSM and the Bureau essentially argued that no engineering "facts" were in dispute, only the proper analysis of those facts, and that disagreements among experts do not necessarily require elaboration at hearing where, as here, experts have already had an opportunity

to express their opinions (with supporting documentation) in writing and there is no candor issue requiring demeanor findings. Moreover, according to GSM and the Bureau, the Commission approved a data averaging methodology in *United Broadcasting Co., Inc.*, 1 FCC 2d 555, 559, 5 RR 2d 684, 689 (1965), as a means of analyzing conflicting data without the need for a hearing, and the ALJ used data averaging in this proceeding to conclude that there was no prohibited contour overlap. While GMBC agreed in principal with the concept of averaging, it maintained that the alleged averaging of valid data with invalid data in the instant case was unscientific, contrary to the Commission's rules, and should not be permitted. According to GMBC, if only valid data (its own) were averaged, that data would show a prohibited contour overlap. In their July 1983 joint measurement submissions, GSM and the Bureau continue to urge use of data averaging—averaging the 1983 data with the previous data—but GMBC opposes such averaging, still taking issue with the validity of certain previous data and now additionally arguing that averaging even valid data taken under different testing circumstances and along different testing radials is not appropriate.

5. The essential question before us is what weight should be given to the eight years of engineering data and analyses in this record and whether either the data or the analyses leave any "genuine issue of material fact" that must be resolved in the crucible of an evidentiary hearing. Section 1.251(a)(1) of the Rules, 47 CFR 1.251(a)(1). The data may be summarized, as follow:

Distance Chart

Measurement Date/Source	*Distance to Contours*		*Total Distance*
	0.025 mV/m	*0.5mV/m*	
A. December 1975/GSM	109.0	10.2 *	119.2 miles
B. July 1978/GSM	106.0	10.2	116.2
C. January 1977/GMBC	122.0	10.2 *	132.2
D. July 1978/GMBC	117.5	10.2	127.7
E. July 1978/GMBC	115.3	10.2	125.5
F. May-June 1983/GMBC**	123.0/124.49***	7.8	130.8/132.29
May-June 1983/GSM**	122.0	6.9	128.9

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* Contour measured by GSM in 1975 and by GMBC in 1982

** GMBC and GSM provided different analyses of identical May-June 1983 data.

*** GMBC provided alternative analyses in its July 6 and 21, 1983 pleadings.

The parties agree that the total distance between Station WPGW's transmitter site and GSM's proposed site is 128.2 miles. Thus, if the "Total Distance" of the 0.025 mV/m and 0.5 mV/m contours exceeds that figure, the contours will overlap. It is clear from the above chart that, without data averaging, the data on lines C and F indicate contour overlap, while the data on lines A, B, D, and E do not.

6. For data averaging purposes, various combinations of data have been used (or considered) by the parties in this proceeding. These combinations may also be summarized, as follows:

Distance Data Combination	*Averaging Chart Source*	*Total Distance (Averaged)*
*(1) D, E **	*GSM Motion for Summary Decision; adopted in S.D.*	*126.2 miles*
(2) C, D, E	*GMBC Exceptions*	*128.46*
(3) A, C, E	*GSM Reply to Exceptions*	*125.3*
or A, C, D, E	*GSM Reply to Exceptions*	*125.9*
*(4) F ***	*GMBC July 1983 Reply*	*130.8/132.29*
(5) A, C, E, F	*GSM July 1983 Comments*	*126.175*
or A, C, D, E, F	*GSM July 1983 Comments*	*126.26*
(6) C, E, F	*Combination (5) without A*	*128.86*
or C, D, E, F	*Combination (5) without A*	*128.3*

* *Letters correspond to lines in Distance Chart, supra.*
** In its july 21, 1983 Reply, GMBC argues that the F data represent an average in themselves.

This chart indicates that, if data averaging is used, data combinations (2), (4), and (6) show contour overlap, while combinations (1), (3), and (5) do not. In their July 1983 pleadings, GSM endorses combination (5), GMBC urges combination (4), and the Bureau favors "averaging all available measurement data" (Bur. July 21, 1983 Comments, at 2) and "continues to believe that no overlap occurs," (*id.*), but does not specifically proffer a total distance figure.[2] [3]

7. When it ordered the May-June 1983 joint field measurements to be taken, the Board did not decide whether the measurements should augment or supplant the existing engineering evidence. Order, FCC 83R-34, released May 5, 1983, para. 2. We were hoping that the joint engineering effort would alleviate some of the methodology disputes with which the previous data were rife and would, at the same time, corroborate some of the existing data. We were not disappointed. We again acknowledge, with approbation, that these joint measurements, unlike the "concurrent" measurements of July 1978, were carried out in a most professional way, without petty disagreements and disputes. See paragraph 3, *supra*. However, as line F of the Distance Chart, *supra*, attests, even when there are no disputes about the raw data, experts may well differ in analyzing that data. Nevertheless, all parties—GSM, GMBC, and the Bureau—concede that no matter whose analytical expertise is used, the May-June 1983 data show prohibited contour overlap of any-

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[2] None of the data combinations includes line B, because GMBC vehemently opposes its use and GSM stated in its July 6, 1983 Comments (at 4) that it "would not oppose" disregarding that data. If it were used, it would yield a figure less than the 126.26 miles average of combination (5).

[3] It should be noted that, with the exception of combination (1), these averages are essentially simple arithmetic averages. The Board's reading of *United Broadcasting Co., supra*, suggests that plotting all field intensity data on a single graph and drawing composite contours is analytically preferable, if not mandatory, and GSM and GMBC acknowledged that method's superiority at oral argument. Tr. 80, 101. However, GSM believes that the difference between the two methods in this case is "very minimal" (Tr. 101) and has not objected to use of the simple arithmetic method adopting it itself in combinations (3) and (5). In future cases we expect all parties to heed *United's* guidelines strictly in order to ensure the most accurate averaging results.

where from 0.7 miles (GSM) to 4.09 miles (GMBC). See Distance Chart, *supra*, at line F (*e.g.*, 128.9 miles minus 128.2 = 0.7 miles of overlap).[4]

8. It would be simple enough to curtail the data analysis at this point, toss out all of the 1975–1978 engineering measurements as flawed, and reach a decision based on the 1983 data alone. After all, the latest data is relatively clearcut, the methodology is undisputed, and the information may be said to accurately reflect technical conditions at the present time—when a grant or denial of operating authority is imminent, not five or eight years ago. And such a curtailment would probably be legally permissible under the circumstances of this case. However, we are abundantly aware that conflicting engineering data is not novel at this agency, and that *United Broadcasting Co.*, *supra*, provides a powerful analytical tool for reconciling some of these conflicts without resort to either evidentiary hearing or the ax. Indeed, the prime justification for *United's* data averaging methodology is to minimize the impact of analytical "bias or error". 1 FCC 2d at 558, 5 RR 2d at 689. However, the data disparities evident in the Distance Chart, *supra*, and other evidence to be discussed *infra*, beg the question voiced by GMBC at oral argument (Tr. 97): "How much bias [or error] can you tolerate [when data averaging] before you throw the data out?" Thus, while we feel obliged by *United* to at least consider the results of data averaging in the instant case, we do not accept the Bureau's interpretation of *United* (see paragraph 6, *supra*) that "all" data may properly be averaged, regardless of its demonstrated defects. Rather, the use of data averaging must be tempered by the command in Section 73.153 of the Rules, 47 CFR 73.153, that field strength measurements will only take precedence over theoretical engineering values if such measurements are "properly taken and presented". In other words, there *are* limits to the data short-comings that may be overlooked in the *United* data averaging process.

9. With this caveat in mind, we turn to GMBC's repeated and

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[4] We pass over GSM's quasi-exception (July 6, 1983 Comments at note 1) concerning the propriety of our ordering these measurements and reopening the record to receive the data and related pleadings. We took this step under our plenary authority to ensure that a full record on a critical issue was secured prior to final decision, Section 0.365(a) of the Rules, 47 CFR 0.365(a), and our action was not unprecedented. *See Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 25 RR 2d 135 (Rev. Bd.), *aff'd*, 37 FCC 2d 583, 25 RR 2d 595 (1972); *cf. Brown Broadcasting Co., Inc.*, 12 FCC 2d 189, 12 RR 2d 826 (1968) (Commission orders submission of supplemental information so that determination of whether a substantial question of fact exists may be based on a complete showing). *Bunker Ramo Corp.*, 31 FCC 2d 449, 22 RR 2d 843 (Rev. Bd. 1971), where the Board declined to direct a hearing examiner to take certain evidence as an impermissible incursion on his preroga- tives to control the course of a hearing, is readily distinguishable because here the presiding officer had already terminated his role in this proceeding and we were merely requiring supplemental evidence, under unusual circumstances, to aid reasoned appellate review.

shrill attacks on the validity and credibility of GSM's December 1975 field measurements (line A of the Distance Chart, *supra*). These measurements were taken by Gunther Meisse (president and 80% shareholder of GSM) and Harry James Hire (president and shareholder of Johnny Appleseed Broadcasting Company, which owns the remaining 20% of GSM's stock) and were filed as part of GSM's instant application. On October 19, 1981, GMBC took the depositions of Messrs. Meisse and Hire, which disclosed, *inter alia*, that: Meisse is not an electrical engineer, has never taken an electronics course, has read some electronics books but "not . . . extensively," and is not an electronics expert (M. Dep. 5); the December 1975 measurements were Meisse's and Hire's first such endeavor (M. Dep.6; H. Dep. 25); Hire has an electrical engineering degree, but Hire and Meisse took the measurements under the directions of a different engineer, Mr. Serge Bergen, who was not present but gave "some written instructions. However, most of it was handled by phone" (H. Dep. 19; M.Dep. 6); and both Hire and Meisse had only a vague recollection of the instructions they received and had not retained their notes (H. Dep. 26, 47; M. Dep. 9, 18). In its exceptions, GMBC uses these findings to challenge the testing credentials of Meisse and Hire and the reliability of their measurement data. It also uses other deposition statements to cast doubt on the propriety of their measurement techniques and equipment, especially during their July 1978 field measurements. Finally, GMBC notes that the December 1975 (and July 1978) GSM measurements "differ radically" from the "norm" of all of the other measurement data in this proceeding. GMBC Exceptions, at 11.

10. GMBC addressed similar concerns to the ALJ in the context of a motion to enlarge issues, which was denied by Memorandum Opinion and Order, FCC 82M-0133, released January 18, 1982. The ALJ gave short shrift to GMBC's technical arguments as "of little consequence" and fraught with speculation and surmise, and held that the Commission's rules do not specify the qualifications of measurement takers and that Meisse and Hire "can hardly be faulted" for imperfect memories concerning measurements that were taken six years before their depositions. *Id.*, para. 3. Our view is somewhat different. Although the Commission's rules do not specify the qualifications of measurement takers, we believe that especially where, as here, precise engineering measurements lie at the heart of a licensing decision, the Commission has a right to expect (and a duty to demand) that those measurements will not be taken by rank amateurs. This proceeding was clearly not the proper setting for the kind of unsupervised, novice efforts that GSM sponsored in December 1975. And while the data disparities noted by GMBC (see Distance Chart, *supra*) are only circumstantial evidence of substantial measurement errors, we conclude that these marked disparities, which have not been adequately explained, and the below-par testing

credentials of Meisse and Hire place GSM's December 1975 field measurements beyond the protection of *United's* "error" averaging umbrella and require that measurement data to be excluded from evidentiary consideration here. In reaching this conclusion, we do not address GMBC's contention that the December 1975 measurements were fraudulent. It is sufficient for us to decide that enough doubt has been cast on the accuracy of the data to warrant its exclusion from data averaging under *United*. See paragraph 8, *supra*.[5]

11. Turning again to the Averaging Chart, *supra*, we see that if GSM's December 1975 measurements (line A) are discarded, we are left with data combination 6 as the only sets of measurement data which fully comport with *United*. Those data averages show a prohibited contour overlap of either 0.1 or 0.66 miles, depending on which of GSM's data combinations is used. Thus, *United's* data averaging methodology confirms the unanimous conclusion of the May-June 1983 measurements—that GSM's proposed station would create prohibited contour overlap with Station WPGW. See paragraph 7, *supra*. Anticipating in its July 6, 1983 Comments, at 6, that the Board might reach this conclusion, GSM baldly requests that "the *de minimis* nature of any overlap . . . be considered [and] that the Board find such overlap to be insignificant and waive the appropriate rules." While the Board recognizes that the prohibited contour overlap in this case is slight, the Commission rule at issue—Section 73.37(a), 47 CFR 73.37(a)—is a go-no go rule. *See Assignment Standards -AM and FM*, 45 FCC 1515, 2 RR 2d 1658 (1964). As such, it has been rarely waived by the Commission—after extensive showings of "unique and compelling circumstances," *B & K Broadcasting Co.*, 2 FCC 2d 21, 6 RR 2d 687 (1965)—and waiver has been consistently denied, absent "extraordinary circumstances," *Valley Radio Corp.*, 52 RR 2d 1641, 1642 (1983). Because GSM has failed to provide any justification whatsoever for such extraordinary action (other than to call the prohibited overlap *de minimis*), its waiver request must, perforce, be refused. *Cf. WAIT Radio* v. *FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

12. At this juncture, GSM might wish to disown its view (see paragraph 4, *supra*) that summary decision on the present record is appropriate and that further proceedings are unnecessary. However, GSM is correct that the mere existence of conflicting expert opinions does not mandate a hearing, unless there are disputed genuine issues of material fact. *See Tele-Media Corporation* v. *FCC*, 697 F.2d 402, 409 (D.C. Cir. 1983); *Chuck Stone* v. *FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972). The preceding analysis demonstrates that no such issues exist.

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[5] For similar reasons, the Board would also exclude GSM's July 1978 measurements (line B of Distance Chart, *supra*), but for the fact that GSM has already voluntarily abandoned them. See note 2, *supra*.

It is in the nature of field intensity measurements that no two sets of measurements will be identical. *See United Broadcasting Co., Inc., supra*. Where, as here, joint field measurements are taken with similar interpretative results and these results are confirmed by *United's* data averaging technique (excluding highly suspect data), no further exploration of minor differing viewpoints is called for. The controversy over GSM's December 1975 field measurements does not require a different result. Those measurements have been excluded largely because of deposition testimony by GSM's own principals. The deposition sessions were exhaustive and GSM counsel was present and had the opportunity to clarify or amplify Meisse's and Hire's testimony through "cross-examination" but saw no need (one unrelated question asked at Hire's deposition, H. Dep. 61; no questions asked at Meisse's deposition, M. Dep. 78). Having previously relied on the passage of time as an excuse for "imperfect memories," *see* FCC 82M-0133, *supra*, it is difficult to comprehend how GSM might now maintain (which it does *not*) that a hearing two years later than the depositions would further elucidate matters or lead to a different result. Hence, we conclude that summary decision is appropriate on the record as it presently exists, *cf. Tele-Media Corporation* v. *FCC, supra*, at 409, and that it must be granted in GMBC's favor on the contour overlap issue. This disposition, in turn, mandates the denial of GSM's application.

13. One final matter. On July 7, 1983, GMBC filed a petition to enlarge issues in which it alleges that, based on GMBC's May-June 1983 test site measurements, GSM's 5 mV/m proposed contour does not encompass all of the residential areas of Ontario, Ohio, in violation of Section 73.24(j) of the Rules, 47 CFR 73.24(j). GSM opposes the issue, arguing that the area and population excluded are *de minimis* (no more than 0.24 square miles out of 9.59 and no more than 19 persons out of a total population of 4,123), the area is essentially rural in nature, an adequate signal will nevertheless be provided throughout the community, and that, therefore, a finding of substantial compliance with Section 73.24(j), or waiver of the rule, is warranted. The Bureau states that a proposal falling short of absolute compliance with Section 73.24(j) may be granted without a waiver of the rules, where "substantial compliance" with the 5 mV/m coverage requirement is shown, citing *H-B-K Enterprises*, 15 FCC 2d 683, 685–686 (Rev. Bd. 1968).[6] We conclude that GSM's showing meets the substantial compliance test of *H-B-K*, and GMBC's petition will therefore be denied.

14. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues filed by Greater Mansfield Broadcasting Company on July 7, 1983 IS DENIED; that the petition for leave to submit

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[6] Disputes under Section 73.24(j) thus differ significantly from those under Section 73.37(a). See paragraph 11, *supra*.

responsive affidavit filed by Greater Mansfield Broadcasting Company on August 3, 1983, IS GRANTED; and that page 2 of a letter from Greater Mansfield Broadcasting Company to Review Board staff, dated August 18, 1983, IS STRICKEN.

15. IT IS FURTHER ORDERED, That the application of GSM Media Corporation (File No. BP-20,202) for authority to construct a new AM station at Ontario, Ohio, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 82D-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
GSM MEDIA CORPORATION
Ontario, Ohio

For Construction Permit

BC Docket No. 81-606
File No. 20,202

Appearances

Vincent J. Curtis, Jr., Esq., on behalf of GSM Media Corporation; *Lauren A. Colby, Esq.*, on behalf of Greater Mansfield Broadcasting Company; and *Brian P. Kilbane, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued: December 8, 1982; Released: December 15, 1982)

Preliminary Statement

1. On September 14, 1982, GSM Media Corporation (GSM) filed a Motion for Summary Decision. GSM filed, September 20, 1982, an Addendum forwarding an affidavit of its President. Greater Mansfield Broadcasting Company (Greater Mansfield), petitioner to deny, filed an Opposition on October 28, 1982. The Chief, Broadcast Bureau (Bureau) filed "Comments" in support on October 29, 1982. The Bureau filed, November 1, 1982, a Supplement concerning a supporting affidavit. Greater Mansfield filed a Motion for Leave to File Reply on November 8, 1982. GSM opposed that Motion on November 10, 1982, and Greater Mansfield filed its Reply on the same date. The Bureau filed, November 18, 1982, an Opposition to Motion for Leave to File Reply.

2. In the Designation Order, *Memorandum Opinion and Order*, 46 Fed. Reg. 45188, published September 10, 1981, the following issues were specified:

> 1. To determine whether the proposed operation would cause contour overlap with station WPGW, Portland, Indiana, in violation of Section 73.37(a) of the Commission's Rules.
>
> 2. To determine whether the proposed antenna system can be adjusted and maintained within the proposed limits of radiation.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether grant of the application would serve the public interest, convenience, and necessity.

Findings of Fact

3. GSM urges that the issues specified in this proceeding are solely of a technical nature seeking to determine in the first instance whether there would be overlap of the 0.025 mV/m contour of station WPGW, Portland, Indiana, and the proposed 0.5 mV/m contour of GSM and secondly, whether the antenna system proposed is capable of adjustment and maintenance during operations. As purely technical issues, states GSM, the questions presented are ideally suited for action by summary decision. Here the technical facts have been established and what remains is the technical analysis of those facts and the legal conclusions to be drawn therefrom. GSM sets forth in an affidavit of Harold L. Kassens, GSM's consulting engineer, an analysis of the data available which, in its view, clearly warrants findings on both technical issues in the favor of GSM and a grant of its application.

Issue 1

A. *WPGW's 0.025 mV/m Contour*

4. Continuing its argument, GSM states, "At this time, there are four separate sets of measurements which seek to establish where the .025 mV/m contour of station WPGW, Portland, Indiana lies.[1] The first of these measurements were conducted by GSM and were filed with its original application in 1975. These showed the contour falling at 108 miles.

5. "The second set of measurements were conducted on December 31, 1976 and January 1, 1977 by [a Mr. Ball] one of the engineer's for Greater Mansfield Broadcasting Company, the licensee of stations WCLW and WCLW-FM, Mansfield, Ohio, and filed as part of a Petition to Deny the GSM Media application. That set of measurements showed a considerable difference between GSM Media's measurements and extended the WPGW contour beyond the proposed GSM Media site.

6. "The third and fourth sets of measurements resulted from a letter sent to GSM Media and WCLW in January, 1978 by the Chief, Broadcast Bureau requesting the parties to take joint measurements. Because of considerable antagonism that had developed, the parties could not agree on 'joint' measurements but did conduct what has been labeled as 'concurrent' measurements on July 18–20, 1978. These measurements, together with separate analysis were submitted by WCLW's consulting engineer, Harold Munn, and GSM Media's then consultant, Serge Bergen. Bergen's analysis of his own (GSM Media's) set of measurements finds the WPGW contour at 106 miles. (Kassens affidavit at p. 4). Munn submitted an analysis of both

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[1] It has been calculated that a distance of 128.2 miles separates WPGW and GSM's proposed site. (Kassens affidavit at p. 10.)

GSM Media's measurements and his own (WCLW's) measurements. Munn found that the GSM Media measurements should be analyzed to show a distance of 117.5 miles for the WPGW contour.[2] Surprisingly, Munn's analysis of *his own* measurements shows the WPGW .025 mV/m contour at 115.3 miles or 1.7 miles *less* than his analysis of GSM Media's measurements. (Kassens affidavit at pp. 4–5)."

7. Further, GSM urges that it is well recognized that when field measurements are submitted to the Commission they are to take precedent over predicted calculations. The major caveat is that the field measurements are valid. Under the situation at hand, as explained by Mr. Kassens, both the original measurements by GSM and Mr. Ball's December 31, 1976, and January 1, 1977, measurements failed to indicate that concurrent readings of the directional antenna of WPGW were made. (Kassens affidavit at p. 7.) Also, the Ball measurements were totally out of sync with the other three sets of measurements—including WCLW's "concurrent" measurements. Since all four sets of measurements show an inverse distance field at one mile of 195 mV/m (the proof of performance value for WPGW)[3] and all four were made to a distance of approximately 117.5 miles, the Ball results appear to reflect that some major deviation from the norm was involved. Thus, it is submitted that the only two sets of measurements that remain to be "analyzed" are the "concurrent" July 1978 measurements.

8. As reflected above, and as set forth in Mr. Kassens' affidavit, he has "averaged" the "concurrent" measurements, using both the GSM and WCLW measurement data, and analyzed the WPGW contour to fall at 116 miles. (Kassens affidavit at p. 8.) This "average" would be above *Munn's own analysis of his own (WCLW's) set of measurement of 115.3 miles.*[4] [5]

B. *The GSM 0.5 mV/m Contour*

9. With its application, GSM submitted the results of a field test survey of GSM's proposed 0.5 mV/m contour from its proposed site. Utilizing this data[6], Mr. Kassens has analyzed the data and

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[2] Munn and WCLW's counsel both have argued that the GSM measurements were not validly conducted and should be rejected.

[3] Previously, Munn has complained that his measurements were distorted because of the WPGW operation.

[4] Thus, if one were to accept WCLW's earlier argument that the GSM "concurrent" measurements were also to be rejected as invalid and were left with only WCLW's own measurements, the WPGW contour would fall at the 115.3 mile point, some 0.7 miles less than the average.

[5] Mr. Kassens also deals with and explains away the "stub" measurements conducted by Ball *after* the "concurrent" measurements were made (Kassens affidavit at pp. 8–9). These *additional* measurements, in addition to being contrary to the technical standards were also contrary to the Commission's January 1978 letter seeking to terminate the pleading war involved.

[6] WCLW has on three previous occasions attempted to discredit this data and on

concluded that the proposed 0.5 mV/m contour of GSM will fall at a distance of 10.2 miles. (Kassens affidavit at p. 10.)

C. *Separation between Contours*

10. Recognizing that the calculated distance between the WPGW site and the GSM proposed site is 128.2 miles (Kassens affidavit at p. 10), GSM continues its argument that if we took the analyzed distance of the GSM 0.5 mV/m contour at 10.2 miles and the WPGW 0.025 mV/m contour at an "averaged" distance of 116 miles, it is evident that *a two mile* separation occurs. Even omitting averaging and accepting *only* WCLW's *own* "concurrent" measurements and Munn's *own* analyses, the contour would fall at 115.3 miles or 2.7 miles separation.[7] Therefore, GSM states, whichever is accepted GSM or WCLW alone or both averaged, even using WCLW's own analysis, an adequate separation exists and the first issue must be found in favor of the applicant.

Issue Two

A. *Stability*

11. The affidavit of Mr. Kassens provides a complete answer to the questions facing the Chief, Broadcast Bureau at the time of designation. Not only does Mr. Kassens' statement confirm that the array would be stable but also GSM has agreed to take certain steps to ensure that proper variations will be maintained.[8]

B. *Suitability*

12. In their various pleadings, WCLW has previously raised questions concerning the suitability of the proposed site and the effect thereof on the directional operation. Again, Mr. Kassens' affidavit (pp. 17–21) demonstrates the problems alleged by WCLW can be readily overcome—should they actually arise—by usual procedures normally followed in like situations. In short, there is nothing that WCLW has raised that has not been routinely handled by many Commission licensees in the past.[9]

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each occasion its contention has been rejected. See *Memorandum Opinion and Order, supra*, at para. 5. *Memorandum Opinion and Order*, FCC 82M-0133, released January 18, 1982; *Order*, FCC 82M-2400, released August 5, 1982.

[7] If one took *only* the GSM measurements and *only* accepted Munn's analysis, the separation would be 0.5 miles.

[8] See also affidavit of Gunther S. Meisse, GSM's President, confirming that the statements made by Mr. Kassens relating to the proposed array and site would be complied with. (Also, Kassens affidavit at pp. 16–17.)

[9] Meisse's affidavit confirms the willingness of GSM to take the steps necessary to meet problems should they arise.

C. *Proposal will Comply with Commission Requirements*

13. It is evident from Mr. Kassens' discussion that the averaging proposal can be adjusted and maintained.

14. GSM concludes that, the technical issues specified having been shown to require action favorable to GSM, summary decision should be granted allowing the application of GSM to be granted.

15. Greater Mansfield's opposition suggests that the GSM motion does not resolve the many conflicts of fact which remain. Stating that there is a clear conflict of engineering opinion of whether there would be prohibited overlap, Greater Mansfield urges that this conflict can only be resolved by a full evidentiary hearing. Further, Greater Mansfield contends that GSM's motion is predicated on a basic misunderstanding, and that its engineer denies that Greater Mansfield's measurements show that the location of the WPGW "nuisance contour" is closer to WPGW than would be shown by the GSM measurements. Also that GSM has failed to utilize valid measurement data, which must be taken into account. Among other reasons, Greater Mansfield states that where many "crucial" facts are in sharp dispute, summary decision would be wholly inappropriate.

16. In its "Comments," the Bureau notes that GSM maintains that only two sets of measurements are valid, and that GSM's engineering analysis of an "average" of those two sets establishes that there would be no contour overlap between the GSM 0.5 mV/m contour and the WPGW 0.025 mV/m contour; that analysis of either one of the two sets, without averaging, shows that there will be an adequate separation of contours. Supporting GSM's motion, the Bureau says that its engineering staff conducted an analysis "of all sets of field measurements." That the Commission requires that an engineering analysis "use an average effective conductivity determined from all available data. . . ." citing *United Broadcasting Company, Inc.*, 1 FCC 2d 555, 559 (1965), which the Bureau says it has done. Based on that analysis, the Bureau concludes with GSM that there would be no prohibited contour overlap between WPGW and GSM's proposed contour. That being so, the Bureau continues, there being no genuine issue of material fact, the overlap issue should be resolved in GSM's favor. Also, the Bureau urges that the issue concerning the maintenance of GSM's proposed antenna system should likewise be resolved in GSM's favor, in that GSM has established that its antenna system can be adjusted and maintained within the proposed limits of variation. The Bureau's position is enhanced by an appropriate verified affidavit of its engineer.

17. Respecting Greater Mansfield's uncommon Motion for Leave to File Reply, premised on its notion of a further "kick at the can," in the main, because of the Bureau's "supporting comments," suffice to say, that the "can" has been more than liberally kicked, almost to

the point of annihilation, if one but recalls the several grants of time extensions to the parties here, not to mention Greater Mansfield's granted extension of October 15, 1982, beyond its earlier profession of needing not more than "a flat period of 30 days" granted by *Order*, FCC 82M-2941, released September 23, 1982. But beyond this observation, GSM's opposition of November 10, 1982, states the proposition well—that the Bureau's analysis is not "new evidence" but simply an analysis of factual data before this agency—hence, GSM's argument[10] is persuasive and is adopted. Thus, Greater Mansfield's Motion for Leave must be AND IS HEREBY DENIED; accordingly, its proffered Reply filed November 10, 1982, IS REJECTED, as unauthorized.

Conclusion

18. Greater Mansfield would have it that, and otherwise correctly so, "Summary Decision should be granted only where the truth is clear, where the basic facts are undisputed, and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 32 RR 1119 (Rev. Bd. 1975). Its position, however, after review of all available factual submissions, is fatally flawed. This, not "because the Broadcast Bureau recommends such action" (as Greater Mansfield would have it); rather, it is the clear persuasiveness of the Bureau's analysis comprehending "[a]ll of the FIM [field intensity measurements] taken both by GSM and GMBC [Greater Mansfield]" and its consequent conclusion that "GSM's proposed 0.5 mV/m and WPGW's 0.025 mV/m criteria do not overlap." GSM's position is equally convincing. Though it very well may be that there are conflicting *views* or *opinions*, *vis a vis* the respective adversary engineers, this does not amount to nor equate with the sole and compelling rational inference from the facts presented that a genuine issue of material fact remains to be determined. Not only are the analyses of the factual data in dispute made by the Bureau convincing, they are soundly supported in apposite precedent, *infra*. Thus, taking into account the various provisions permissive of Summary Decision in Rule 1.251, as well as abiding precedent—*United Broadcasting Company, Inc.*, *supra*, and rendering the close scrutiny of Movants' papers with a full consideration of Greater Mansfield's prayer concerning the need for cross-examination, it is concluded that no genuine issue of material fact remains for determination at hearing respecting the given issues at bar.

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[10] GSM Media also alludes to the notion that what Greater Mansfield has been pursuing throughout this proceeding by its pleading tactics "is seeking for straws to keep its battle against new competition alive." That question, even were it true, need not be reached.

That being so, GSM Media Corporation's Motion for Summary Decision may be AND IS HEREBY GRANTED[11]; thus the outstanding issues in this proceeding ARE RESOLVED favorably to GSM Media Corporation.

Accordingly, the application of GSM Media Corporation for the captioned facilities at Ontario, Ohio, may be AND IS HEREBY GRANTED, with the following *caveat* (as stated in the Designation Order, *Memorandum Opinion and Order, supra*):

> An antenna monitor of sufficient accuracy and repeatability, and having a minimum resolution of 0.1 degree phase deviation and 0.1 percent sample current deviation, shall be installed and continuously available to indicate the relative phase and magnitude of the sample currents of each element in the array, to insure maintenance of the radiated fields within the authorized values of radiation.
>
> Upon receipt of operating specifications and before issuance of a license, permittee shall submit the results of observations made daily of the base currents and their ratios, relative phases, sample currents and their ratios, and sample current ratio deviations for each element of the array, along with the final amplifier plate voltage and current, the common point current, and field strengths of each monitoring point for both nondirectional and directional operations for a period of at least 30 days, to demonstrate that the array will be maintained within the specified tolerances.
>
> If the Commission ultimately adopts a rule prohibiting commonly owned AM and FM stations in the same market, permittee will divest itself of its AM station or sever its relationship with WVNO(FM), Mansfield, Ohio, in accordance with the requirements established in such rulemaking proceeding.

Nothing further remaining, this proceeding IS TERMINATED. IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION
JAMES F. TIERNEY, *Administrative Law Judge*

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[11] Under Rule 1.257, this, as a Summary Decision, is to be accorded similar appellate disposition as with an Initial Decision under Rule 1.276. Thus, in the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release.

Reconsideration, Petition for, Denial of
Satellite, Earth Station, Facilities

> **Petition for reconsideration of *GTE Satellite Corp.*, 90 FCC 2d 1009 (1982), denied, and related application of GSAT for authority to construct and operate earth station granted. Action affirms underlying decision without restricking, telecommunications services to consumers.**
> ***–GTE Satellite Corp.***

FCC 83-271

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Applications of GTE SATELLITE CORPORATION For authority pursuant to Section 214 of the Communications Act of 1934, to lease and operate transponder capacity from Telesat Canada for the provision of communication common carrier services within the contiguous United States,	File No. W-P-C-4355
and	
GTE SATELLITE CORPORATION For authority to construct and operate a $^{14}/_{12}$ GHz transmit/receive Telemetry, Tracking and Command (TT&C) earth station at Terre Haute, Indiana.	File No. 000179-DSE-P/L-83

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted June 2, 1983 Released June 23, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it a petition for reconsideration of *GTE Satellite Corporation*, 90 FCC 2d 1009 (1982) (hereinafter referred to as *Order*) and a related application of GTE Satellite Corporation (GSAT) for authority to construct and operate a $^{14}/_{12}$ GHz transmit/receive TT&C earth station. The petition was filed

pursuant to Section 1.106 of the Commission's rules (47 C.F.R. § 1.106) by United States Satellite Broadcasting Company, Inc. (USSB). Comments generally supporting USSB's petition were filed by Satellite Business Systems (SBS) and Satellite Television Corporation (STC). GSAT and United Satellite Television (USTV)[1] oppose the petition and also have filed motions to strike the comments of SBS and STC. We also have received a Petition to Accept Late Filed Pleading and Comments of SPACE, the Society for Private and Commercial Earth Stations, generally supporting the grant of GSAT's application and denial of reconsideration.[2] USSB also has filed a petition to deny GSAT's TT&C application, to which GSAT and USTV have responded.[3]

Background

2. On February 17, 1982, the Commission received an application from GSAT requesting authority to lease 10 transponders on Telesat Canada's ANIK-C satellite to provide communication common carrier services. Public notice of this application was made on March 3, 1982. No comments were received. On June 18, 1982, the Commission received a letter from USTV explaining its proposed use of the GSAT facilities and requesting expeditious action on the GSAT application.[4] On August 5, 1982, the Commission granted the GSAT application.

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[1] United Satellite Communications, Inc. is the new corporate name of United Satellite Television. However, for the purpose of consistency we will continue to refer to the entity as USTV.

[2] Additional pleadings were filed in this matter after GSAT informed the Commission of a change in circumstance. See paragraphs 26–29, *infra*. In total, more than 30 pleadings have been filed in this proceeding, of varying procedural regularity. We have considered (but not separately stated) the arguments of all the parties because doing so has not delayed this proceeding, has permitted all interested parties an opportunity to comment, and has provided a fuller record upon which to base our decision. *See* Associated Press, 72 FCC 2d 760, 762–63 (1979); Columbia Broadcasting Systems, Inc., 46 FCC 2d 903, 905–06 (1974).

We reject USSB's petition for oral argument, filed May 27, 1983, in which it requests the Commission to hold oral argument on the question of whether non-licensees (such as USTV) should be subject to certain obligations imposed on broadcasters. In addressing a similar issue previously, we declined to impose these obligations at this time, but stated we may need to apply regulatory constraints on common carrier DBS licensees or their programmer customers "if circumstances arise to suggest they are needed." Direct Broadcast Satellites, 90 FCC 2d 676, 711 (1982). If USSB believes circumstances exist warranting imposition of constraints, they should be raised in a petition for rulemaking instead of an individual proceeding.

[3] Although worded differently, the arguments made by USSB in this petition essentially parallel those raised in its petition for reconsideration and challenge the merits of the underlying proposal of GSAT and USTV. While we have not separately stated all those arguments we have examined and considered them and the responses thereto in our decision.

[4] This information was in a letter to the Chief, Common Carrier Bureau.

3. In the *Order*, we gave GSAT authority to acquire and operate satellite transponder capacity under a lease arrangement with Telesat Canada. GSAT's customer, USTV, was to use GSAT's services to provide video programming to small receiving antennas in the 11.7–12.2 GHz fixed satellite band. According to USTV, its customers would include small cable television systems, hotels, motels, hospitals, low power television stations, STV and MDS stations and multiple and single unit dwellings. Authority was granted until December 31, 1984, by which time GSAT must transfer its services to a United States satellite, presumably GSAT's GSTAR satellite.[5]

4. In the *Order*, we pointed out that USTV's proposal to provide video programming to single unit dwellings raised a question as to the consistency of GSAT's application with the order adopting interim rules for Direct Broadcast Satellite (DBS) service[6] and with the United States' proposal to the World Administrative Radio Conference (WARC) to allocate separate frequency bands to the fixed satellite and the broadcast satellite services.[7] Having raised the issues, we concluded, at footnote 5, that our position at WARC and the order adopting interim rules for DBS were primarily premised on two concerns: (1) "the belief that high quality [DBS] services would require satellites operating at significantly higher powers than existing and proposed fixed satellite systems," and (2) that "the potential interleaving of such satellites of disparate power sharing the same frequency bands would have a detrimental impact on the Commission's ability to make necessary changes in the spacing of evolving communications satellite systems." We pointed out that the WARC did recognize continued sharing by adopting Radio Regulation 836 which provides that the band set aside for fixed satellite services (11.7–12.1 GHz) could be used for broadcasting satellite services but only at restricted power and without causing greater interference or requiring more protection from interference than the coordinated fixed-satellite service frequency assignments. Therefore, because the GSAT application proposed to provide USTV with relatively low power service (and would otherwise be subject to technical constraints on fixed satellites), we concluded that there was not inherent inconsistency between grant of the application and the Final Acts of the WARC or with our interim DBS rules.

5. Because USSB raises the issue of procedures relating to the Commission's authorization of DBS services, we will summarize briefly the DBS service and Commission procedures for processing DBS applications.

6. DBS service is an experimental technology which utilizes

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[5] GTE Satellite Corp., 84 FCC 2d 562 (1981).

[6] Report and Order in Docket No. 80–603, 90 FCC 2d 676 (1982).

[7] Report and Order in Docket No. 20271, 70 FCC 2d 1193 (1978).

high-powered satellites and small parabolic receiving antennas for the distribution and reception of video programming. Though frequencies have been allocated for DBS service by the 1979 WARC, final frequency and orbital allotments and other technical parameters for the United States' broadcasting satellite band will not be made until the Western Hemisphere Regional Administrative Radio Conference (RARC) to be held later this month.

7. In 1980, the Commission began a process to establish regulatory policies for DBS to ensure that it serves the public interest.[8] On June 1, 1981, the Commission issued a *Notice of Proposed Policy Statement and Rulemaking* (*Notice*) to consider proposed policies and rules to govern the authorization of DBS service prior to RARC - 83.[9] At the same time, the Commission accepted STC's application for filing and established a 45-day cutoff period for the submission of other applications to be considered with STC's application. The cutoff date ultimately established for competing DBS applications was July 16, 1981.

8. On October 28, 1981, the Commission released a Public Notice (FCC 81–507), 45 Fed. Reg. at 32497, accepting for filing the applications of USSB, Focus Broadcast Satellite Company, and six others. In a *Report and Order* issued in the DBS docket,[10] the Commission concluded that interim DBS authorizations, on an experimental basis, would serve the public interest, subject to the policies and rules set forth in the *Report and Order*. In response to a petition from STC, the Commission released a *Memorandum Opinion and Order*,[11] on November 3, 1981, finding that a number of interim DBS applications were incomplete and unacceptable for filing. This decision was affirmed in a subsequent *Memorandum Opinion and Order*.[12]

9. On November 4, 1982, the Commission granted the applications of USSB, among others, and dismissed the application of Focus Broadcast Satellite Company. The Commission also determined that

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[8] Notice of Inquiry in Gen. Docket No. 80–603 FCC 80–565, released October 29, 1980 (45 Fed. Reg. 72719 (November 3, 1980)). On December 17, 1980, the Commission received an application from STC requesting authority to begin construction of satellites for a satellite-to-home video broadcasting system. The Commission placed STC's application in the docket file and invited public comment on the application.

[9] 86 FCC 2d 719 (1981). In this Notice, the Commission proposed that downlink operations for DBS systems be authorized in the 12.2–12.7 GHz band, and that the 17.3–17.8 GHz band be used for DBS uplinks.

[10] 90 FCC 2d 676 (1982).

[11] 88 FCC 2d 100.

[12] 89 FCC 2d 177 (1982). An appeal of this decision was dismissed. National Christian Network, Inc. v. FCC, No. 82–1345 (D.C. Cir., appeal filed March 31, 1982); Motion for Voluntary Dismissal filed November 18, 1982; dismissed by the court November 22, 1982.

use of domestic fixed satellites would be considered in the context of modifications to the domestic satellite authorizations.

Petition for Reconsideration

10. In its petition, USSB asks the Commission to rescind the GSAT grant, or in the alternative, condition the grant by prohibiting GSAT from offering television service intended for individual reception by the general public.[13] USSB argues: (1) that the grant to GSAT was made without benefit of public comment from interested parties because the public notice failed to describe adequately the nature of the proposed service;[14] (2) that the "GSAT/USTV proposal is an errant DBS application" which must be treated pursuant to the procedures and policies established in General Docket No. 80–603; and (3) that GSAT has not satisfied the requirements of Section 214 of the Communications Act, 47 U.S.C. § 214, in that it has not demonstrated the adequacy of its proposed DBS service, and (4) that the Commission did not find that grant of the application would serve the public convenience and necessity because it did not know the true use for which the facilities would be employed.

11. USSB explains it has standing because as an applicant for interim authority to provide DBS services, its interests will be adversely affected if GSAT's grant is not rescinded. It claims that by filing an acceptable DBS application by July 16, 1981 it became entitled, together with others, to have its application receive consideration prior to applications which were not submitted in substantially complete form until after July 16, 1981.

12. According to USSB, the fact that the public was not given notice that USTV planned to provide DBS service is fatal to the GSAT grant because the public was denied an opportunity to be heard. "It is well settled," USSB states, "that 'the Commission may not, however, inadvertently, give public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut-off by the notice . . .' *Ridge Radio Corporation* v. *FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961)." USSB contends that this principle clearly applies to petitions opposing the grant of an application. It states that GSAT and USTV acted in concert to withhold from the public and the Commission the fact that USTV would provide direct broadcast, not fixed satellite service.

13. USSB contends further that because GSAT is proposing to offer a vehicle for the provision of DBS service, GSAT's application must be considered and processed according to the policies and

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[13] SBS and STC argue that direct-to-home service is not appropriate in the fixed satellite service.

[14] Although STC agrees with USSB, SBS does not believe that the adequacy of the notice and comment procedures are at issue here.

procedures which the Commission has adopted in Docket 80-603 to govern interim DBS applications.[15] It maintains that equity and fair play require that the Commission not give GSAT's application, filed February 17, 1982, equal priority with the applicants who filed acceptable applications on or before the cut-off date of July 16, 1981.

14. In addition, USSB suggests that the failure to apply the DBS procedures to the GSAT/USTV proposal raises serious questions about the validity of the processing scheme which the Commission has applied to first and second round DBS applicants, and is inconsistent with the position it has espoused before the U.S. Court of Appeals in *National Christian Network, Inc.* v. *FCC, supra* note 12.[16]

15. USSB argues that the DBS proceeding encompasses proposals to use the 11.7–12.2 GHz band. This is evidenced, USSB claims, by the application of Western Union and Focus Broadcast Satellite Company in which Focus proposed to provide DBS programming service in the 12.1–12.2 GHz band via Western Union's Advanced Westar satellite. USSB notes that the Commission, in its *Report and Order* (*supra*, note 6), authorizing experimental DBS services, found the Western Union/Focus proposal appropriate for consideration in that proceeding. The Commission stated that proposals to operate DBS systems outside the 12.2–12.7 GHz band raised significant legal, policy, and technical issues. Similarly, USSB contends, common carriers offering DBS service and these carriers' customers are equally subject to DBS policies and procedures.

16. Substantively, USSB argues that grant of the GSAT/USTV proposal has significant policy implications which need to be addressed in a notice and comment rulemaking proceeding. According to USSB, customers who invest in the receive equipment recommended by GSAT/USTV for use with their system will receive a poor quality television picture and will not be able to receive other DBS signals with their antennas oriented to receive the USTV signal. USSB suggests that USTV will not be able to move to the GSTAR satellite system. Even if USTV can use GSTAR, USSB claims that customers will need antennas with improved discrimination to receive the same quality signal due to the proximity of other satellites operating in the fixed satellite band. USSB argues, therefore, that the GSAT/USTV proposal is directly relevant to the

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[15] USSB uses the definition of "broadcast satellite service" developed by the International Telecommunications Union (ITU) for support of its position. ITU defines the broadcast satellite service as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public." ITU, Radio Regulations (Geneva 1982), Art. 1, § 3.18. USSB claims that several of USTV's channels will be advertiser supported.

[16] USSB claims that the Commission's position is that for public interest reasons, the cut-off rules will not be waived to permit late-filed applications to be considered with first round applicants, nor will such applications be accepted *nunc pro tunc*.

overall issue of DBS technical standards, which is under consideration in the DBS proceeding. Thus, it claims, the carrier's facilities are not adequate to provide the service proposed and the public's interest is not well served.

GSAT's Opposition

17. In its opposition, GSAT challenges USSB's position that the Commission failed to give adequate notice of GSAT's application. GSAT states that public notice of applications need only be sufficient to "give interested parties a thirty-day opportunity to learn of an application or substantial amendment. . . ."[17] The notice, GSAT declares, was not to be a total education in and of itself, but only a pointer to the existence of an application.

18. Furthermore, GSAT denied that its application is a DBS filing. According to GSAT, its acquisition of transponders on Telesat Canada's Anik-C satellite, as a common carrier, is for the purpose of distributing the programming services of its customer "point to multipoint." Moreover, it states that when the initial application was filed, the feasibility of direct-to-home transmission was unknown, so it believed it prudent to obtain authority to provide a variety of different services.

19. While GSAT recognizes similarities between fixed satellite service and DBS services, it denies that the similar characteristics transform GSAT's application into a DBS proposal. GSAT points out that it requested authority to use a different set of frequencies than is allocated for DBS and that in accepting the Commission's grant it also accepted power limitations not placed upon DBS services.

20. GSAT also argues that as a common carrier its duty is "to carry for all people indifferently," and to allow its customers to use its facilities to "transmit intelligence of their own design and choosing."[18] Thus, to restrict delivery of USTV's television services, based on whether or not their terminations were single unit dwellings, GSAT maintains, would be in derogation of its duty as a common carrier, and inconsistent with the carrier's statutory responsibility to provide service upon reasonable demand. In GSAT's view, there is nothing unreasonable about USTV's demand to transmit television programming to all fixed points within GSAT's authorized service area where USTV elects to install receiving earth stations.

21. Finally, GSAT finds unpersuasive, and irrelevant, USSB's warning that the public interest will be disserved by GSAT's service. GSAT states that it has explained why and how interference at small

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[17] Amendments of Parts 1 and 21, Docket No. 19905, 60 FCC 2d 549, 551 (1976).

[18] GSAT cites National Association of Regulatory Utility Commissioners v. FCC, 413, 525 F.2d 630, 641, n. 58 (1976).

antennas can be minimized if the Commission reduces orbital spacing from 3 degrees to 2 degrees.[19] Moreover, GSAT finds "ludicrous" USSB's supposition that USTV would accept the commercial risks of inability to transfer from temporary use of the ANIK system to permanent use of the GSTAR system. GSAT maintains that the decision whether the price and quality of USTV's service is acceptable is best made by consumers, not by potential competitors or the Commission.

USTV's Opposition

22. In its opposition, USTV asserts that USSB's petition is without merit and must be denied. In addressing USSB's allegation that the public did not receive adequate public notice of GSAT's proposal, USTV points out that the notice provided all of the information required by Section 214 of the Act and Section 63.01 of the Commission's rules. USTV further notes that the Commission's common carrier facilities authorization process does not normally concern itself with the end uses of transmissions delivered over those facilities and there was no obligation for GSAT to divulge the business plans of its customer in its application.

23. Similarly, USTV rejects USSB's contention that GSAT's application is a "DBS application" and the *Order* is a "DBS authorization." USTV reasons that its proposed service using existing fixed satellites to distribute video programming on fixed 11.7–12.2 band satellite frequencies with restricted power, cannot be considered a DBS service. By its very terms, USTV states, DBS entails new DBS satellites in the 12.2–12.7 GHz band with far higher power.

24. In support of this position, USTV cites 47 C.F.R. § 100.1 which specifies that DBS service "shall operate in the frequency band 12.2–12.7 GHz." Moreover, USTV asserts that both the interim DBS *Notice, supra* note 9, and the subsequent DBS *Report and Order, supra* note 6, make clear that the new interim processing procedures relate to proposals for construction of new DBS satellites capable of transmissions at high power in the 12.2–12.7 GHz band. In any event, it states, service to individual residences will constitute only a part of its service.

25. USTV finds erroneous and irrelevant USSB's contentions that USTV's switch to GSTAR will require modification of the reception equipment that will disrupt service and will be costly to customers, and that implementation of 2 degree spacing of orbital satellites will impair the quality of USTV's service. USTV insists that the receive-only antennas that it would employ are designed for

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[19] GSAT cites its comments filed March 8, 1982 in Satellite Space Utilization Docket No. 80–741; its petition for reconsideration of Memorandum Opinion and Order, FCC No. 82–233, released May 20, 1982; and its application filed July 12, 1982, File No. 2084-DSS-LA-82.

reception of GSTAR satellite transmissions, and that these antennas also are fully capable of receiving ANIK - C transmissions.

GSAT's January 12 Letter

26. After the pleading cycle had ended regarding the reconsideration petition, GSAT submitted a letter announcing two new developments: (1) that USTV would only need 4 or 5 transponders for its initial service instead of the 10 originally requested and (2) that GSAT was considering requesting modification of its GSTAR satellite construction authorizations to increase the maximum power level on certain transponders on the satellites.[20]

27. The GSAT letter was placed on public notice so that interested parties could respond. Comments were received from various entities including the parties who had participated previously in the reconsideration proceeding.[21] While several issues were similar to those raised previously, the primary issue in these comments is whether USTV's decision to reduce the number of ANIK-C transponders to be leased has any impact on GSAT's authorization.

28. SBS initially claimed that it has available for lease 5 transponders with EIRP levels of 46 dBW which it maintains are adequate signal levels for the service proposed by USTV. Therefore, SBS argues, GSAT should not now be permitted to lease any capacity from Telesat Canada since GSAT's application no longer falls within the intent of the 1972 intergovernmental agreement between the United States and Canada.[22]

29. In response, USTV asserts that contrary to SBS' statements, SBS only made firm commitments to provide 4 transponders, with a fifth becoming available if another customer did not exercise an option. It further contends that even if it had 5 transponders available, SBS could not provide the requisite 47 dBW power level that USTV's business plans require.

Discussion

30. Our *Order* granted GSAT authority pursuant to Section 214 of the Act to acquire by lease ten transponders on Telesat Canada's Anik-C satellite. These channels were to be offered to GSAT's customer, USTV, pursuant to tariff. We noted that Section 214 requires that we find a proposed acquisition or operation of new lines

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[20] GSAT later decided not to pursue the modification request. GSAT letter dated January 31, 1983.

[21] General Instrument Corporation, the National Black Media Coalition (NBMC), the National Citizens Committee for Broadcasting/Telecommunications Research and Action Center (NCCB) and Prudential Insurance Company of America, filed their inital comments in response to the public notice.

[22] For support, SBS cites RCA American Communications, Inc., 50 FCC 2d 406, 413 (1974).

will serve the public convenience and necessity before granting Section 214 authority. We further noted that such authority ordinarily will be granted for private line services, unless there is some basis to believe a grant is likely to produce results that conflict with the goals of the Communications Act. Because none of the arguments presented by the parties demonstrates that results inimical to the public interest will result from the authorization, or otherwise demonstrate the authorization was erroneous, the petitions for reconsideration and the relief requested in the supporting comments and comments filed in response to the January 14, 1983 public notice, will be denied. The petition to deny the application to construct and operate an uplink earth station also will be denied. The Section 214 authorization will be modified, however, to reflect the reduction in need from 10 transponders to 5.

Nature of Service

31. None of the parties challenge the contention of the applicant that the distribution of program material to small cable television systems, hotels, motels, hospitals, low power TV stations, STV and MDS stations is properly within the scope of the fixed satellite service. *See* 47 C.F.R. § 2.1. Such services are also consistent with GSAT's current domestic satellite authorizations.[23] To this extent, then, our *Order* can not be at issue. It is only USTV's provision of service to individual residences that raises issues which the parties believe warrant reconsideration. These issues are (1) proper notice was not made to the public that DBS service was proposed (2) as a DBS application, the proposal is subject to the procedures outlined in General Docket No. 80-603; and (3) the public interest will not be served because the technical quality of the received signal will not be acceptable to the public.

32. As we explained at note 5 of the *Order*, the GSAT proposal is not inconsistent with our activities in General Docket 80-603. The proposal is not Direct Broadcast Satellite Service for purposes of the Commission's rules, is proper in the fixed satellite service bands, and should not have been processed pursuant to the Direct Broadcast Satellite procedures.

33. Section 100.1(b) of the rules, 47 C.F.R. § 100.1(b), specifically states that the Rules in Part 100—Direct Broadcast Satellite Service—were designed to make available the frequency band 12.2–12.7 GHz for direct broadcast satellite service. The service is characterized by (1) high power geostationary satellites, (2) operations in the 12.2–12.7 GHz band, and (3) direct reception of signals by

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[23] *See* GTE Satellite Corporation, 43 FCC 2d 1141 (1973), 57 FCC 2d 147 (1975), and 84 FCC 2d 562 (1981); 47 C.F.R. § 63.07. It should also be noted that DBS facilities may also be used to serve viewers at such locations in addition to direct reception at individual residences.

the general public using small, inexpensive earth terminals as an initial satellite design objective.[24] While several of these characteristics may be general in the abstract, the difference between DBS and the GSAT proposal are clear: (1) both the Anik-C and the GSAT satellites are designed to operate with approximately $^1/_{10}$th the power of the proposed DBS satellites; (2) the Anik-C (and later, GSTAR) satellite will operate in the 11.7–12.2 GHz band; and (3) the antennas used by USTV will be approximately twice the size of those used in DBS (4–6 ft. v. 2.5 ft.). The GSTAR satellites will operate with 2° spacing, while DBS satellites are proposed to be operated with 8°-10° or larger spacing.[25]

34. The three factors pointed to by USSB as evidencing that GSAT will be providing DBS service—television service by satellite, direct to the home, by means of 1.2–2.5 meter antennas—are present today in various fixed services. For example, television service has always been considered an appropriate domestic fixed satellite offering.[26] Nor is service by definition precluded to homes.[27] And USTV represents that the location of all homes receiving its service will be known, which distinguishes it from broadcast services where specific points of reception are not known.[28] Even if USTV's service to homes could be considered a broadcast service, it still would not be prohibited. Our present table of allocations allows broadcasting and fixed satellite services in the 11.7–12.2 GHz band. See Section 2.106 Table of Frequency Allocations, 47 C.F.R. § 2.106; *First Report and Order* in General Docket No. 80–739, adopted June 1, 1983. Finally, services (although not video) are now being routinely supplied by domestic fixed satellites to antennas even smaller than 1.2 meters.[29]

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[24] Report and Order in General Docket No. 80–603, 90 FCC 2d 676, 677 n. 1; 723 (1982).

[25] *See* Report and Order in Gen. Docket No. 80–398, FCC 83–102, (released March 21, 1983), at para. 48.

[26] *See, e.g.*, Domestic Communications Satellite Facilities, 22 FCC 2d 86, 88 (1970), where we found that domestic satellites "appear to offer unique promise as an economical means of providing service from one transmission point to many reception points, e.g., for the relay of radio and television programs for entertainment, educational and instructional purposes, and for reaching remote, relatively inaccessible areas."

[27] The definition of "fixed-satellite service" parallels that of the terrestrial "fixed-service" in Section 2.1 of our rules, 47 C.F.R. § 2.1. Service to individual residences is not precluded in the Multipoint Distribution Service, a terrestrial common carrier fixed-service. *See e.g.*, Section 21.903 of our rules, 47 C.F.R. § 21.903; Notice of Inquiry, Proposed Rulemaking and Order in General Docket No. 80–112, FCC 80–136 released May 2, 1980 at paragraph 12; Multipoint Distribution Service, 45 FCC 2d 616, 617 (1974).

[28] USTV Responses to STC at para. 12.

[29] While we have established antenna size criteria for *prima facie* findings of consistency with reasonable orbital spacings, we have not precluded the use of any antenna solely on the basis of its size. *See* American Broadcasting Companies, 62 FCC 2d 901 (1977). Antennas as small as 0.6 and 1.2 meters in diameter are

Thus, we cannot accept USSB's characterization that the GSAT/USTV services are DBS and must be processed within the procedural rules adopted in General Docket No. 80-603.

35. Our DBS processing experience to date also demonstrates that USTV's use of GSAT's facilities to distribute video programming to homes does not subject USTV to the processing procedures of Part 100 of our rules. Our treatment of the application of Focus Broadcast Satellite Company, contrary to USSB's contentions, supports this interpretation. Focus applied, *inter alia,* to use a fixed satellite operating in the 11.7-12.2 GHz band (Western Union's Advanced Westar) for "DBS". We found that Focus did not propose to become a licensee of a facility, but only expressed an intention to use the facilities of broadcast and fixed satellite licensees. Accordingly, we found a DBS application by Focus was unnecessary. We stated that Western Union's companion application to modify the authorized fixed satellite Advanced Westar to provide service to Focus in the 11.7-12.2 GHz band would not be considered as part of a DBS proceeding, but rather would be considered as a modification of Western Union's fixed satellite authorization. *See Memorandum Opinion and Order*, FCC 82-498, released December 3, 1982 at paragraphs 120 and 122. Thus, while the General Docket No. 80-603 proceedings did allow for consideration of the extent to which domestic fixed satellites are available and could be used to provide additional program services, use of domestic fixed satellites for DBS-like services must also be consistent with our domsat technical standards and policies.[30] Clearly, the proceedings in General Docket No. 80-603 were not intended to review our regulation of the nature of services that could be provided over domestic fixed satellites in the 11.7-12.2 GHz bands.

36. In summary, GSAT's proposal differs substantially from those addressed in the DBS proceeding in terms of satellite power, receiving antenna size, satellite spacing and, most important, operational bands. USSB's arguments that the GSAT/USTV proposal is an out of band DBS proposal subject to the procedures established in Part 100 must be rejected. Nor have opponents of the proposal demonstrated that the public interest requires restricting uses of fixed satellites to protect prospective General Docket 80-603 DBS entities from competition. The programming operations of USTV do not need to be licensed pursuant to either our domestic

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now being used by Equatorial Communications and Muzak, respectively, to distribute data and audio programming throughout the country.

[30] One of the serious concerns presented by the Focus/Western Union application to use Advanced WESTAR was the effect of the high power density television carrier on satellite spacing. *See* Petition to Deny by Satellite Business Systems. However, that proposal has since been withdrawn. Moreover, we have addressed the technical basis for these concerns, as well as the procedural aspects of our regulation of domestic satellites, in another proceeding. *See* Report and Order in Docket No. CC 81-704, FCC 83-184, adopted April 27, 1983.

fixed satellite policies or the DBS procedures established in the proceedings in General Docket No. 80-603.[31] No application would be necessary by USTV because USTV is not proposing to build a satellite.

Public Notice

37. As a program distribution service in the fixed satellite service, the notice given of the GSAT Section 214 application was adequate.[32] We indicated the number of channels to be leased, the area within which service is to be provided, and the satellite on which the channels were to be leased.[33] This is sufficient notice in the case of applications to acquire transponders.[34]

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[31] The argument that the GSAT/USTV proposal is actually a DBS service was also raised by NBMC and NCCB in response to GSAT's January 12 letter. *See* note 21, *supra*. NBMC's main concern is that operators in the fixed satellite band do not have to adhere to the Commission's equal employment opportunity (EEO) rules, whereas DBS operators will. NCCB recommends that the actual operation of the DBS portion of the service be governed by the interim DBS rules and that both GSAT and USTV be bound by the permanent rules adopted after the 1983 RARC. We must reject these arguments also. We have determined that neither GSAT nor USTV is subject to the DBS processing procedures. Since USTV is not licensed as a broadcaster either in the DBS service or otherwise, and is not required to be licensed, it cannot be made subject to our EEO requirements. More importantly, even if some aspects of GSAT's proposed common carrier operation are similar to certain of the DBS proposals, GSAT's operation would be consistent with the interim regulatory policies we have adopted for DBS. Thus, for example, the EEO rules adopted for DBS are applicable only to DBS licensees operating as broadcasters and do not apply to common carrier DBS licensees or their programmer customers. *See* 90 FCC 2d 676, 715; 47 C.F.R. § 100.51(a). Hence, neither GSAT nor USTV would be subject to these EEO requirements in any event. If satellite licensees themselves offer predominently broadcast services, *see* 90 FCC 2d at 709, we would expect them to be subject to the same Title III and related requirements specified for similarly situated DBS licensees.

[32] If it were not for the fact that transponders were being acquired for use in non-U.S. satellites, GSAT would not have had to file a Section 214 application. *See* 47 C.F.R. § 63.07(e) and Competitive Common Carrier Rulemaking, 85 FCC 2d 1 (1981); Orbit Deployment Plan, 84 FCC 2d 584, 612–13 (1981).

[33] The parties cite several cases that they claim support their position on the public notice issue. For example, Ridge Radio Corp. v. FCC, *supra*, para. 12; Central Mobile Radio Phone Service, 65 FCC 2d 648 (1977); Domestic Public Land Mobile Radio Service, 60 FCC 2d 549 (1976); and Carter Mountain Transmission Corp., 32 FCC 459 (1962). These cases, however, are inapposite since they are concerned with the statutory notice requirements for radio licenses under Title III of the Act. Here, GSAT did not propose to be a licensee of the ANIK satellite.

[34] The notice issued March 3, 1982 (Report No. D-108) provided:

> W-P-C-4355 GTE Satellite Corp. (GSAT) FORMAL (Section 63.01) Applicant requests authority to acquire by lease and operate a satellite transponder capacity of 54 Mb/s on each of 10 unprotected preemptible transponders on ANIK-C satellite of Telesat Canada (Telesat) which is to be launched in late 1982 and become operational in mid-January 1983. Telesat will submit appropriate request to the Canadian Dept. of Communications for authority to enter into the lease agreement with GSAT. Canadian satellite capacity is requested because of the unavailability of U.S. domestic satellite capacity. The use of the facility will

38. However, as pointed out by petitioners, GSAT's failure to volunteer more specific information at the outset has caused much confusion about its plans. Various reasons are offered by GSAT for initially describing the proposed service as perhaps including "television, voice, data and facsimile." These include GSAT's desire not to disclose prematurely USTV's marketing plans, and the fact that additional information about a customer's precise use of common carrier facilities generally is not disclosed in a facilities application. We expect such disclosure from applicants in cases such as this where the details of the service might have an effect on regulatory classification. Although greater detail about the precise plans later were disclosed to the Commission, initial disclosure would have removed any argument that the public was not properly apprised of the application.

39. In any event, details of the GSAT/USTV proposal were provided to the Commission and placed in the public file. On our own motion, we fully discussed the relationship of the application with our General Docket No. 80–603 and found that grant of GSAT's application was consistent with our DBS policies. Specifically, we noted our policies to keep the fixed and broadcast satellite bands separate were motivated by concerns of disparate power of the two types of satellites and the resultant effect on satellite spacing. We observed (at note 5) that GSAT would utilize a lower power satellite, that we have proposed to reduce spacing at $^{12}/_{14}$ GHz, and that GSAT would not be provided special protection against interference by virtue of the authorization.

40. Finally, notwithstanding our consideration of the DBS aspects of the USTV/GSAT proposal in the *Order*, we have adopted a liberal pleading schedule on reconsideration so that all arguments are fully aired. There were over thirty pleadings submitted on reconsideration, and a variety of appendices attached thereto, which illuminated the issues raised and discussed all aspects of the proceeding in fine detail. Thus, USSB could and all other interested parties, have been fully heard.

Quality of Service

41. We see no merit in petitioner's claim that the public would be ill served by the quality of the program service offered over domestic fixed satellites. USTV has not claimed to offer the same quality of service that would be supplied by satellitees with the technical parameters being developed for planning the DBS service

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be to provide communications services into areas not now directly served by GSAT. Communications to be provided may include television, voice, data and facsimile. The subject transponder capacity is to provide interim facilities necessary to meet customer demand prior to the launch and operation of GSAT's own GSTAR satellite system in 1984.

at 12.2–12.7 GHz at the 1983 RARC. Thus, we see no need to hold USTV to those technical standards.[35] USTV has provided extensive technical analyses of the expected technical quality of its transmissions, and petitioners have not demonstrated any significant technical flaws with USTV's documentation of expected service quality. The only dispute between petitioner and USTV is over the technical standards against which to evaluate this performance. However, USSB and STC cannot impose their technical standards on USTV's service. The USTV ANIK/GSTAR service and USSB/STC DBS service are simply designed to different technical standards. As a practical matter, USTV will meet its objectives and USSB and STC will meet theirs.[36] We have consistently encouraged providers of domestic satellite services to experiment and to tailor the nature and quality of their offerings to customer demands. This is what the parties will be doing, and the consumer will make the ultimate decision of the acceptability of the USTV service. Our primary concern here is to insure that such operations do not lead to increased orbital spacings being required between domestic satellites operating in the 11.7–12.2 GHz band.

42. We therefore see no need at this time to force the USTV service into the DBS mold. GSAT and USTV emphasize that a good portion of their services will be directed to the types of program distribution services traditionally provided over the fixed satellite service facilities. These aspects of the GSAT/USTV undertaking clearly comport with our domestic satellite policies which govern the use of the 11.7–12.2 GHz band. And we find no legitimate public interest reason to prevent the offering of service direct-to-homes. While the band suffers from certain comparative disadvantages with the 12.2–12.7 GHz band, the disadvantages are not so great as to make the USTV/GSAT proposal illusory. To the extent that some aspects of the proposal might appear to take on the characteristics

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[35] DBS planning in preparations for the 1983 RARC is proceeding on the basis of satellites designed from the outset to serve individual homes directly with a high quality signal. Domestic fixed satellites were not originally constructed to provide such service. It was the power difference, resulting from the original design intentions for FSS and DSB, that would lead to inefficient orbit use if both services shared the same band. This fact supported our separate allocation proposals to the 1979 WARC. However, technological advances which allow domestic fixed satellites to deliver television programs to homes, albeit at lower quality and/or with less reliability than true DBS systems, should not be excluded simply because of their lower quality. In these circumstances, we are reluctant to substitute our judgment for that of marketplace forces to determine price, range of service and quality of service that consumers will expect.

[36] This is sufficient to satisfy any concerns we may have established in Associated Press, *supra* note 2. Moreover, we have conditioned our Section 214 grant of GSAT to insure that USTV's service to small antennas does not prejudice our decision in Docket CC 81–704 to narrow spacing between satellites in the $^{12}/_{14}$ GHz bands to 2 °. GSAT represents that USTV's service is compatible with 2 ° spacing.

similar to what others, such as USSB or STC are doing with satellites that are clearly DBS in the 12.2–12.7 GHz band, we are providing flexibility in the course of the implementation of the 1979 WARC by incorporating Footnote 836 in the national table of allocations. Thus, we find that our action approving the GSAT application was fully consistent with all of these policies and proceedings.

Use of Canadian Satellites

43. In our *Order*, we concluded that GSAT's proposal fell within the intent of the 1972 Intergovernmental Agreement between the United States and Canada because an insufficient number of suitable transponders appeared to be available to satisfy USTV's requirements. Since that time, USTV has reduced its requirements to 5 transponders covering the eastern portion of the United States. SBS and other parties at one time claimed that USTV's interim requirements could be satisfied, prior to the availability of the GSTAR satellites, by United States domestic satellites facilities, i.e. the SBS system. Recently, however, SBS informed the Commission[37] that because of its agreement with another entity, it could no longer offer five transponders on one satellite to GSAT. Since SBS is the only U.S. Ku-band satellite carrier currently operating, SBS' statement appears to have removed the number of leased transponders as an issue. We will, however, limit GSAT's Section 214 authorization to the 5 transponders needed to serve its only identified customer for this service.

44. In view of the foregoing, it is hereby certified that the public interest, convenience and necessity will be served by authorizing GSAT to lease capacity on the ANIK-C satellite and constructing and operating the proposed TT&C earth station.

45. IT IS HEREBY ORDERED, that application File No. 000179-DSE-P/L-83 IS GRANTED and GTE Satellite Corporation IS AUTHORIZED to construct and operate a 14/12 GHz transmit/receive Telemetry, Tracking and Command earth station described in the referenced application and associated radio station authorizations. IT IS ALSO ORDERED, that the authorization is effective upon adoption.

46. IT IS FURTHER ORDERED, that GTE Satellite Corporation's Section 214 authorization to lease 10 transponders on the Canadian satellite is reduced to 5 transponders.

47. IT IS FURTHER ORDERED, that the petition for reconsideration filed by United States Satellite Broadcasting Co., Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[37] Letter from SBS, dated May 6, 1983.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

re:

PETITION FOR RECONSIDERATION OF GTE SATELLITE CORPORATION

I strongly support the Commission's action today reaffirming GSAT's authorization to lease transponders from Telsat Canada. The primary controversy in this case has centered around GSAT's customer, USCI, and that company's proposed use of these facilities to provide video programming directly to the home. Petitioners argued that the GSAT/USCI proposal was really an "errant" Direct Broadcast Satellite (DBS) service subject to the Commission's interim rules established for that service.*

In this Order, we have reaffirmed our conclusion that the GSAT/USCI proposal differs substantially from those addressed in the DBS proceeding. The Commission also concluded that USCI's satellite-to-home video service can properly be provided in the fixed satellite service. Finally, the Commission determined that the public interest would not be served by prohibiting USCI from offering such a service in potential competition with prospective DBS service providers.

Long-standing policy considerations underlie these conclusions not the least of which is that the consumer benefits when satellite facilities are utilized to the maximum extent possible. To ensure these benefits, service providers leasing satellite capacity must be free to use those facilities in innovative and productive ways. With particular respect to USCI's proposal, nothing in the Commission's rules prohibits the provision of television service to individual homes in the domestic fixed satellite service. From a public interest standpoint, USCI's proposal offers a new manner of video distribution adding variety and a corresponding boost in consumer choice.

This gain to consumers would be frustrated by prohibiting USCI's use of fixed satellites to provide home video service in potential competition with DBS. Since the inception of domestic satellite service, this Commission's policies have been directed towards maximizing entry and maintaining a flexible regulatory approach for the very purpose of promoting competitive and innovative service offerings.** Limiting the use of fixed satellites would needlessly thwart this goal with no corresponding benefits to the public.

It is interesting to note in this regard that USCI's early entry into the satellite-to-home video market has prompted other companies to do the same. In an effort to gain an early foothold in the market,

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* *See*, Direct Broadcast Satellite Services, 90 FCC 2d 676 (1982).

** Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970), 35 FCC 2d 844 (1972), *recon. in part*, 38 FCC 2d 665 (1972), (Domsat I, II and III).

Comsat has announced that its subsidiary, Satellite Television Corporation (STC), will begin offering low-powered satellite-to-home service next year rather than waiting for its own DBS satellite. Another company, Inter-American Satellite Television, has also announced similar plans. It is clear from these proposed service offerings that the race to provide home entertainment services via satellite has begun. Additional entrants would not be surprising. At the same time, technological advances in order to provide quality service can be expected.

Not only will the public benefit from this flurry of competitive activity in this market but the public will also decide which of these service providers will survive—those utilizing existing lower powered satellites or those utilizing high powered DBS satellites. Which transmission medium is best suited to providing the quality of service necessary to maintain a customer base is a question which need not be resolved by this Commission. Rather, given the competitiveness of the marketplace, consumer preference, not artificial regulatory restraint, must be the means by which any particular service offering prevails.

CONCURRING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Application of GTE Satellite Corporation to Lease and Operate Transponder Capacity from Telesat Canada

When this matter appeared on our agenda, I voiced my concern that favorable action on GTE's application might adversely affect the United States' ability to obtain necessary spectrum and orbital slots at the 1983 Regional Administrative Radio Conference. A substantial body of informed opinion responded that the decision to allow home video service in the 11.7–12.2 GHz (FSS) spectrum band would not prejudice our position at this conference. I felt I had little choice but to defer to the experts. However, my concern was not entirely assuaged and, accordingly, I concur.

I would also like to point out that the Order's hypertechnical holding that this service is not DBS "for purposes of the Commission's rules" does not obscure the inescapable fact that USTV's direct-to-home satellite television service and the direct-to-home service that will later be offered in the 12.2–12.7 GHz (BSS) band are functionally equivalent.[1] Therefore, substantive regulations applicable to home video service in the BSS must—and will—apply when that service is provided in the FSS.[2] That approach may be of limited consequence during the "experimental" phase of this new service, but its impact will likely be far more distinct when the Commission adopts final regulations governing direct-to-home satellite television service.

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[1] That view is widely shared by the public. *See, e.g.*, "Lowering Skies for the Satellite Business," *Fortune Magazine*, p. 148 (Dec. 13, 1982); "Firm to Start Satellite TV Service by Fall," *Washington Post*, p. C11 (Feb. 3, 1983).

Finally, I would have preferred a slightly more explicit discussion in this Order of the policy judgments involved here. During the pendency of the proceeding to establish interim regulatory policies for DBS, direct-to-home satellite service was not considered to be commercially viable below 12.2–12.7 GHz for largely technical reasons. As a result, the Commission did not squarely address whether such service was permissible elsewhere in the spectrum and, if so, under what conditions.[3]

Apparently, technology has since advanced, and entrepreneurs now believe that direct-to-home satellite television service is commercially viable below 12.2 GHz. That being the case, and given that non-technical substantive regulations applicable to such activity in the BSS will be applied, there is no compelling reason to forestall the introduction of this service to the public.[4]

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[2] *See* Memorandum Opinion, Order and Authorization at note 31. While the GSAT/USTV proposal is consistent with regulatory classification guidelines announced in the DBS Report and Order, I am not unsympathetic to the regulatory concerns raised by USSB in its petition for oral argument as to common carrier DBS licensees and their programmer customers; however, I agree that those issues are better suited to rulemaking than adjudication.

[3] In considering whether to accept the two-party DBS proposal filed by Advanced Westar and Focus, we did express "reservations about the use of the 11.7–12.2 GHz band for DBS" because of the proposal's apparent inconsistency with the United States' position at WARC-79. *See* Memorandum Opinion and Order, FCC 82-498, released December 3, 1982. Because the Focus application was dismissed and Western Union ultimately withdrew its application to modify Advanced Westar's authorization, this is the Commission's first opportunity to pass upon an application proposing use of 11.7–12.2 GHz for direct-to-home satellite television service.

[4] Mixed spectrum use can present spectrum planning and management problems; nevertheless, I am persuaded that it is desirable, for now, to continue a flexible approach to the kinds of services that can be transmitted over domestic satellites.

Common Carrier, Lease Channel Service
Instructional Television Fixed Service (ITFS)
Multipoint Distribution Service (MDS)
Rules, Amendment of

Rule changes reallocate eight channels from the Instructional Television Fixed Service (ITFS) to the Multipoint Distribution Service (MDS) to permit the operation of multichannel MDS systems. Existing ITFS licensees, permittees and applicants are "grandfathered". ITFS licensees may lease excess channel capacity on facilities for other communication services.
–Instructional TV Fixed Service
GEN. Docket No. 80–112

FCC 83–243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service.	General Docket No. 80–112
Inquiry into the development of regulatory policy with regard to future service offerings and expected growth in the Multipoint Distribution Service and Private Operational Fixed Microwave Service, and into the development of provisions of the Commission's Rules and Regulations in regard to the compatibility of the operation of satellite services with other services authorized to operate in the 2500–2690 MHz band.	
Amendment of Part 21 of the Commission's Rules to Permit the Use of Alternative Procedures in Choosing Applicants for Radio Authorzations in the Multipoint Distribution Service.	CC Docket No. 80–116

Petition for Rulemaking filed by Microband Corporation of America to amend Section 21.901 of the Commission's Rules and Regulations.	RM-3540
Application of Channel View Inc. for an Experimental (Developmental) station at Salt Lake City.	File No. 8938-ED-MR-82
Application of Contemporary Communications Corporation for Developmental Authorizations to Establish Multi-Channel Systems (MCS) in New York, Chicago, Los Angeles, St. Louis and Philadelphia.	File No. BPEX-820802KH

Report and Order

(Adopted May 26, 1983; Released July 15, 1983)

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Fogarty not participating; Commissioner Jones concurring in the result; Commissioner Dawson concurring and issuing a statement; Commissioner Rivera concurring in part, dissenting in part and issuing a statement; Commissioner Sharp absent.

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I. *Introduction and Summary*

1. On May 2, 1980 the Commission released a *Notice of Inquiry and Proposed Rulemaking and Order* in General Docket 80–112, 45 Fed. Reg. 29,323 (1980) (hereinafter *Notice*), in which it proposed to reallocate the 2500–2690 MHz band to provide additional channels for the Multipoint Distribution Service (MDS) and the Private Operational Fixed Microwave Service (OFS) and to reduce the number of channels available for the Instructional Television Fixed Service (ITFS). The *Notice* referred to these services as "area wide microwave distribution services" (AMDS) and inquired into their future prospects and anticipated growth.

2. Approximately 200 entities submitted comments and reply comments in response to the *Notice*. On February 10, 1982 Microband Corporation of America (Microband) submitted a 3 volume proposal to create what it termed a "wireless cable system" using frequencies in the 2500–2690 MHz band. Proposal of Microband Corporation of America, General Dockets 80–112 and 80–113 (February 10, 1982) (hereinafter Microband Proposal). Microband simultaneously submitted a "Motion for Acceptance of Additional Comments" requesting that its proposal be accepted as additional comments in this proceeding and in the companion proceeding in General Docket 80–113.[1] On April 20, 1982 the Chief of the Common Carrier Bureau, acting pursuant to delegated authority, issued an order accepting the Microband Proposal as additional comments in these dockets and inviting interested parties to submit reply comments. *Order Accepting Additional Comments*, 47 Fed. Reg. 18,932 (1982). Approximately 190 reply comments were received in response to the Microband proposal.[2]

3. On August 2, 1982 Contemporary Communications Corporation (CCC) submitted a set of applications in which it requested

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[1] *Notice of Inquiry and Proposed Rulemaking* in Gen. Docket No. 80–113, FCC 80–137, 45 Fed. Reg. 29,350 (April, 1980). In that proceeding the Commission proposed to revise certain technical rules applicable to the Multipoint Distribution Service, operating in the 2150–2162 MHz band, and inquired into the feasibility of applying the proposed rules to 2500–2690 MHz band.

[2] A list of all those submitting comments in this proceeding is contained in Appendix A. This list includes all comments both formal and informal. Comments that were not filed in a timely manner are hereby accepted as informal comments. Some entities submitted more than one set of comments and hence are listed more than once.

developmental authority to construct what it termed Multi-Channel Systems (MCS) in New York, Philadelphia, Chicago, St. Louis and Los Angeles. The CCC applications are similar in some respect to the Microband proposal and to the experimental authorization we granted to Channel View in Salt Lake City (see note 24, *infra*). They are different in that Microband filed additional comments in response to the *Notice* while Channel View requested authority to construct experimental facilities in Salt Lake City. CCC specifically requested authority to conduct market trials in five cities. It made two basic claims in support of its MCS proposal. First, it claimed that the Commission would receive valuable information concerning certain technical aspects of multichannel operation such as adjacent channel operation and propagation characteristics at ITFS frequencies. Second, CCC claimed the proposed five market developmental operation would provide the industry and the Commission with needed information concerning what CCC referred to as the "intermixture of programming and pricing" for multichannel systems. While we agree that such additional information might be useful, we do not believe that it would be in the public interest to delay introduction of multichannel service while CCC conducts its developmental program. For this reason, we are denying CCC's developmental applications.

4. Our review of the extensive record in this proceeding and our experience with these and other services leads us to the conclusion that the public interest would best be served by a limited reallocation of spectrum from the ITFS to the MDS. There are a substantial number of unused ITFS channels in many areas of the country (several states have no ITFS licensees), and it appears that, while some growth in the ITFS service will occur, this growth is unlikely to exhaust the supply of channels. The market studies presented in this proceeding appear to demonstrate a substantial demand for multichannel MDS. Creating a multichannel MDS service offers a number of public interest benefits including expanding consumer choice, creating lower cost equipment, and providing competition to other services (such as cable television) which should lead both services to construct more quickly and provide better service at lower cost. Accordingly, we herein reallocate the E and F groups to MDS. This will nominally permit us to authorize two systems in each area. Each system would have four channels, which appears to be a sufficient number to satisfy the perceived customer demand. Importantly, four channel systems are consistent with the existing channel plans for this band, and preserving the existing group design should minimize disruption to ITFS operations in the band. Our choice of the E and F groups is prompted by our desire to minimize disruption to the ITFS and other services (such as the potential use of the band by satellite systems). To further minimize disruption to existing ITFS operations, we are "grandfathering" ITFS permittees, licensees and

applicants in the E and F groups. A potential MDS entrant will have to demonstrate to the Commission prior to commencing operation that grandfathered ITFS entities will not suffer harmful interference as a result of the operation of the MDS station. We are by a further notice in this docket proposing to select licensees by lottery. We also are permitting ITFS licensees to lease excess capacity on their existing systems. We believe these actions will result in a more intensive use of the spectrum and represent an appropriate balance of the conflicting public policy interests presented.

II. *Background*

A. *MDS*

5. The origin of this service may be traced to July 31, 1970, when the Commission removed the 3.5 MHz bandwidth limitation that had been imposed on stations using the 2150–2160 MHz band. *Amendment of Part 21.703(g)*, 47 FCC 2d 957 (1970). This action precipitated a number of applications that proposed to use this spectrum for the common carrier distribution of television programming from a central location to numerous points selected by the common carriers' subscribers. At that time, this spectrum was administered as a part of the Point-to-Point Microwave Radio Service. The Commission subsequently concluded the point-to-point rules were not appropriate for administering what had become a point-to-multipoint service and hence proposed to establish a new common carrier service to be known as the Multipoint Distribution Service. *Multipoint Distribution Service*, 34 FCC 2d 719 (1972). In January of 1974 the Commission adopted rules to govern the service. *Multipoint Distribution Service*, 45 FCC 2d 616 (1974), *recon. denied*, 57 FCC 2d 301 (1975). These rules provide for two 6 MHz channels in 50 of the largest metropolitan areas. The channels are designated channel 1 (2150–2156 MHz) and channel 2 (2156–2162 MHz). In all other areas of the country, where the 2160–2162 MHz band is used for rural telephone service, the second channel bandwidth is limited to 4 MHz (2156–2160 MHz) and is designated channel 2A. This channel cannot be used to transmit a standard television signal, which requires 6 MHz of spectrum.

6. The majority of the transmission time now leased by MDS common carrier licensees is used by their customers to transmit premium television[3] to hotels, motels, apartment complexes and single family residences.

B. *The 2500–2690 MHz Band*

7. This band is divided into thirty-one 6 MHz channels and

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[3] The term premium television refers to television entertainment programming for which the viewer pays a fee and that is not supported by advertising revenues.

thirty-two 125 KHz response channels. Twenty-eight of the 6 MHz channels and the same number of response channels are allocated to the ITFS. 47 C.F.R. §§ 74.902, 74.939. The remaining three 6 MHz channels and three response channels are allocated to the OFS. 47 C.F.R. § 94.65(f). The remaining 125 KHz response channel is not assigned to either service.

C. *ITFS*

8. The ITFS was created by a Report and Order in Docket No. 14744 adopted by the Commission in 1963. *Educational Television*, 39 FCC 846 (1963), *recons. denied*, 39 FCC 873 (1964) (hereinafter ETV). By this action the Commission allowed the newly created ITFS to use the 2500–2690 band on a shared basis with the existing OFS stations with the proviso that no new OFS stations be authorized in the band for 3 years except for modifications or expansions of existing stations, or for the use of the band by OFS eligible entities for television transmission in accord with ITFS technical standards. Prior to this action the band had been allocated to the Fixed Service for shared use by Operational Fixed Stations and International Control Stations. In taking this action, the Commission stated its intention to observe the amount of use of these channels by educators and "[to] determine what course of action should be taken to encourage the fullest development of the 2500–2690 Mc/s band . . ." at the end of the three year period. *Id.* at 851.

9. The Commission stated in 1963 that the purpose of the service was to transmit:

> instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students. Systems which have been licensed for this purpose may also be used for other incidental purposes among which are the transmission of cultural material and entertainment to these same receiving locations; the transmission of special training material to selected receiving locations outside the school system such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, commercial and industrial establishments etc.; the transmission of special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use; and to perform other related services directly concerned with formal or informal instruction and training. When not being used for such purposes, the facilities licensed under these rules may be used for handling administrative traffic of the licensee such as the transmission of reports and assignments, conferences with personnel, etc. Individual stations or complete systems will not be licensed solely for handling administrative traffic.

ETV, 39 FCC at 853. The Commission further stated that this service could also be used for the relay of such material. *Id.* These service limitations are contained in Section 74.931 of the rules, 47 C.F.R. § 74.931. Elsewhere in this Order, we are amending Section 74.931 to allow ITFS licensees to lease any excess capacity available on their channels (paragraphs 110–127, *infra*). In addition, we are today opening another proceeding in which we propose, *inter alia*, to broaden permissible uses of the ITFS channels.

10. The Commission limited the eligibility to hold an ITFS license to accredited institutions providing a program of formal education and to those eligible to hold a non-commercial educational TV license. *ETV*, 39 FCC at 853–854. The eligibility standards for the ITFS are contained in Section 74.932 of the rules, 47 C.F.R. § 74.932.

11. The Commission did not consider the use of this band again until 1971 when it adopted the Second Report and Order in Docket No. 14744. *Instructional Television*, 30 FCC 2d 197 (1971) (hereinafter *ITV*). In that proceeding the Commission made the present exclusive allocation of 28 channels to the ITFS.

D. *OFS*

12. As noted above, prior to 1963 the 2500–2690 MHz band was allocated to what was then known as the Fixed Service. When the Commission established the ITFS it allowed the newly created service to use this band and limited the Fixed Service use of the band for three years to expansion or modification of existing stations, or the establishment of new television transmission stations. The traditional Fixed Service use of this band was not for television transmission but rather was for more traditional private microwave communications uses such as multichannel voice and data circuits. The Commission recognized that there were certain traditional OFS users such as municipalities that might have television transmission needs and, although it declined to allow such entities to apply as ITFS applicants, it did invite them to apply for facilities under the rules governing the public safety radio services. *ETV*, 39 FCC at 854. When the Second Report and Order was adopted in Docket No. 14744 the Commission determined that the video transmission needs of municipalities and other entities eligible for Fixed Service licenses could be met by a 3 channel allocation. It based this conclusion on the fact that only 16 stations had been licensed to such entities. *ETV*, 39 FCC at 200. The Commission further suballocated these channels to the Public Safety Service on a primary basis and to all other fixed service eligibles on a secondary basis.[4] This preference was deleted in 1975 when the Commission created what is now known as the Private Operational Fixed Microwave Service. *Private Operational Fixed Microwave Service*, 52 FCC 2d 894, 900 (1975). That action made the three channels available to all eligible entities on an equal basis.

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[4] When the Commission allowed the newly created ITFS to use the 2500–2690 MHz band, the move was resisted by the traditional users of this band on the basis that what was being created was a "quasi-broadcast" service and that other portions of the spectrum were more suitable for the new service. It was further argued that the decision could result in the permanent exclusion of operational fixed users from the band. ETV, *supra*, at 874.

13. In 1973 the Commission authorized Columbia Pictures to use what was then known as Business Radio Service spectrum for the distribution of "feature motion picture films" and associated promotional material to "guests" in "hotels". *Columbia Pictures Industries, Inc.*, 39 FCC 2d 411, 413 (1973). In making this grant, the Commission questioned whether this was an appropriate use of the Business Radio Service spectrum and as a result specifically conditioned the grant on the result of the inquiry and rulemaking proceeding in General Docket 19671[5] that was initiated simultaneously with the grant. *Id.* at 412, n.1.

14. In 1981 the Commission issued the First Report and Order in Docket No. 19671. *Use of Private Microwave Frequencies*, 86 FCC 2d 299 (1981), *stay denied sub nom. Operational Fixed Microwave Services*, 87 FCC 2d 768 (1981). After considering the comments submitted in response to its inquiry, the Commission concluded "that it is in the public interest to allow the use of the OFS frequencies for distribution purposes and, more generally, to restrict as little as possible alternative uses of the spectrum." *Id.* at 306. In allowing this use of the OFS spectrum, the Commission noted that it was only "authorizing a licensee to distribute products and services in which the licensee has an ownership or other interest to the licensee's own customers or subscribers." *Id.* at 309. The Commission also specifically declined to authorize a licensee of "point-to-multipoint" microwave facilities in the OFS to transmit any video programming directly to apartment houses, MATV systems or private homes pending resolution of the question of whether the similarity of such services to services such as subscription television requires that they be similarly regulated. *Id.* at 311.

15. In the *Notice* the Commission concluded that if it were to authorize the use of the OFS to distribute entertainment programming to subscribers there would be an increase in demand for the OFS channels in the 2500–2690 MHz band. *Notice, supra* at para 37. Since the adoption of the First Report and Order in Docket 19671, we have received more than 1,400 applications from 60 different entities seeking to provide video entertainment services on the 3 OFS channels. In a separate action, we are today excluding the distribution of video entertainment material on OFS frequencies lower than 21.2 GHz for two years.[6] 47 C.F.R. §§ 94.9(a)(1), 94.9(b)(2)(iii).

16. Because we have decided not to allow the distribution of video entertainment material on the OFS channels in the 2500–2690 MHz band at this time, we have concluded that there is no reason to provide additional spectrum for that service in this band. Thus, we will not consider OFS further in this order.

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[5] *Transmitting Program Material to Hotels*, 39 FCC 2d 527 (1973).

[6] *Memorandum Opinion and Order.*, Docket No. 19671, FCC 83-245, released June 23, 1983.

III. *Discussion*

A. *Spectrum Utilization*

17. The Commission based its proposals to reallocate the 2500–2690 MHz band on three tentative conclusions. First, it concluded that the demand for MDS service exceeded the supply. This conclusion was based primarily on the observation that there were a large number of situations in which more than one party had filed for the same channel and that many applicants were proposing to "short space" stations. *Notice*, at paras. 19–23. Second, it was concluded that the 2500–2690 MHz band was under-utilized. *Id.* at para. 28. Finally, it was concluded that if the existing restrictions on the use of the OFS channels were removed there would be increased demand for these channels. *Id.* at para. 57. The Commission recognized a need to develop a better record concerning the facts on which these tentative conclusions were based. For this reason a series of questions was included in the *Notice* to elicit the kind of information needed to make a reasoned decision on the issues before the Commission. *Id.* at para. 52 and Appendix C.

1. *ITFS Spectrum Use*

18. Very few of the comments filed in this proceeding contained quantative information concerning the use of the ITFS spectrum. Most of the comments filed by the ITFS community expressed the view that the spectrum should not be reallocated and supported this proposition with public policy arguments rather than spectrum utilization data. The policy arguments raised in these comments are discussed below. *See* paras. 52–64 *infra*.

19. The most extensive analysis of current ITFS spectrum use was submitted by the Center for Excellence (Centex) of Williamsburg, Virginia.[7] The Centex data showed that as of August 1980 there were 82 operating ITFS stations using 492 channels. The 82 systems were spread over 27 states. California had 15 operating systems and New York had 11 operating systems. Of the 27 states that had operating systems 13 had only one system operating. The Centex analysis also contained data on ITFS channel use in the top 50 markets as defined by the 1979 Arbitron population book. These data showed that in only one market, Los Angeles, were all the ITFS channels being used. In fact, the data showed that the Los Angeles market had 40 channels in use with applications pending for 8 more channels. The data also showed heavy use in several other markets.

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[7] The Center for Excellence, Inc. (Centex) "is a non-profit Virginia Corporation engaged in educational, medical and social services delivery, research and research development." Comments of Center for Excellence, Inc. General Docket No. 80–112, at 1 (September 26, 1980). In 1976 Centex began a study program that included a "a biennial study of the use of ITFS across the Nation". This study was updated in 1980. *Id.* Attachment C, 7–8. This data was referred to by several commenters from the ITFS community and many included portions of it with their comments.

New York, Chicago, San Francisco, Boston, Cleveland, Dallas, Ft. Worth, San Diego, and Milwaukee all had 10 or more channels in use. On the other hand Pittsburgh, St. Louis, Seattle, Baltimore, Hartford, and many other large cities had no current channel use. The total number of channels being used in the top 50 Arbitron markets was 319. Of these, 232 were operating in the 9 cities listed above as having more than 10 channels operating. Comments of Center for Excellence, Inc., General Docket 80-112, Attachment C, (September 26, 1980) (hereinafter Centex comments).

20. Microband included as part of its proposal an "ITFS Spectrum Utilization Study." In making this study, Microband claimed that it had been unable to find a "single authoritative source or data base identifying the location and ownership of all ITFS channel licenses." Microband Proposal, *supra*, Appendix H, 1. Microband produced its analysis on the basis of data from: "(a) the FCC non-Government Frequency List, (b) TV Fact Book, (c) Compucon and (d) copies of licenses obtained through Downtown Copy Center." *Id.*[8,9]

21. The Microband survey was different from the Centex survey in several respects. The Centex survey was a compilation of existing and proposed licensees by channel group on a city-by-city and a state-by-state basis. The Microband survey listed on a city-by-city basis for each channel whether there was an existing licensee either within 25 or 50 miles of the coordinates of the channel 1 MDS station.[10] This methodology could have resulted in Microband showing a channel in use where Centex showed it vacant or vice-versa. It is more likely, however, that Microband would show a channel as being occupied

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[8] The Downtown Copy Center is a private organization that contracts with the Commission to reproduce our public records and sell the reproductions to the public.

[9] The 50 cities that Microband submitted data for were not the same cities that were the subject of the Centex survey. Centex surveyed the 50 Arbitron markets, whereas Microband surveyed the 50 cities listed in Section 21.901 of the Rules, 47 C.F.R. § 21.901. The two surveys contain 40 common cities. The cities in the Microband survey that were not in the Centex survey were Akron, Anaheim, Gary, Rochester, San Antonio, San Bernadino, San Jose, Syracuse and Toledo. Ft. Worth was considered separately from Dallas in the Microband Survey. The two were consolidated in the Centex Survey. The Cities in the Centex survey that were not surveyed by Microband were Nashville, Charlotte, Greenville, Grand Rapids, Orlando/Daytona Beach, Charleston, Raleigh, Harrisburg, Salt Lake, and Wilkes Barre.

[10] Microband conducted its surveys at 25 and 50 miles because it is generally assumed that if cochannel MDS stations are located more than 50 miles apart, there is unlikely to be harmful cochannel interference. It is also assumed that if cochannel stations are closer than 25 miles that harmful interference will occur. When the separation is between 25 and 50 miles, a detailed interference study must be done to assess the possibility that harmful cochannel interference will occur. Thus, if there are cochannel stations within 25 miles of a proposed transmitter location, the channel is deemed to be in use and not available. If there is no cochannel station within 50 of the proposed transmitter location, the channel is likely to be available.

that Centex showed to be vacant because the Microband data was based on a 50 mile spacing and was on a channel by channel basis as opposed to the channel group basis used by Centex. Thus, the Microband data represents a finer grain analysis of channel use than the Centex study. On the basis of its study, Microband concluded that within 25 miles of the location of the MDS channel 1 station 75% of the ITFS channels are not licensed. It also showed that in 38 of the 50 markets surveyed less than half the channels were licensed.

22. The Commission staff conducted its own spectrum utilization studies based on all stations licensed as of November 1, 1982.[11] The staff study showed that there were 124 licensed ITFS operators using 808 channels. These operators were distributed over 29 states and the District of Columbia. More than half of the licensed channels were located within 25 miles of a major metropolitan area. There were 21 states with no ITFS licensees, 9 states with 1 licensee and 5 states with 2 licensees. On the other hand, California had 22 licensees using 167 channels, New York had 13 licensees using 76 channels, Florida had 12 licensees using 22 channels and Pennsylvania had 8 licensees using 53 channels.

23. The Commission staff also did a computer analysis of the ITFS channel use in the same markets Microband used in its study. The staff analysis was only done for 25 miles. That is, the analysis only considered those ITFS stations located within 25 miles of the MDS station coordinates. The results of the staff analysis were not identical to the results submitted by Microband; however, they were similar. The staff analysis showed more ITFS stations than the Microband study because the staff study was done later and hence included more recently licensed ITFS stations. It should also be noted that the staff analysis also included stations for which construction permits had been granted but which had not yet been licensed. Neither study included pending applications.

24. In its comments on the Microband proposal, the Corporation for Public Broadcasting (CPB) pointed out that the issue of adjacent channel operation must be considered before any conclusions can be drawn concerning spectrum use or availability. The 2500–2690 MHz spectrum is divided in 7 groups of four 6 MHz channels and 1 group of three 6 MHz channels. The channels within each group are not adjacent; they are alternated with those of another group to provide a 6 MHz guard band between the channels within each group. Traditionally ITFS licensees have been granted up to 4 channels in a single group. The operation on these channels is protected from

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[11] This survey was done using the Commission's ITFS station card file that is readily available to the public. This file includes all licensed ITFS stations and all stations for which a construction permit has been issued. It is possible that some of the stations included are no longer operating and it is also possible that some stations had not been indexed; however, we believe that it represents a generally accurate picture of ITFS channel use. This study has been made a part of the record in this proceeding.

adjacent channel interference where feasible by not licensing the guard band channel in the same area. This means that if the A group channels (A1, A2, A3, A4) were licensed in a given area, the B group channels that serve as the guard band channels for the A group channels (B1, B2, B3, B4) would not be licensed in the same area. For these reasons, CPB suggests that in analyzing channel use the adjacent channels should also be considered occupied.[12] CPB redid the analysis submitted by Microband on the basis that if a cochannel were licensed within 50 miles of a given set of coordinates or an adjacent channel were licensed within 25 miles of the same coordinates, the channel was in use in that area. CPB also included all channels applied for as well as those licensed in its analysis. The CPB analysis indicates much greater channel use in the 50 metropolitan areas than either the Microband survey or the Commission staff analysis. The CPB analysis does, however, indicate that in 24 of the 50 cities surveyed there are 8 or more adjacent channels available. Further Comments of the Corporation for Public Broadcasting, Engineering Statement, 8, 9 and Figure 11 (July 2, 1982).

25. Although the studies submitted and the study made by the Commission's staff did not produce identical results, the results are similar enough to allow certain conclusions to be drawn. First, in several large metropolitan areas the ITFS channels are heavily licensed. On the other hand, there are several large metropolitan areas in which there are no licensed ITFS stations. Finally, there is little ITFS spectrum in use outside the large metropolitan areas. We believe these conclusions tend to confirm the tentative findings made in the *Notice* that while the ITFS channels are heavily licensed in some metropolitan areas, they are not heavily licensed in other metropolitan areas. Further, neither CPB nor any other commenter offered any evidence that the ITFS channels are heavily licensed outside the major metropolitan areas.

2. *MDS Spectrum Use*

26. As of December 22, 1982 there were 234 licensed MDS channel 1 stations. These licensees were distributed over 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Construction permits had been granted for an additional 114 stations. There were 194 pending channel 1 applications. Of these, 172 were mutually exclusive with at least 1 other application. There were 5 licensed channel 2 stations. Construction permits had been granted for 3 additional stations. There were 143 pending applications for channel 2 licenses in 42 cities. All of these applications were mutually exclusive with at least 1 other application. There were 3 licensed channel 2A stations. Construction permits had been granted

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[12] We do not agree that use of one channel group necessarily precludes use of the interleaved channel group. See paras. 65–78, *infra*.

for 16 additional channel 2A stations. In addition, there were 9 pending channel 2A applications for 4 cities. Of these applications, 8 were mutually exclusive with at least one other application.

27. The Commission does not keep records of whether licensed MDS stations are actually operating. Since MDS is a common carrier service, whether a station is on the air at a given time is not determined by the licensee but rather by whether a customer has purchased time from the licensee. At least one private concern, Paul Kagan Associates, Inc., collects such data. According to its latest report, as of August 3, 1982, there were 82 MDS stations operating and an additional 120 stations licensed that had not yet obtained a customer. "Statistical Progress of MDS", *The MDS Data Book*, 64 (October 1982).

28. MDS channel 1 licenses have been granted in 49 of the 50 markets listed in Section 21.901(c) of the Rules, 47 C.F.R. § 21.901(c). A construction permit has been granted for the remaining city. Of the 49 stations licensed, 43 have customers. Outside of these markets there were, as of the date of the Kagan survey, 152 stations licensed. Of these 39 had customers. On the basis of these facts, it can be concluded that the MDS channel 1 is heavily used in the larger metropolitan areas but less used outside these areas.

29. All the channel 2 applications that are not mutually exclusive have been granted. As of December 12, 1982 five stations had been licensed and construction permits had been granted for three additional cities. Only one of these channels has a customer. As was pointed out in the *Notice*, there are certain technical problems that limit the simultaneous use of channel 1 and channel 2 in the same area. The nature of the downconversion equipment used in MDS is such that if different operators are using channel 1 and channel 2, the channel 1 subscribers will be able to receive the channel 2 programming and the channel 2 subscribers will be able to receive the channel 1 programming. Scrambling of both signals would negate this problem, but it is expensive to add scrambling to existing MDS systems. This means that if we were to authorize a channel 2 station in an area that already has a channel 1 station delivering unscrambled programming and the channel 2 station offered scrambled service, the customers of the channel 2 operator could receive both the scrambled channel 2 programming and the unscrambled channel 1 programming. There is a channel 1 station authorized in every locale that has a channel 2 available. Furthermore, because channel 1 and channel 2 have no guard band between them, it is possible that noncolocated channel 1 and channel 2 transmitters could cause unacceptable adjacent channel interference.

30. These factors have contributed to the light use of MDS channel 2. In one city, Phoenix, Arizona, these problems have been overcome. There, Microband is the licensee of channel 1 and

Contemporary Communications Corporation is the licensee of channel 2. American Cable Television is the subscriber of both Microband and Contemporary and programs both channels and has a common set of customers receiving two-channel service.

3. *Projected ITFS Growth*

31. One of the most controversial issues raised in this proceeding concerns the projected ITFS growth. In the *Notice*, the Commission concluded that there are reasons to expect some growth in the demand for ITFS channels, but not such a significant amount that most vacant channels could be expected to be filled. Several commenters from the ITFS community took issue with these conclusions. The comments submitted by the University of Maryland were typical. It claimed that the Commission's conclusion was a "vast under estimation of future ITFS demand." Comments of the University of Maryland, General Docket 80–112, at 3, (September 26, 1980). Those commenting on this issue gave several reasons why they believed the future demand for ITFS channels was much greater than the Commission envisioned.

32. The most commonly made argument concerned availability of funding. Many commenters pointed out that ITFS growth took place without any federal fundiong until the Public Telecommunications Financing Act of 1978, 92 STAT. 2405 (1978) (47 U.S.C. §§ 390–399), authorized. The National Telecommunications and Information Administration (NTIA) to make funds available for ITFS facilities. The NTIA has informed us that in 1979 $1,130,000 was made available for 4 ITFS systems. In 1980 $211,937 was made available for 3 systems; in 1981 $815,260 was made available for 4 systems and in 1982 $570,485 was made available for 4 systems. Thus, NTIA records show that since ITFS has become eligible to receive such funds 15 ITFS systems have received a total of $2,727,682.[13]

33. Other commenters have stressed that the increased use of ITFS to deliver graduate level engineering, scientific and business training directly into the work places of those needing such training will result in accelerated demand for ITFS channels. Typical of the systems referred to are those operated by Stanford University and the Illinois Institute of Technology. Stanford operates a 4 channel ITFS system known as the Stanford Instructional Television Network that is used to transmit graduate level engineering courses and continuing education courses to approximately 20 high technology companies located in California's "Silicon Valley". In its comments, Stanford indicated that it will likely need more channels in the future to satisfy the increased demand for this type of educational

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[13] This information was furnished by the Policy Branch of the Office of Policy Coordination and Management of the National Telecommunications and Information Agency.

service. Comments of the Leland Stanford Junior University, General Docket 80–112, Attachment B (September 26, 1980).

34. The Illinois Institute of Technology (IIT) operates a 4 channel ITFS system known as Interactive Instructional Television (IIT/V) that is used to provide graduate level engineering education to over "1200 professional engineers, scientists, and managers annually in the greater Chicago area." Comments of the Illinois Institute of Technology relative to Microband Proposal, Docket 80–112 and 80–113, at 2 (July 2, 1982). In its comments, IIT presented data that indicated the level of enrollment in its program has risen constantly from approximately 100 students per semester in 1976 to approximately 550 students per semester in 1980. (Comments of Illinois Institute of Technology, Docket 80–112, at 8 (September 26, 1980).

35. In some states graduate level and other post secondary instructional television is handled on a state-wide basis by a single entity. For example in Indiana, the Indiana General Assembly established the Indiana Higher Education Telecommunications System (IHETS) to provide for the development of telecommunications systems to meet the needs of public and private post secondary institutions in Indiana. IHETS operates 23 ITFS stations in sixteen Indiana cities using 28 ITFS channels.[14] IHETS intends to add three additional channels to this system in the near future. In the longer term, IHETS sees the need for 19 more channels in Indiana. These stations are used to distribute medical, engineering, and other forms of post secondary education throughout the state of Indiana. Comments in Opposition to Microband Proposal, General Dockets 80–112 and 80–113, James R. Potter, Indiana Higher Education Telecommunications System (July 8, 1982). The IHETS plan is typical of State wide plans to use the ITFS channels. Other states have similar systems either operating or planned.

36. Less comment was received on the future growth in the use of the ITFS channels by elementary schools, junior high schools, and high schools. Dr. Gerald A. Rosander, County Superintendent of Schools, Department of Education, San Diego County, submitted extensive comments showing that virtually all the ITFS channels are used in San Diego. Much of this use is for primary, junior high, and high school education. Comments were received from most of the school districts in San Diego County articulating the value of ITFS delivered programming at these educational levels. Comments expressing the same view were also submitted by several teachers from San Diego County Schools. Thus, while very little comment was

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[14] It is useful to note that IHETS provides these 28 channels of service using only 12 different ITFS channels. Furthermore, it does not use more than 4 channels in any city. It uses 4 channels in one city, 3 channels in another city, 2 channels in six cities, and 1 channel in nine cities. Of the 12 channels used, channel A1, B1, and D1 are used 4 times, channels A2 and G2 are used 3 times, channels C1, D2, and E1 are used twice and channels B2, E2, F1 and F2 are used once.

received on the projected growth in the use of ITFS for the delivery of educational programming at this level it is possible that if other school systems followed the lead of San Diego County there would be increased demand for ITFS channels by such secondary school systems.

37. Some comments suggested, on the other hand, that the future growth of ITFS may be limited at this time by what was referred to in the comments submitted by the National Education Association and others as "the proposition 13 mentality". Comments of the National Education Association, Docket 80–113, Appendix A, at 2 (September 30, 1980). These commenters note that when the amount of money available for public schools is being reduced by taxpayers, expenses for educational technologies such as ITFS are usually among the first to be reduced or eliminated. NEA also pointed out that there is a general reluctance on the part of educators to use new technologies. It stated that "many teachers and administrators tend to view educational innovations as fads that will pass if they are ignored." *Id.*

38. Another commenter, the United States Catholic Conference (USCC), indicated that when the Catholic Church institutes its nationwide satellite network, to be known as the Catholic Telecommunication Network of America, local dioceses will use ITFS facilities to connect the satellite earth stations with the end user of the communication service. It is estimated that at least 700 and perhaps as many as 1,050 ITFS channels may be required to fill this need. Comments of Department of Communications, United States Catholic Conference, General Dockets 80–112 and 80–113, 3 (July 2, 1982). The services to be offered on these channels are described as:

> (a) Church-related communications capabilities and (b) community-related uses of the system. Among the Church-related communication capabilities are:
>
> 1. National and regional teleconferencing for Church organizations.
>
> 2. Data and facsimile transmission of the Church's national news service to the 150 newspapers of the American Catholic press.
>
> 3. In-service training for specialized Catholic social service organizations, for example, schools, hospitals, Catholic charities, etc.
>
> 4. Electronic message and related internal digitalized communications.
>
> The community-related uses include:
>
> 1. Educational programming services to local cable systems.
>
> 2. Specialized community-related digital services. (For example, CAT scanner interconnections to regional centralized computer facilities. . . .)
>
> 3. Regional teleconferencing for civic organizations.
>
> 4. Inter-connection for national, non-profit, educational/cultural/inter-religious organizations (via cost-sharing arrangements).

Id. at 4. The growth projected by the USSC is difficult to categorize. Data subsequently submitted by the Catholic Television Network[15] show that 11 Catholic Dioceses are now operating systems that use 108 channels. These 11 systems reach 28% of the U.S. population. Another 7 Dioceses are building systems that will use 84 channels and serve 9% of the U.S. population. Thus, the 18 Diocesan systems either in existence or under construction use 192 channels to serve 37% of the U.S. population. Contrasted with these data are the data concerning the 60 Diocesan systems to be constructed in 2 to 5 years for CTN. These 60 systems will require 720 channels to reach 30% of the U.S. population. On the basis of these figures, it can be concluded that much of the growth projected by USCC will occur in areas where ITFS channels have traditionally been most underutilized.

39. In addition, it is not clear what is encompassed by each of the uses listed. It appears that some of what is to be transmitted is not "instructional and cultural material . . . for the primary purpose of providing a formal education and development to students enrolled in accredited public and private schools, colleges and universities" as required by Section 74.931(a) of the Rules, 47 C.F.R. § 74.931(a). Furthermore, much of the demand projected by CTN will not occur for many years, and when it does occur it will be concentrated in those areas where ITFS channels have been underutilized. Thus, it appears that even if all the channel requirements projected by CTN do materialize it is most likely that sufficient channels will be available to meet the projected demand regardless of the reallocation authorized by this order.

40. Finally, the Association of Hospital Television Networks (AHTN), a national non-profit consortium whose 32 members operate or are planning to operate systems to provide instructional programming for health professions, indicated that although not all these systems use ITFS frequencies to distribute their programming, it is expected that some the systems not yet constructed will use ITFS channels if they are available. Comments of the Association of Hospital Networks, General Dockets 80–112 and 80–113, (July 2, 1982).

41. The growth of ITFS channel use during the pendency of this proceeding has been robust. As noted above, just after this proceeding was started Centex reviewed ITFS channel use and determined that there were 82 ITFS systems using 492 channels. Our own analysis conducted approximately two years later showed that there

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[15] On February 7, 1983, the Catholic Television Network (CTN) submitted a document titled "Information Indicating Current and Projected ITFS Utilization by Catholic Dioceses" and simultaneously requested pursuant to Section 1.41 of the Rules, 47 C.F.R. § 1.41, that the information be made part of the record in this proceeding and in the proceeding in General Docket 80–113. The information submitted by CTN on February 7, 1983 is hereby accepted in this proceeding and in General Docket 80–113. This action is taken pursuant to Section 1.415(d) of the Rules, 47 C.F.R. § 1.415(d).

were 124 ITFS systems using 808 channels. Thus the number of ITFS operators has grown by approximately 50% and the number of licensed channels has grown by over 60%. In addition, as of October 1982, we had 183 applications pending for new construction permits.[16] As discussed below, many in the MDS community have expressed the view that this growth was triggered by our instituting this proceeding. This may or may not be accurate. In any event, if an applicant is eligible and otherwise qualified and intends to use the spectrum for the purposes stated in our Rules, we have no basis to question its motivation for deciding to proceed at any particular time.

42. On the basis of the above, the following conclusions can be made. It is likely there will be an increase in demand for ITFS channels for use by institutions of higher education for the delivery of graduate level training to the workplaces of engineers, scientists, and other professionals. There is less evidence that there will be substantial growth of ITFS use by elementary, junior high, and high school systems. There is also some evidence that there will be growth in the delivery of health services information, but such growth is not likely to be substantial. It also is likely that growth projected by CTN that is appropriate for ITFS will occur in areas where ITFS utilization already is low. Finally, in a companion *Notice* adopted today, we are proposing to relieve ITFS licensees of a number of regulatory burdens thereby encouraging the fuller use of the ITFS channels.

4. *Projected MDS Growth*

43. It is very difficult to make predictions about the future growth of MDS. In the *Notice*, the Commission observed that in the 50 major markets and in many of the secondary markets further acceptance of MDS applications is precluded by the cutoff rules. *Notice, supra* at para. 19. As noted above, there are mutually exclusive channel 1 applications pending in 84 cities and mutually exclusive channel 2 applications pending in 42 cities. Thus there are no MDS channels available for growth in any major metropolitan, and many non-metropolitan, areas of the country. Furthermore, unless the mutually exclusive applicants reach an agreement among themselves, a comparative hearing is required to resolve each mutually exclusive situation.

44. The principal factor that most of the MDS entities commenting in this proceeding cited as limiting the growth of MDS is the lack of a multichannel capability. Virtually every member of the MDS community that filed comments in this proceeding expressed the

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[16] Above 120 of the applications were filed by the Public Broadcasting Service (PBS) and its member stations to provide what PBS terms a National Narrowcast Service. Whether PBS is eligible to be an ITFS licensee is presently under review.

view that if MDS is to survive as an industry, multichannel operation is an absolute necessity. These views were summarized in the comments submitted by the Ad Hoc Committee for Wireless Cable which argued "the expansion of existing MDS service to a multichannel, over-the-air delivery in competition with cable and other forms of distribution is essential to the continued viability of the MDS industry and of its existing carriers and operators." Comments of the Ad Hoc Committee for Wireless Cable, General Dockets 80–112 and 80–113, at 3 (July 2, 1982). This claim is especially noteworthy because the Committee is made up of "representatives from substantially all the Carriers and Operators in the MDS Industry." *Id.* at 2.[17] In addition, Microband and others have submitted data in this proceeding to support the proposition that there is a large unmet demand for multiple channels of premium television that is unlikely to be met by cable television or any other available technologies. (*See* paras. 57–64, *infra*). Microband also submitted studies which it claims establish that the per channel cost for a 5 channel system will be 60% less than for a single channel system because of common equipment and operations. It argues that consumer appeal increases substantially when the number of channels increases but the cost is not substantially higher. Microband Proposal at 57–72.

45. There are two reasons why there is only one multichannel MDS system in operation today. The first reason is, of course, that there are not enough channels available to allow multichannel operation. As noted above, there are only two MDS channels capable of transmitting a standard television signal available in the top 50 markets. Outside of these markets there is only one such channel available. Furthermore, in most of the top 50 markets, a comparative hearing may be required before the second channel is licensed. Even when it is licensed there will be very limited opportunity for even two-channel MDS operation. In general, this appears feasible only if the same operator becomes the customer of both licensees as has occured in Phoenix (paragraph 30, *infra*).

46. The other reason is that Section 21.901(d) of our Rules, 47 C.F.R. § 21.901(d), precludes a licensee from obtaining a second channel in the same metropolitan area until it has operated the first channel for at least one year and can show that there is a public demand for additional service that is not likely to be met by a competing carrier. In the *Notice*, the Commission proposed to repeal this rule and it will be discussed below. The rule is pertinent here because it has been shown to be an impediment to MDS growth.

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[17] The Committee is made of both licensed MDS carriers and the MDS operators who are the customers of the licensees. The carriers represent more than 80% of the existing or potential MDS licensees in the top 50 markets and the operators provide programming for 70% of all active MDS channels. Ad Hoc Committee Comments, *supra*, 2 and 1.

Except for this rule, existing channel 1 licensees would be better able to work out arrangements with the channel 2 applicants that would facilitate 2-channel operation. Or the same entity could have applied for both channels and offered 2-channel service to one customer or offered one channel service to two customers.

47. On the other hand, as was observed in the *Notice* and by most of the ITFS commenters in this proceeding, the fact that there are a large number of applications for authority to construct MDS stations does not necessarily mean there is an unmet demand for MDS service. In fact many have claimed that the MDS applications on file are merely a reflection of a "land rush mentality" rather than real demand. Typical of these comments was the view that:

> demand for MDS channels, manifested through applications filed with the Commission and the demand for MDS service, are two entirely different things. Many MDS applicants, like land speculators, are applying for spectrum with no certain knowledge of what they would do with an MDS channel and, in many cases, with no immediate plans for using any MDS channel which may be granted to them.

Comments of the Association for Higher Education of North Texas, et al., General Dockets 80–112 and 80–113, at 14 (July 2, 1982).

48. Many members of the ITFS community submitting comments regarding MDS channel use and projected growth did so on the basis of information supplied by Centex. For this reason, we believe it is appropriate to comment on the Centex MDS analysis. Centex submitted an analysis of the growth of MDS from 1972 thru 1980 that Centex claims "points to fundamental errors in the FCC analysis of MDS channel needs." Centex Comments, *supra*, Attachment C, 12. Centex claims that during this period a total of 1,771 MDS applications of various types were filed. Centex also states that "there are, in fact 21 different types of applications listed by the FCC, of which *only 8 deal directly with construction permits and licenses*, while 13 deal with modifications or additions. The FCC dockets fail to make this important point clear." *Id.* The Centex data shows that of 1,771 applications filed 1,137 were for construction permits and 102 were for station licenses. Because of this Centex exclaims "the number of applications for licenses for new stations is, however, only 102 or *5.8% of all applications*!" *Id.* at 13 (emphasis in original). The Centex data also shows that of a total of 239 channel 2 applications, only 2 were for licenses. On the basis of this data Centex makes the following assertion:

> Since serious operators—both profit and non-profit entities—usually aggressively pursue their applications for construction permits and assiduously pursue station construction authorizations, one could rightly ask, why has this not occurred in the case of MDS? Is it because applications are being made on the basis of Oklahoma-type land-grabs with the hope that valuable "mineral" or "farm lands" may be acquired? Regardless of the basis for the current status of MDS channel applications, the fact that only 1 of every 14, or 7%, of all MDS channel

> applications has developed into an FCC-licensed operation is indicative of the real status of MDS.

Id. at 14.

49. We recognize and appreciate that Centex is the most reliable private source of ITFS facility data; however, we believe that these comments suggest a misunderstanding of the MDS industry and Commission processing procedures on Centex's part. When an entity desires to construct a MDS facility it submits a construction permit application to the Commission. If the application is *not mutually exclusive with another construction permit application* and is complete in all respects and if the Commission finds that the applicant is legally, technically and otherwise qualified, the Commission will grant the requested construction permit. After the permittee constructs the station it will then apply for a station license. As is clear from the statistics quoted by Centex, there are many more construction permit applications than there are channels available and thus most of the construction permit applications received are mutually exclusive with at least one other application. None of these mutually exclusive applications can be granted until either a comparative hearing is held or the mutually exclusive applicants reach a satisfactory settlement agreement. This situation accounts in part for the slow growth in the number of MDS stations.[18]

50. It also may be that there is some truth in these assertions. It does appear that in many areas the development of MDS has been slow (*see* para. 28, *supra*). The data submitted by MDS interests suggest that the marginal cost of providing additional channels is sufficiently low that additional penetration could be anticipated were multichannel operations authorized (*see* para. 44, *supra*).

51. On the basis of the information presented, we conclude that there will be little growth in the use of MDS channels as long as there are only two channels available and each licensee is only allowed to use one channel per metropolitan area (*see* para. 44, *supra*). The market for single channel MDS in many areas is limited (*see* para. 28, *supra*). We further conclude that if more channels were made available and if the restrictions on multiple channel operation

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[18] The Centex comments also included a table that represented a statistical comparison of MDS, OFS, and ITFS. In this table, Centex claimed that 98 MDS stations served a total of 133 receive sites with an average 1.4 receiving sites per installation. *Id.* at 19. It is not clear where Centex obtained these figures, but it is clear that they represent a gross misstatement of MDS channel use. According to the figures compiled by Paul Kagan Associates, Inc. as of June 30, 1980 the MDS industry was providing *premium television* service to 352,000 individual locations. MDS Data Book, *supra*, at 12. It may be that what Centex did in its analysis was confuse the number of entities purchasing time from MDS stations with the number of locations receiving service via MDS. In the usual MDS situation there is a single MDS licensee with a single subscriber who provides service to a large number of customers.

are removed there could be a rapid acceleration in the growth of MDS.

B. *Public Policy Considerations*

52. Several ITFS commenters in this proceeding claimed that even if the ITFS channels are not now fully utilized, as a matter of public policy, the Commission should continue to keep all 28 channels reserved for ITFS. For example, the American Library Association asserted that "as a matter of public policy the Commission should retain this spectrum for noncommercial educational use. As the guardian of the airwaves for the public, the Commission has a special responsibility—in our judgment—to set aside a portion of the spectrum for the benefit of the public, just as is done in the case of land development in Alaska and the Far West." Comments of the American Library Association, General Docket 80–112, at 3 (September 5, 1980). The National Association of Educational Broadcasters stated that:

> The growth of instructional telecommunications systems depends on the concept of reservation. Educational and public telecommunication interests should not be forced into the "marketplace" with commercial and private microwave system operators. The ITFS band is the last "free" resource available to the country for educational purposes. The Commission maintains the noncommercial reservation of the lower 4 MHz of the FM radio band and of unused assignments in the TV Table of Allocations, despite the pressures from would-be commercial broadcasters to invade this reserved territory. Maintenance of the reserved nature of the 2500–2690 MHz band is also warranted by the same policy considerations.

Comments of the National Association of Educational Broadcasters, General Docket 80–112, 6 (September 26, 1980).

53. We recognize that there are sound public policy reasons for creating spectrum reserves. In the order granting the exclusive use of the 28 channels to the ITFS, the Commission concluded that "[b]y providing the exclusivity desired by the educators, planning of the system as well as usage should be simplified since they will not need to consider the questions of new non-ITFS systems." *ITV*, *supra*, at 200. In the same order, the Commission recognized that it should wait longer to review the use of spectrum allocated for educational use "because it was aware of the problems encountered by educational interests in preparing funding and implementing the new tool as well as developing the operational expertise . . . ." *Id.* at 199. We continue to believe that the concept of a spectrum reservation for educational and other public service entities is valid. We also continue to recognize, as many of the ITFS commenters in this proceeding have again emphasized, that the nature of educational institutions is such that it will generally take them much longer

than it would take a commercial entity to begin using a new technology such as ITFS.[19] It has been pointed out in this proceeding that educators are slow to accept new technologies and that many of the funding sources for education are even slower to make funds available for innovative endeavors such as ITFS. We also note in this regard that in its comments, Microband stated that "[w]hile it might be argued that school systems, which must pay for land, buildings, supplies, electricity and other facilities, should otherwise compete in the free market for these channels, we do not subscribe to such an approach. Instead, we would urge the retention of a number of channels for exclusive ITFS use." Comments of Microband Corporation of America, General Docket 80–112, at 27 (October 9, 1980). We agree. Thus, we continue to believe it is in the public interest to have a spectrum reserve for the ITFS.

54. Deciding that it is the public interest to have a spectrum reserve does not mean, however, that a 28 channel nationwide reserve is in the public interest. In this proceeding, we have tried to determine whether the channels that have been available for the ITFS since 1963 are now being used or will be used in the future. As summarized above, the evidence indicates that in some of the largest metropolitan areas most of the ITFS channels have been licensed. In other metropolitan areas, there has been limited or no use of the channels. In many states, there are no channels in use, and in most of the other states, there is little use outside of the metropolitan area. Although it is difficult to make accurate projections concerning the future use of these channels, the evidence available indicates that there will be some growth, but not enough to fully utilize all the channels on a nationwide basis.

55. Having found that there are ITFS channels that are not now being used and are unlikely to be used in the near future, we are faced with the question of whether it would be in the public interest to reallocate some of them for use by MDS as proposed in the *Notice*. MDS is now used primarily for the distribution of premium television to hotels, motels, apartments and single family residences. In its proposal, Microband submitted extensive evidence that there is a large unmet demand for multichannel premium television and that "cable (television) is not capable of meeting the existing demand . . . now or any time in the forseeable future." Microband Proposal, *supra*, at 55. Microband further argues that making more channels available for MDS would act as a competitive spur to the cable television industry and that "[s]ince there are no alternative distribution systems authorized to provide multichannel broadband service, cable has been able to behave as a monopoly industry,

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[19] It could be argued that ITFS can no longer be considered a new technology since it has been available for almost 20 years. However, it is only recently that many of the school systems and universities have become aware of its potential.

building at a schedule suited to its own pace, with little incentive to upgrade antiquated systems." *Id.* at 12 (footnotes omitted). Microband concludes that an expanded MDS would "provide a competitive spur to cable, thereby moderating its monopoly characteristics and speeding its growth." *Id.* at 25.

56. On the other hand, most of the ITFS commenters expressed the view that expanding the MDS was unnecessary in view of the number of alternative methods of delivering entertainment programming to the public. The Public Broadcasting Services (PBS) comments were typical. PBS asserted that:

> Microband's argument that multichannel MDS systems should be used to increase competition for cable television does not justify a departure from the nation's long established and sound policy of assuring adequate telecommunications resources for educational purposes, especially when that competition is provided by numerous other technologies. Nor are multichannel MDS systems required to fill in service gaps where cable television is not available. With the explosion of STV, and DBS and low power television on the short-term horizon, there will be more than sufficient alternative services available to the public in both urban and rural areas. Low power television and DBS, in particular, have been highly touted as solutions to the problem of underserved rural areas.

Comments of the Public Broadcasting Service, General Dockets 80–112 and 80–113 (June 2, 1982).

57. These comments do not demonstrate that there is no substantial public demand for additional premium entertainment programming. Rather, they address the matter of how the demand should be met. As to the timing of the introduction of other new services, we note that there is no multichannel alternative to cable available now. STV is a one channel service. A high power Direct Broadcast Satellite service, transmitting entertainment programming directly to individual homes on a widespread basis, is several years away.[30] Low power television as a means for delivering subscription television is basically a low power version of STV. In any case, multichannel MDS will expand consumer options, and expanding consumer options is a legitimate public interest justification for reallocating spectrum. If those who claim there is no market for multichannel MDS are correct then whatever spectrum is allocated for multichannel MDS will go unused and can be reallocated back to the ITFS or to some other appropriate use.

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[30] A number of entities (*e.g.* United Satellite Communications, Inc.) have announced plans to attempt to use low power fixed satellites to deliver video entertainment programming to individual homes, in addition to traditional fixed satellite reception points (cable television systems, MDS systems, hotels, etc.). The fixed satellite service is at a comparative technical disadvantage vis-a-vis the direct broadcast satellite service because, among other things, the lower power transmitters require larger receive antennas and the satellites are spaced more closely together which increases the possibility of interference. In any event such systems are nascent in design and may be subject to further regulatory considerations.

58. If, on the other hand, a market does develop for multichannel MDS there would be benefits to the public at large and there could be large benefits to the users of the ITFS channels as well. For example, in both this proceeding and in the companion proceeding in Docket 80–113, we have been informed by ITFS licensees that there has been no reduction in the cost of the equipment they are being offered by manufacturers. This is in direct contrast to the MDS industry where the cost of the downconversion equipment has decreased from over one thousand dollars to less than one hundred dollars. We believe that if there is widespread use of multichannel MDS there could be similar reductions in the cost of ITFS equipment. These savings would result from economies of scale in the manufacture of reception equipment. This could result in dramatic decreases in the cost of constructing ITFS systems thereby making them affordable to many who cannot now afford to build these systems.[21] Lower cost ITFS reception equipment could also make it possible for existing ITFS systems to expand the market for their programming. It could become economically and technically feasible to deliver instructional programming directly to private homes.

59. Microband further claims that authorizing multichannel MDS would be in the public interest because it would "promote economic activity in a high technology field which is important to the nation's future." *Id.*, at 73. Microband estimates that the authorization of the multichannel MDS could provide 20,000 new jobs. *Id.* Bogner Broadcast Equipment claims that the authorization of multichannel MDS would cause equipment manufacturers such as itself "to develop new, improved and competitively priced multichannel reception equipment." Bogner further claims that "the stimulus will have a ripple effect throughout the industry benefitting manufacturers, marketers, retailers, MDS licensees, MDS programmers, and most of all the consumer." Comments on Proposal, Bogner Broadcast Equipment Corporation, General Dockets 80–112 and 80–113, at 2 (June 2, 1982). Other equipment manufacturers have expressed similar views. Conifer Corporation asserts that authorization of multichannel MDS "will create new business opportunities and will benefit the economy." Comments on Proposal, Conifer Corporation, General Dockets 80–112 and 80–113, at 2 (June 2, 1982). Lance Industries states that authorizing multichannel MDS "will cause a re-vitalization of a significant segment of the American-based electronics manufacturing industry" and thereby "create jobs and benefit society as a whole." Comments in Support of Rulemaking Proposal, Lance Industries, General Dockets 80–112 and 80–113, at 2 (May 28, 1982).

60. Another public interest argument made by some commenters

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[21] This does not argue against reallocation of a portion of the band to MDS because the premise of the reallocation is based on commercial operation.

is that authorizing multichannel MDS will make multiple premium television channels available to rural areas that may never be served by conventional cable television. One citizen from West Virginia made the following observation:

> Any survey of rural America will demonstrate that the presently allocated instructional television fixed channels are not being used or are used only in a minimal fashion in rural areas. The likelihood that a multi-channel MDS service would impinge on the availability of such channels for instructional purposes is most remote at best.
>
> I really believe that it is about time that your agency give as much consideration to expanding various electronic services to rural America as you give to increasing the plethora of electronic services that are available in the larger markets.

Informal comment of S. Craig Curtis, General Dockets 80–112 and 80–113 (May 8, 1982). An MDS operator from New Hampshire surveyed potential multichannel MDS customers and submitted the following summary of the responses received:

> Most of these residents cited a recent article that appeared in the newspapers concerning a small town that was considering Cable Television, wherein one of the politicians stated that "Only 50% of the residents in the State of New Hampshire will ever have Cable Television Service." Their general reaction to this article is that when an electronic type of service is available to provide them with this service, which will not cost the taxpayers any additional money and will actually employ more people in the State, why should they be deprived of this service simply because they choose to build their home and raise their family in a suburban type of atmosphere? Others expressed views that they realized that it was more costly for their water, sewage system and fire insurance rates where their homes have been erected, but their reaction was, "Isn't this what the United States is all about—Freedom of choice?" And they felt as long as they were willing to pay the cost for their freedom, the FCC should provide them the same equal opportunity that is provided to those who have elected to live in a large city, provided the cost is paid for by themselves, and not the State or Government.

Comments of Dynamic Sound, General Dockets 80–112 and 80–113, at 3 (June 1, 1982).

61. Two major public interest arguments favoring the authorization of multichannel MDS are efficiency and flexibility. It is clear that substantial demand exists for multichannel premium television service. In uncabled areas (some of which may never be cabled), multichannel MDS is a means for satisfying consumer demand for additional premium television service. In areas that are or are about to be cabled, competition from multichannel MDS may spur cable systems to build promised systems faster, improve existing systems, and keep prices low. The efficient production of goods and services and the efficient use of spectrum are promoted when competition among providers is present.

62. Multichannel MDS is also a particularly flexible service. While current indications are that its primary use would be for premium video, many other uses are possible (*e.g.*, high speed data

transmission or transmission of educational programming). The common carrier nature of MDS means that the type of service provided can change on public demand. Thus, frequencies authorized for multichannel MDS use are likely to be employed in their highest valued use.

63. In addition to these two advantages, it is also possible that multichannel MDS would stimulate equipment innovations that would lower the cost of ITFS equipment. This could make ITFS service more widely available.

64. The major argument raised in opposition to the reallocation, other than the spectrum reservation argument discussed above, is that multichannel MDS is not needed because there are other technologies available to meet whatever demand exists. After carefully considering all these arguments, we have concluded that reallocating some ITFS channels to MDS will serve the public interest. We believe the benefits noted above are sufficiently likely to permit MDS entrepreneurs an opportunity to expand consumer choice by offering a multichannel MDS service. Should these benefits not materialize, a further reallocation may be undertaken. We do not believe our reallocation plan, discussed below, compromises the legitimate needs of the ITFS community for channels of communication.

C. *Reallocation Plans*

65. Before reviewing the reallocation plans considered, we believe it is useful to review the existing allocation scheme used for the 2500–2690 MHz band. The band is divided into thirty-one 6 MHz channels and the same number of 125 KHz response channels.[22] (The final 125 KHz of the band is not allocated for these services.) The thirty-one 6 MHz channels are contained in the portion of the band from 2500 MHz to 2686 MHz and the thirty-one 125 KHz response channels are contained in the band from 2686 MHz to 2689.8750 MHz. The thirty-one 6 MHz channels are further divided into 7 groups of 4 channels each and a single group of 3 channels. The 4 channel groups are designated channel groups A through G and are assigned to the ITFS. The 3 channel group is designated the H group and is assigned to the OFS. Within each group there is a 6 MHz gap between each of the channels. That is, channels within each group are not adjacent; they are alternated with those of another group to provide a 6 MHz guard band between the channel within each group. The chart below illustrates the allocation plan.

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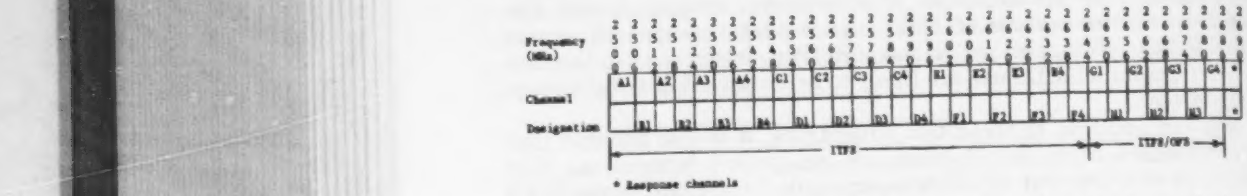
[22] The response channels are used by some existing ITFS channels to allow students in the remote class rooms to speak with the instructor at the studio. Other systems use telephone lines for this purpose and their response channels are unused.


Frequency (MHz)
2500
2506
2512
2518
2524
2530
2536
2542
2548
2554
2560
2566
2572
2578
2584
2590
2596
2602
2608
2614
2620
2626
2632
2638
2644
2650
2656
2662
2668
2674
2680
2686
2690
Channel Designation
A1
A2
A3
A4
C1
C2
C3
C4
E1
E2
E3
E4
G1
G2
G3
G4
*
B1
B2
B3
B4
D1
D2
D3
D4
F1
F2
F3
F4
H1
H2
H3
*
ITFS
ITFS/OFS
* Response channels

66. ITFS licensees are limited to no more than 4 channels in a single area, all of which must come from the same group. 47 C.F.R. § 74.902(c). If an applicant is not ready to use all four channels when it first applies, it may request the remaining channels be reserved for it for future use. *Id.* In those situations in which there are two ITFS licensees in the same area, the channel groups are assigned in so far as is possible so that there is no adjacent channel operation. For example, if there were an A group licensee in a given area, we would try to avoid granting a B group license in the area. It should also be pointed out in this regard that our rules provide for reusing channels in the same area if doing so would not cause harmful interference. 47 C.F.R. § 74.902(d).

67. The principal reason for adopting the present scheme was that it allowed the use of simple and inexpensive reception equipment. *Instruction Television Fixed Service*, 2 RR2d 1615 (1964). The equipment used to receive an ITFS signal consists of an antenna, a downconverter and a conventional television receiver. The downconverter simultaneously converts the incoming signals from the four ITFS channels (if four channels are being transmitted) to four VHF television channels. The VHF channels used are usually either 7, 9, 11 and 13, or 8, 10, 12 and 13(+).[23] Which set to use is determined by which VHF channels are used in the area. This eliminates the possibility of the VHF stations interfering with the downconverted ITFS channel. It also allows the local television channels to be distributed on the same cable as the downconverted ITFS channels. *Id.* at 1617.

68. In the *Notice*, we proposed a plan whereby the 31 channels in the 2500–2690 MHz band would be reallocated for shared use by the ITFS, the MDS and the OFS. Under this plan there was to be a primary allocation of 11 channels to the ITFS, 10 channels to the OFS, and 10 channels to the MDS. We also proposed that if the primary allocation of a service was fully used in one area any unused channels in the other two allocations could be used to satisfy the excess demand in the fully used service. The proposed plan did away with the channel groups described above and replaced them with

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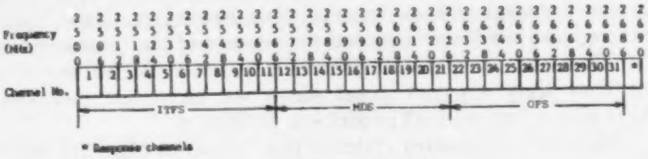
[23] The designation 13+ refers to the use of the spectrum immediately above channel 13. This is made possible by adjusting certain circuits within the television receiver. Further Comments of the Corporation for Public Broadcasting, General Dockets 80–112 and 80–113, Engineering Statement, at 6 (July 2, 1982).

contiguous allocations. The chart below illustrates the proposed allocation plan.



69. This plan received virtually no support from the commenters in this proceeding. It was criticized as being technically not feasible and unduly disruptive of the existing ITFS allocation scheme.

70. The claims that is was technically not feasible were all based on the belief that adjacent channel operation cannot readily be achieved. Several reasons were given to support the claim. First, some claimed that adjacent channel operation would preclude the use of the block downconversion equipment now used by virtually all ITFS systems. One of the major advantages of the block downconversion technique is that it "avoids interference created from 'direct pickup' of a VHF television station by the television receiver, or by a 'MATV' system used to distribute converted ITFS signals to school classrooms." Further Comments of the Corporation for Public Broadcasting, General Dockets 80–112 and 80–113, Engineering Statement, at 5 (July 2, 1982). If adjacent channel operation were required, the local VHF television signal would be picked up by the television receiver being used to display the ITFS signal and cause a degraded picture. CPB outlined a downconversion scheme that would mitigate this problem but that would also produce another problem, interference with the reception of the local VHF signals carried on the same distribution system. *Id.* at 6. The equipment required to implement the downconversion scheme was much more complicated and expensive than existing ITFS downconversion equipment.

71. CPB also mentioned two other problems that could occur with adjacent channel operation: unavoidable unauthorized reception of the adjacent channel programming and downconverter overloading. *Id.* at 2. The unauthorized reception referred to by CPB would occur when different licensees were using interleaved channel groups. For example if one ITFS licensee were using the A group and another ITFS licensee were using the B group in the same area, the block downconversion equipment used at the receiving sites of both licensees would be capable of receiving programming from both licensees. The other problem raised by CPB, downconverter overloading, could result if 8 strong signals were received at a single location from two nearby ITFS stations. CPB claims that the presence of eight signals in the downconverter would produce intermodulation interference to both systems.

72. Notwithstanding the theoretical merits of CPB's criticisms, we note that there are many large metropolitan areas where interleaved channel groups are being used. For example, the A and B groups are licensed in Los Angeles, San Francisco, New York and Milwaukee, and we have received no reports of the problems raised by CPB. This is not to say that problems do not exist, but we can only assume that they are not great since we have not received any reports of this arrangement producing problems.

73. Another commenter claimed that adjacent channel operation would eliminate the ability of ITFS operators to use the same transmitter for both the aural and the visual channels as is done now and force them to the expense of using a separate transmitter for each channel. It was claimed the present "mode of operation simplifies the transmitter and makes it less expensive but also complicates the suppression of energy outside the particular channel transmitted." Comments of National Instructional Telecommunications Council, Inc. and Catholic Television Network, General Docket 80–112, Attachment H, Engineering Statement by Jules Cohen & Associates, at 2 (July 26, 1980). According to Mr. Cohen single transmitter operation would produce so much interference that adjacent channel operation would be impossible. Finally, Dr. William Kincheloe, Jr., Adjunct Professor of Electrical Engineering at Stanford University concludes, "that such a major change in policy for frequency allocations as that proposed by the adjacent channel assignment in Docket 80–113 should be done with great care if a situation is not to develop where many instances of degraded service would be experienced to the embarassment of the FCC." Comments of the Leland Stanford Junior University, Attachment A at 6 (September 26, 1980).

74. These and other commenters are only claiming that the adjacent channel operation that was implicit in our proposal is not technically feasible *using existing ITFS equipment*. None has claimed that such operation is not technically feasible using state-of-the-art engineering practices. In fact, the Corporation for Public Broadcasting made the following claim in its first set of comments:

> With present state-of-the-art engineering practices, it is no longer necessary to restrict distribution systems to alternate channels. Primarily by careful control and maintenance of signal strength ratios, systems can be constructed to successfully utilize adjacent channels, as in the now common cable television distribution systems where all 12 VHF channels are filled.

Comments of the Corporation for Public Broadcasting, General Docket 80–112, Appendix 1, at 57, n.1 (September 26, 1980).

75. In its proposal Microband expressed some doubt about adjacent channel operation using *existing* MDS equipment. It stated:

> We rejected a scheme which would make use of a block of contiguous channels all operating on the same polarization. The major difficulty associated with this plan is not knowing what the adjacent channel interference performance of such a

> system would be. *Existing equipment* type accepted for MDS and ITFS operation would not be capable of operating without significant adjacent channel interference because the vestigial sideband attenuation required by paragraph 73.687 of these Rules does not provide for sufficient isolation between adjacent channels. Thus, without additional isolation provided by orthogonal polarization operation and/or a significant increase in the vestigial sideband filtering, interference-free adjacent channel operations will not be possible.

Microband Proposal, *supra* at 33 n. 37 (emphasis added). Contrasted with Microband's view was that of Richard Vega who claimed that "the transmission of copolarized adjacent channels can easily be accomplished by relatively *simple and inexpensive modifications* to existing type accepted MDS transmitters." Comments of Richard L. Vega. General Dockets 80–112 and 80–113, at 5 (July 2, 1982) (emphasis added). Mr. Vega further claims that the multichannel experiment being conducted in Salt Lake City supports this claim. *Id.*[24] In its comments, Contemporary Communications Corporation (CCC), while agreeing with Microband's claim that the existing MDS and ITFS transmitters will not allow adjacent channel operation, contends that "state-of-the-art transmitters are readily available today whose technical specifications will permit adjacent channel operation using the same polarization without causing interference." Additional Comments of Contemporary Communications Corporation, General Dockets 80–112 and 80–113, at 19 (July 2, 1982). CCC also suggests that modifications of some sections of the rules would make adjacent channel operation easier. *Id.*

76. Many ITFS operators have claimed that even if adjacent channel operation were technically feasible the costs of the necessary equipment changes would be prohibitive. For example, the University of Southern California stated "the suggested channel reallocation would entail significant additional costs which educational institutions in their present financial circumstances, can ill afford." USC further argued that "[a]ny new allocation schemes that would increase the technical complexity of existing ITFS equipment would undermine the very basis upon which the low cost educational

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[24] On December 3, 1981, the Commission granted Channel View, Inc. an experimental station license to test the technical feasibility of transmitting eight adjacent channels from a single site. The station is designated KM2XBN. File No. 866-ED-PL-81. The early results submitted by Channel View indicated some difficulty in reducing the spurious emissions from the transmitter more than 60 dB below the peak visual transmitter output; however, subsequent design adjustments in the transmission equipment have solved this problem and the tests have demonstrated that operating an 8 channel system using adjacent channels appears to be technically feasible. Channel View subsequently sought permission to conduct a "market experiment" using these frequencies. File no. 8938-ED-MR-82. In particular, Channel View requested authorization to program its multichannel system with premium programming and to provide service to the public for profit. The original experimental authorization prohibited Channel View from offering multichannel service to the public for profit. In view of our action reallocating spectrum, a market experiment would serve no useful purpose and that portion of Channel View's application therefore is denied.

use of ITFS was originally promoted." Comments of the University of Southern California Instructional Television Network, General Docket 80–112, at 3 (September 29, 1980).

77. Many of the existing ITFS licensees claimed that the proposed plan would result in substantial reductions in the service they are now providing. For example the California Public Broadcasting Commission (CPBC) claimed that if the plan in the *Notice* were adopted "there would be a net loss of two-thirds of the channels now operating or imminent in Los Angeles, San Francisco and San Diego," and "that California's principal cities will face massive reductions in their present ITFS service . . . ." Comments of the California Public Broadcasting Commission, General Docket 80–112, at 7 (September 26, 1980). We are aware that these California cities represent areas of unusually heavy ITFS channel use, and that there is some validity to the concerns that our initial proposal could cause dislocations or additional expense.

78. On the basis of these considerations, we have reached the following conclusions regarding the reallocation plan in the *Notice*. Adjacent channel operation is technically feasible but it can only be implemented using transmission and reception equipment that is different from existing ITFS equipment. We believe implementation of the allocation plan in the *Notice* would be expensive and would put an undue financial burden on existing ITFS licensees.[25] Furthermore, the plan would be disruptive of many existing and planned ITFS systems. For these reasons and since we have concluded there are less disruptive methods to make spectrum available for MDS use, we have concluded that adoption of the allocation plan in the *Notice* would not be in the public interest.

79. The *Notice* also discussed other allocation plans. One was that each service be allocated specific channels within the band. We rejected that plan for two reasons. First, it required us to make predictions concerning the future needs of the services, a prediction we felt unable to make at the time. Second, we felt that such a plan would not be flexible enough to deal with regional variations in the number of channels required for the services. For these reasons, we proposed the primary allocation plan that allowed sharing of unused channels by the other two services. As articulated above, the voluminous record in this proceeding has enabled us to develop a better sense of the future growth of these services. It also has demonstrated that our concerns about regional variations were

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[25] It is difficult to make precise estimates of the costs that would be incurred in converting existing ITFS systems to adjacent channels systems. It is likely that in most situations the existing transmitters would need to be replaced at a cost in excess of $100,000 per transmitter. It is also possible that existing downconverters would need to be replaced or modified. The total cost involved would be a function of the number of receiver sites and the cost per site could be several hundred dollars.

valid. There are wide regional variations in the use of both MDS and ITFS.

80. We also considered the alternative of unlimited sharing of the band by all three services. We rejected this plan because we believed it would be difficult to administer, especially if different technical rules were applied for each of the services sharing the band. After reviewing the record in this proceeding, we have also concluded as set out above, that such a plan would be contrary to the public interest in that it would not insure that some spectrum would continue to be reserved for potential ITFS applicants.

81. On the basis of these conclusions, we have reviewed the reallocation options available and have concluded that a plan that considers regional variations in spectrum use while at the same time reserving some channels for potential ITFS applicants would best serve the public interest. Several of those commenting in this proceeding also expressed the view that an allocation plan that reflected regional differences in spectrum use also made more sense than a uniform nationwide plan. *See* Comments of Oklahoma State Regents For Higher Education, General Docket 80–112 (June 16, 1980); Comments of C. Peter Magrath, President, University of Minnesota, General Docket 80–112, 3 (September 29, 1980); Comments of the State University of New York, General Docket 80–112, 4, (September 24, 1980).

82. We have considered various methods to take into account the regional variations in the demand for ITFS stations and multichannel MDS. One method suggested by President Magrath of the University of Minnesota was to hold local or regional public hearings to determine, *inter alia*, "the views of the community effected concerning the merits of the existing and proposed services." Comment of the University of Minnesota, General Docket 80–113 at 3 (September 5, 1980). Such public hearings could also be used to get accurate detailed information on the projected demand for ITFS channels and the demand for multichannel MDS for each area. We believe that holding such hearings would be a lengthy and expensive process, requiring a substantial amount of travel and administrative support. We do not believe that such a procedure is feasible and even if it were we do not believe that results obtained would be so substantially better than those obtained by other methods as to justify the expense and delay involved.

83. We have also considered reallocating channels to provide multichannel MDS only in those areas where there has been little or no use of the existing ITFS channels. Proceeding in this manner has two distinct disadvantages. First, it could involve the Commission in a protracted process to determine the boundaries of such areas. The only realistic way this could be done would be to wait until a multichannel application was received and then determine the ITFS channel use within a specified distance of the proposed MDS station.

Only after conducting such an analysis could we accurately determine ITFS channel use in the proposed MDS service area. Of course, we could require MDS applicants to include this analysis as a part of their applications. This would likely cause many existing and potential ITFS licensees to challenge the accuracy of the MDS applicant's analysis thereby involving the Commission staff in a series of contested proceedings. This would clearly delay the introduction of multichannel service in many areas.

84. The other difficulty with such a plan is that there would be little possibility of multichannel MDS in those metropolitan areas where the ITFS channels are extensively used. Thus, even where existing ITFS licensees were willing, or even desired, to transfer their license to an MDS operator, MDS operations would not be permissible.

85. The plan we have settled upon takes into consideration regional variations in ITFS channel use, "grandfathers" all existing ITFS licensees, permittees, and applicants and reallocates a specific set of channels for MDS use on a strict noninterference basis. The plan works as follows:

a. The E and F groups are reallocated for multichannel MDS use on a nationwide basis.

b. A multichannel MDS permittee will not be authorized to begin construction until it submits a statement from all existing cochannel and adjacent channel ITFS users with transmitters located within 50 miles of the new MDS station that the operation of the multichannel MDS station will not interfere with the ITFS operation or that the ITFS operator would accept any interference that did occur. This means that the MDS permittee is authorized to negotiate with existing cochannel and adjacent channel users of the ITFS channels to attempt to reach an accommodation whereby the needs of each can be satisfied. In those cases where there are no ITFS operators within 50 miles of the proposed MDS transmitter location that are using the authorized channels or any adjacent channels, the MDS permittee must so state.[26]

c. All ITFS licensees and permittees of, and applicants for, the channels as of the adoption date of this order will be grandfathered with rights of renewal. That is, all ITFS licensees of E or F group channels will be allowed to renew their licenses. Furthermore, all permittees of and applicants for either E or F group channels that ultimately obtain a license will be allowed to renew such licenses. No assignments, other than *pro forma* assignments of ITFS E or F group licenses, applications, or construction permits will be authorized.

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[26] We expect existing and potential ITFS operators to cooperate with MDS permittees in determining whether the operation of the MDS facilities will interfere with the ITFS operators. If the MDS permittee is not able, after making reasonable efforts, to obtain the desired statement from the ITFS operator it may submit evidence to the Commission on the issue of whether harmful interference will occur. The MDS permittee must also detail the efforts it made to obtain the desired statement and must serve a copy of all evidence submitted to the Commission to all affected ITFS operators. We expect such submissions to represent extraordinary cases.

d. No new ITFS applications for the E or the F group channels filed after adoption of this order will be accepted.

86. The elements of this plan have several advantages that other plans lack. Reallocating a specific set of channels on a nationwide basis means that in those areas where the reallocated channels are not being used, channels will be immediately available for multichannel MDS. It also creates at least the possibility that multichannel MDS will be available even in those areas where the reallocated channels are being used by ITFS service providers. It does this by granting conditioned construction permits for multichannel MDS in such areas and allowing the holders of these construction permits to negotiate with the existing cochannel and adjacent channel users to attempt to reach an accommodation whereby the requirements of both can be met.

87. We expect that such negotiations would consider, *inter alia*, the relocation of the existing ITFS users to other available ITFS channels, the use of frequency reuse techniques such as cross-polarization, site shielding and frequency offsets, and even the possibility of satisfying some of the communication requirements of the existing ITFS users in other areas of the spectrum. In this regard, we note that some members of the MDS community have argued that ITFS channel use is inefficient in the large metropolitan areas. For example, in its proposal, Microband claimed that many of the licensed ITFS channels were being used for point-to-point communication rather than for omnidirectional communication and concluded that, "[t]he significance of these point-to-point uses is that when intermixed with an intended omnidirectional use, they lead to a significant waste of spectrum." Microband Proposal, *supra*, Appendix H, at 6. In his first set of comments, Richard L. Vega, concluded that, "[i]n many cases, the ITFS authorized channel is for point-to-point microwave service thereby creating a wasteland of co-channel and adjacent channels over a relatively large geographical area due to the potential for harmful interference." Comments of Richard L. Vega, General Docket 80–112, at 2 (September 30, 1980). In many cases, the use of ITFS channels for point-to-point communications is complementary to point-to-multipoint or omnidirectional use in the same area. The point-to-point use of the ITFS channels is usually for studio to transmitter links (STLs). For example, under the proper set of circumstances, it could be possible to use one group of a pair of interleaved channel groups in an omnidirectional configuration and to use the other group as an STL in the same area. Furthermore, the use of an ITFS channel group for point-to-point communications allows the ITFS operator to use simpler and less expensive equipment than would be required by conventional point-to-point service. Finally, of course, such use is specifically provided for in Section 74.931(d) of the Rules, 47 C.F.R. § 74.931(d). We do believe, however, that it may be possible to accommodate such users in other portions

of the spectrum. In regard to these negotiations, we would expect the multichannel MDS permittee to give reasonable compensation for any dislocations caused by the operation of its facilities.

88. Another advantage to reallocating a specific set of channels and requiring an agreement prior to construction of the multichannel facilities is that it is easy to administer. This is in a sense a double advantage. It makes it easier for applicants to file acceptable applications and it makes it easier for the staff to review the applications. Under this plan, an applicant is not required to conduct an interference analysis until after he has received an authorization. Thus, all applicants are expected to comply with all pertinent Sections of Part 21 including those we are adopting today except that they are not required to show non-interference with existing and proposed cochannel and adjacent channel ITFS users of the reallocated channels until after a construction permit has been granted. This procedure will save unsuccessful applicants the time and expense required to prepare such analysis and it will save the staff the time required to review each analysis submitted. Furthermore, we expect that the analyses that are submitted by permittees will be of a much higher quality than those submitted by applicants. Another administrative advantage is that under all of the other plans considered it may have been necessary to freeze the acceptance of all further ITFS applications for some period time. This plan does not require such a procedure because it does not change the application process for the twenty channels still allocated for ITFS use.

89. A final advantage to a uniform nationwide allocation for multichannel MDS is that it avoids, to the greatest extent possible, disrupting the authorized satellite use of the 2500–2690 MHz band. The use of the band by the broadcast satellite service is limited domestically "to domestic and regional systems for community reception of educational television programming and public service information." 47 C.F.R. § 2.106, n. NG 101. The bands 2500–2535 MHz (space to earth) and 2655–2690 MHz (earth to space) are also shared with the fixed satellite service for common carrier use in Alaska and certain areas in the Western Pacific and in the contiguous United States, Alaska and the Mid and Western Pacific areas for education use. 47 C.F.R. § 2.106, n. NG 102.

90. Several of those filing comments in this proceeding suggested that if we were to reallocate spectrum from the ITFS use to the MDS use we would reduce the possibility of any satellite service sharing the band.

91. The shared use of the band by terrestrial and satellite services poses two distinct problems. First, the broadcast satellite transmissions can interfere with the reception of terrestrial signals. In general, this would be a problem for any terrestrial service, but it could be more of a problem for MDS than for ITFS users because of

the receiving antennas used. ITFS receiver sites generally are equipped with higher gain and hence more directional antennas than MDS receiver sites. The latter in many cases use low gain less directional antennas that are much more likely to pick up interfering signals from satellites than are the higher gain ITFS antennas. The Corporation for Public Broadcasting submitted an extensive analysis of the impact of sharing this band between terrestrial and satellite users that indicated that terrestrial ITFS users could coexist with satellite users. CPB was unwilling to extend this analysis to include MDS because of the antenna differences. Comments of the Corporation for Public Broadcasting, *supra.*, at 31, 32.

92. Terrestrial transmissions in the shared band can interfere with the reception of the satellite signal by nearby earth stations. Here also CPB claimed that the sharing of the band between ITFS and the satellite service was possible but it was again unwilling to extend its analysis to the MDS sharing. CPB claimed that the studies that it presented for ITFS sharing were not valid for MDS because MDS uses omnidirectional antennas and higher power whereas many ITFS stations use directional antennas and lower power transmitters. *Id.* The argument is that terrestrial transmitters of whatever kind create "holes" where no frequency sharing satellite receive stations can be located and that MDS transmitting stations create larger "holes" than ITFS. We agree. However, others have argued that the creation of such holes should not be used as a justification for precluding terrestrial operation in the same band. The Public Service Satellite Consortium (PSSC) commented as follows:

> PSSC respectfully urges that limiting the development of 2.5 GHz terrestrial distribution, by claiming that it limits potential satellite distribution in the same band, is not sufficiently strong justification for such action. To limit the developmental potential which 2.5 GHz terrestrial distribution service has, by claiming that such terrestrial distribution causes interference "holes" in potential satellite coverage in this same band, has few merits when the potentials are viewed together. It is true that "holes" would be made in satellite coverage in the presence of local ITFS (or other uses of the 2500 to 2690 MHz band), and that satellite earth stations in this band would require careful placement or other precautions to avoid being interfered with. But to limit development of terrestrial networks, which have at least an order of magnitude of more program capacity and flexibility, would be unwise. The total variety of potential programs which could be distributed via satellite on these frequencies is relatively small. In contrast, the variety of programming which could be aired terrestrially within the same band, is about five to six programs for each location where terrestrial transmitters can be coordinated. This would represent thousands of program possibilities which could be tailored to local or regional needs.
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> Another consideration which should be recognized as a factor in this argument relates to the demographic distribution of potential "holes" in satellite coverage. If an assumption is made that a local entity wants to receive a satellite-distributed public service or instructional program, and can point its antenna to one of five or six satellites to receive it, it could do it. But if the program content did not match its needs for programming, either generally or at that particular time, it would probably choose from alternative sources. This is where the demographic distribution enters in.

> The more densely a city or region is populated, the more likely it will be that diverse programs are available to the public, and therefore less likely that a small selection of nationally distributed material will be useful. Where the satellite-distributed material will be most useful is in the more rural areas of the country where alternatives are not as plentiful.
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> Carrying the argument further, rural areas are not as likely to have as great economic justification for installing ITFS transmitters as the more populated regions would have. In rural areas, low-cost satellite receivers installed to serve small towns, and having local signal distribution via low-power VHF or UHF transmitters, would seem to fit the need best. Terrestrial distribution at 2.5 GHz band frequencies would not be justifiable for individual users who would have to invest in additional receiving equipment to get the programs. Simplistically then, there would be no interference "holes" in satellite beam coverage, where such coverage is most appropriate-in areas where terrestrial distribution at these frequencies is less appropriate and economical.

Comments of the Public Service Satellite Consortium, General Docket 80–113, at 8–10 (Sept. 2, 1980) incorporated by reference in Comments of the Public Service Satellite Consortium, General Docket 80–112, at 4 (September 2, 1980). Perhaps more important in this regard is the fact that we are not aware of any existing plans to construct a public service satellite using this band. Many of those that used the ATS-6 satellite that operated in this band are now leasing transponders from existing satellite communications providers that operate in a different band.

93. The National Aeronautics and Space Administration (NASA) has indicated that it is exploring the use of this band to provide what it terms "feeder links" to provide communications between a "satellite and fixed earth stations, to facilitate interconnection of a mobile satellite service with the terrestrial telephone network". Further Comments of the National Aeronautics and Space Administration, General Dockets 80–112 and 80–113, at 2, 3 (July 2, 1982). NASA is proposing to use the 806–890 MHz band to communicate between a mobile user and a satellite and to use the feeder link to communicate from the satellite back to the feeder link earth station. This would allow for the extension of mobile telephone service to users beyond the range of planned terrestrial networks. NASA has proposed to use the 2500–2535 MHz for the space to earth segment and the 2655–2690 MHz band for the earth to space segment of the feeder links. NASA's proposal is not an allowed use under the existing table allocation and thus would require a separate rulemaking proceeding before it could be implemented.[27] In light of its plan, NASA suggests that any additional use of the 2500–2690 MHz by terrestrial users would make sharing of the band by satellite users more difficult.

94. Reallocating specific groups of ITFS channels for MDS would mitigate the problems pointed out by CPB and NASA and would move in the direction suggested by PSSC. Allocating a specific set of

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[27] On November 29, 1982 NASA filed a Petition for Rulemaking in which it formally proposed, *inter alia*, that this band be made available for this purpose.

channels for MDS use would mean that any future public service satellite use of this band could be structured to avoid sharing the MDS frequencies. Thus, the analysis presented by CPB would be valid in most of the band. Further, the use of the frequencies NASA proposed for its feeder links could also be avoided. Of course, proceeding in this manner will increase the use of the channels that remain available to ITFS but if the CPB analysis is correct, and ITFS use of these is much less inimical to sharing of the band than is MDS use, sharing can still be accommodated.

95. Grandfathering all existing licensees and permittees of and applicants for the reallocated channels accounts for regional variations in ITFS channel use without extensive Commission involvement or analysis. It does not require any existing ITFS licensees, permittees or applicants to alter planned or present use of their authorizations. Where the channels are not being used multichannel MDS applicants have immediate access to the channels,[28] and where the channels are licensed or applied for MDS operations cannot commence without negotiations with affected ITFS entities.

96. The final element of the plan we are adopting—not accepting any ITFS applications for the reallocated spectrum after adoption of this order—is necessary in order to keep the reallocated channels available for multichannel MDS and to avoid having mutually exclusive, fundamentally different applicants for the same channel. In most cases, the would-be ITFS applicants will be able to be accomodated in the 20 channels that will continue to be available for ITFS.

97. On the basis of this analysis, we have concluded this plan strikes a reasonable balance between the need to continue to make spectrum available for traditional ITFS users and, at the same time, makes spectrum available for multichannel MDS. It does so by minimizing the disruption to the plans of existing ITFS licensees, permittees, or applicants. It is easy to administer and provides at least the possibility of multichannel MDS on a nationwide basis. It

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[28] It could be argued that if the reallocated channels were the only channels not used in a particular area, and if an applicant were just about to file for these channels, such an applicant would be left with nowhere to apply. We believe that such occurrences will be rare and when they do occur it may be possible to reuse some of the 20 channels that will continue to be available for ITFS use to satisfy the needs of the would-be applicant. Furthermore, in regard to frequency reuse, we have recently been furnished data that indicate there is extensive frequency reuse in several of the large metropolitan areas where ITFS use is heavy. For example, in New York 19 of the 27 authorized channels are reused at least once; in Los Angeles 24 of the 28 authorized channels are reused at least once; in San Francisco 10 of the 26 authorized channels are reused at least once; and in Boston 14 of the 26 authorized channels are reused at least once. "Letter from Victor E. Ferrall, Jr." General Docket Nos. 80–112 and 80–113, attachment titled "ITFS Channel Utilization in the Top 25 Markets," (May 4, 1983). The letter and the data attached thereto are hereby accepted as informal comments in this proceeding.

also preserves, to the greatest extent possible, the future satellite use of this band.

98. We now address the question of how many channels to reallocate for multichannel MDS. This question really involves three separate questions. First, how many channels constitute a viable multichannel MDS system? Second, how many multichannel systems should be provided for in each market? Third, how many channels should be kept in reserve for ITFS use?

99. The existing MDS rules do not allow MDS licensees to operate even a two channel system. Specifically Section 21.901(d), 47 C.F.R. § 21.901(d), precludes an existing licensee from applying for at least one year and even then it must show that there is a public demand for additional service that is unlikely to be satisfied by a competing carrier. The new rules proposed in the *Notice* did not contain this restriction. However, the proposed repeal of the section was not discussed in the *Notice* and we did not receive much comment on it in the first set of comments filed in this proceeding. Virtually all the MDS entities that filed reply comments in response to the Microband Proposal strongly supported the concept of multichannel MDS. Microband itself also noted that the existing restrictions "for all practical purpose, limit carriers to a single channel in any one market," because "it is virtually impossible for MDS carriers to prove a negative—that no other carrier is likely to provide service." Microband Proposal, *supra* at 38, and 39. n. 48. In its filing, Contemporary Communications Corporation (CCC) argued strongly for multiple channel MDS. CCC claimed that:

> For both technical and economic reasons, the public would be better served by a single entity operating multiple channels, as opposed to many operators, each limited to one channel. Studies have shown that if multiple channels are to be provided to subscribers, careful control must be exercised over the transmitting parameters of the channels. In particular, for best operation, transmitting locations should be the same. Even better operation will result if common transmitting antennas are used. To achieve satisfactory reception, relative frequencies of the several transmitters must be controlled with respect to one another, to a degree much finer than that required for a single channel. Power levels must also be related among the several transmitters, transmission lines, and transmitting antennas if interference is to be reduced. In sum, only a single operator can insure efficient operation of a multiple channel system.
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> In addition to technical operating factors, economic factors also support common ownership of multiple channels. Common transmission line (often costing as much as $25 per foot) and common antennas, costing thousands of dollars, can be utilized for multiple channels if there is only one operator. Rent can be reduced, since only one antenna would be employed, and multiple equipment can be operated in the same room, thereby decreasing the total floor space, as compared to a multiplicity of rooms that might be required for multiple operators. Common maintenance personnel can also reduce the maintenance cost per channel. Further, the number of spare parts needed by a single operator of multiple channels is obviously less than the number required by separate operators each operating one channel. Even electricity costs will be less for multiple channel operations.

Additional Comments of CCC, *supra* at 7–8.

100. Of course, it is possible to have multichannel MDS systems where each of the channels is licensed to a different carrier. As mentioned earlier, this is the situation in Phoenix where Microband and Contemporary are the carriers and both have the same customer, American Cable Television, offering two-tier programming with the two channels. We believe that for technical reasons, this is probably the only way a two-channel operation will be achieved under the existing rules. Allocating a single channel to each licensee has done little to promote diversity of ownership, and has the significant detriments of increased system complexity, cost, and regulatory delays in providing service to the public. The increased complexity and costs result from the factors listed by CCC in its comments. In a service where the licensee is not permitted to exercise program control the benefits of diversity are less pronounced than they might be where the licensee controls the material transmitted. Although diversity may lead to competition in such things as quality of service, allocating a single channel to each carrier means that there will likely be a comparative hearing for each channel as compared to a single hearing for a multiple channel application. For these reasons, we have concluded that there is no reason to continue to limit MDS carriers to a single channel operation and that the public interest would be better served by the repeal of the single channel limitation contained in Section 21.901(d) of the rules.

101. Given that multichannel MDS operation will benefit the public interest, we must address the question of how many channels should be in each system. In its proposal Microband suggested that a five channel system was optimum. It based this conclusion on an analysis that showed that "four channels of Pay TV will satisfy 85% of consumer demand." It thus concluded a multichannel system should consist of "four video channels plus a data channel." Microband Proposal, *supra*, at 48. Another commenter, Tekkom, suggested that 10 channels per system would be in the public interest. Comments of Tekkom, Inc., General Dockets 80–112 and 80–113, 11 (June 28, 1982). CBS, on the other hand, argued that the demand in each market should determine the number of channels in multichannel systems. CBS Comments on the Microband Proposal for Multichannel MDS Service, General Dockets 80–112 and 80–113, at 10 (July 1, 1982). We agree with CBS's claim that there may be regional variations in the number of channels that would be optimum in a multichannel system. On the other hand, we recognize that we are making this reallocation from a band that is divided into four channel groups and that four channel systems would, therefore, be less disruptive of the existing scheme. Also the Microband analysis suggested that 4 channels would satisfy nearly all the consumer demand for premium channels. Furthermore, the fact that

MDS is a common carrier service means that market forces will still play a part in determining how users acquire the channels and offer services to the public. Depending on the particular market conditions, a licensee may find it desirable, in a system of carrier initiated tariffs, to offer channels in a variety of different ways. *See e.g.*, *Metrock Corporation*, 73 FCC 2d 802 (1979). This variety would reflect the particular needs and desire of users in different areas. Not only may the terms of the offering of channels vary, but also the uses to which they are put may vary. For example, although it appears the channels will at least initially be used for the distribution of premium television programming, our rules permit "any kind of communications service consistent with the Commission's Rules . . ..." 47 C.F.R. § 21.903. For these reasons, we have concluded that authorizing 4 channel MDS systems serves the public interest.

102. We also recognize that it is possible that the same entity could lease all of the capacity of each common carrier, thereby, precluding others from becoming MDS programmers. Since the public only deals with the customers of the common carrier — and not the common carrier itself — the public could be forced to deal with a single multichannel MDS provider. We have considered requiring multichannel MDS licensees to so tariff their service that such an eventuality could not occur. We have decided not to adopt such a requirement for several reasons. First, we believe that the fact that an entity desiring to lease all available MDS channels will be required to deal with two common carriers somewhat reduces the possibility this will occur. Furthermore, since we are also by this order allowing ITFS licensees to lease excess capacity in their facilities, it is possible that an entity that wishes to provide premium television service to the public could do so using such excess capacity. It is also possible that in many areas, the public will be offered a choice between multichannel MDS and cable. Finally, we believe that restricting MDS tariffs would prevent market forces from determining the optimum mix of channels. Adopting such a requirement would create an artificial upper limit on the maximum number of channels a single entity could program.

103. Finally, we must address the related questions of how many channels to reallocate for MDS and how many channels to hold in reserve for future growth in ITFS. What we must do here is balance the need to make a reasonable number of multichannel MDS systems available with the need to ensure that an adequate number of channels are available for future ITFS growth.

104. In its proposal, Microband suggested that we reallocate three full ITFS groups or twelve channels for MDS use. Microband Proposal, *supra*, at 33. Microband claims to have based this suggestion on its analysis of the potential number of customers for multichannel MDS service in the top 50 markets. Microband did not submit any analysis to support its suggestion. It did present data on

the number of potential multichannel MDS customers in the top 50 market but it did not relate this data to the number of competitive MDS systems that would be optimum or even reasonable. The data presented show that on the average, there are 1,770,800 potential multichannel MDS subscribers in the top 5 markets and 70,400 in markets 46 through 50. Microband took these figures and divided each by 18,000, the break even number of subscribers for a multichannel system, to produce what it called a coverage ratio. What this figure purports to represent is the number of systems that could reach a financial break even point if all the potential customers were to subscribe to a single service and if each of the competing services were to have an equal share of the available customers. The coverage ratio for the top 5 markets was 98.4 and the coverage ratio for markets 46–50 was 3.9. All that the Microband data really show is that there are potential customers for multichannel MDS systems. We believe that there are factors other than the number of homes not passed by cable that will determine the number of multichannel MDS systems that can profitably serve an area. These include the nature and quality of the programming available, the quality of signal that can be delivered, the availability of competitive services, the price of the service, and the discretionary income of the residents of the area. These factors may combine in one area in such a way that only one MDS system can be profitable and in another area in such a way that 3 or more systems could be profitable.

105. Consideration of all these factors does not lead to clear choice for the number of multichannel systems that should be authorized in each area. However, it does appear that in many large areas at least two systems could be viable. Moreover, authorization of more than one system should provide a number of public interest benefits. Competition between competing systems could stimulate technological innovation, could increase systems availability and could also make lower cost service available to the public. We also believe that we should continue to hold a substantial amount of spectrum in reserve for ITFS use. For these reasons, we have concluded that we should make two groups of ITFS channels available for multichannel MDS. This will allow two competitive MDS operators to offer multichannel service in those areas and will keep 20 channels in reserve for existing and future ITFS use.[29]

106. Another issue to be resolved is what channels to reallocate. In its proposal, Microband suggested that the E, F and G groups be reallocated for MDS use. It based this recommendation on its conclusion that these were the bands least used by ITFS licensees. We do not agree. Our records show that the distribution of ITFS

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[29] Each applicant will only be allowed to file a single multi-channel application in each service area.

licenses among groups is as follows: A group-225, B group-93, C group-128, D group-82, E group-112, F group-91, and G group-113. Thus, it would appear that except for the A-B group, use of the interleaved ITFS frequency groups is about the same. It should also be noted that the A, C and E groups are significantly more used than the groups with which they are interleaved. This is to be expected because the use of channels in one pair of an interleaved group tends to preclude use of the other group in the same area. Because the interleaved ITFS group use does not vary significantly by group except for the A-B group, we must look to other criteria to select the group to assign to MDS.

107. The most important factor in selecting the groups to be reallocated is minimum interference to the remaining ITFS licensees. This means that we should reallocate an interleaved pair of groups. Proceeding in this manner will result in only two ITFS channels being adjacent to MDS channels. Choosing non-interleaved groups could result in there being as many as 9 ITFS channels adjacent to MDS channels. We also believe that we should avoid reallocating either the group of channels that share the band (2500–2535 MHz and 2665–2690 MHz) that NASA is proposing to use for its feeder link operation so as not to jeopardize consideration of that proposal. This eliminates the A-B pair and G group. This reduces the choice to either the C-D pair or the E-F pair. We also believe that it would be useful to leave the widest possible contiguous band available for ITFS because this would result in the largest possible contiguous bandwidth being left available for shared use by ITFS and Public Service satellite use. This means that if there is a public service satellite use of this band, it would be shared with only ITFS over the largest possible contiguous band. For these reasons, we have concluded that the best pair of channels to reallocate for MDS are the E and F groups.

108. Finally, we must address the question of how to divide the eight channels in the E and F groups between the two MDS operators licensed. We could follow the ITFS assignment method discussed above and assign the 4 channel E group to one licensee and the 4 channel F group to the other licensee. Proceeding in this manner has the advantage of allowing the use of simpler transmitters and downconversion equipment, but it has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators were not colocated. We could also authorize each operator to use 4 adjacent channels; that is assign channels E1, F1, E2, F2 to one operator and channels E3, F3, E4, F4 to the other operator. Thus, there would only be one pair of adjacent channel F2 and E3. Of course with either method, channel E1 will be adjacent to ITFS channel D4 and channel F4 will be adjacent to ITFS channel G1, both of which may be in use in the area where the MDS channels are being authorized. Thus, by licensing adjacent channels

to the same operator, we would be leaving the possibility of adjacent channel interference with existing ITFS stations unchanged and would be eliminating most of the non-colocated adjacent operation from the reallocated spectrum. This could require that the multichannel operators use more complicated transmission and reception equipment.

109. We did not address this issue extensively in the companion *Notice*, and, although we did not receive much comment on it in response to the companion *Notice*, some of those commenting on the Microband proposal did address the issue. One commenter, the Microwave Communications Association (MCA), noted that because we did not specifically propose rules for multichannel operation, we would be required to do so in the future. MCA further expressed the view that "this is fortuitous, because it will permit the Commission to consider multichannel systems' operating experience. Actual operating experience is clearly preferable to a lengthy technical rulemaking based only upon theoretical calculations." Comments of MCA, *supra*, at 9. There is some validity to MCA's claim; however, we cannot reallocate spectrum without specifying what channels are available for each applicant.[30] For this reason, we have concluded that the best course to follow is to have each applicant apply for a four channel MDS authorization using the interleaved channel plan now used by ITFS licensees. We also will require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group. If the two successful applicants determine either before or after initiation of service that there would be less adjacent channel interference by operating on adjacent channels, we will allow such operation. We believe that the two licensees in each area will be in a better position to make the final determination as to which channelization scheme is best.

110. To summarize we conclude that it is in the public interest to reallocate 8 of the channels now allocated for ITFS for use by the MDS nationally. Existing ITFS licensees (as well as existing permittees and applicants that eventually become licensees) of the reallocated channels would be grandfathered in perpetuity. Further, we have concluded that reallocating the E and F groups for MDS use would be least disruptive of the existing and potential uses of the 2500–2690 MHz band. We will accept applications for multichannel MDS in all areas of the country regardless of whether the reallocated channels have been previously applied for by an ITFS applicant. In those situations where there is an existing ITFS licensee, permittee, or applicant we shall issue multichannel MDS construction permits

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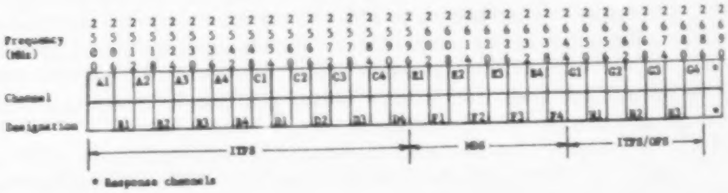
[30] We will apply existing technical rules to multichannel MDS. We expect to adopt new technical rules for MDS prior to or shortly after the authorization of the first multichannel MDS station. (*See* Note 1, *supra*).

conditioned on the permittee obtaining, prior to commencing construction, a statement from each adjacent channel and cochannel ITFS licensee, permittee, or applicant whose transmitter is located within 50 miles of the proposed MDS transmitter site, that the operation of the MDS facility will not cause harmful interference to the ITFS operation or if it does the ITFS operator will accept the interference. We expect that the MDS permittees and the ITFS users of the reallocated channels will negotiate in good faith to mutually accommodate each others' communications requirements. We believe that this process will be beneficial to all concerned. The MDS permittees will be able to offer a potentially profitable new communications service to the public. Existing ITFS users of the reallocated spectrum may end up with better and more efficient communication facilities at no expense, will most likely benefit from technical expertise of the commercial users of the band and will likely benefit from the decreased costs of equipment that will result from the partial commercial exploitation of the band. Finally, the public will benefit from the more efficient use of a valuable national resource, the electromagnetic spectrum. We recognize that there may be some large cities in which no reallocation will occur despite the steps we take today. It is likely in those areas in which this plan does not make multichannel MDS available there will be alternative means available by which the public will be able to obtain multichannel MDS including leasing the excess capacity of existing ITFS channels. The following chart illustrates the channel plan we are adopting.


Frequency (MHz)
2500 2506 2512 2518 2524 2530 2536 2542 2548 2554 2560 2566 2572 2578 2584 2590 2596 2602 2608 2614 2620 2626 2632 2638 2644 2650 2656 2662 2668 2674 2680 2686 2690
Channel Designation
A1 A2 A3 A4 C1 C2 C3 C4 E1 E2 E3 E4 G1 G2 G3 G4 *
B1 B2 B3 B4 D1 D2 D3 D4 F1 F2 F3 F4 H1 H2 H3 *
ITFS
MDS
ITFS/OFS
* Response channels

D. *Time Sharing and Leasing*

111. In the *Notice*, we invited comments on the "technical and practical feasibility" of permitting ITFS stations to share unused transmission time with MDS users. We stated that because most educational use occurs during daytime hours while entertainment television occurs in the evening, sharing appeared to be practical. Three forms of sharing were discussed: separate station facilities sharing the same frequency, jointly licensed facilities, and lease of unused transmission time by ITFS licensees. We also asked whether sharing ought to be mandated. *Notice, supra*, at para. 51.

112. Several ITFS entities accepted our invitation and submitted comments on time sharing of the ITFS channels. Most of the

comments received were not favorable. For example, the Joint Council on Educational Telecommunications commented that colleges, universities and hospitals use their channels in evening hours and on weekends, and that entertainment programming often is transmitted on a 24-hour basis. Comment of the Joint Council on Educational Telecommunications, General Docket 80–112, at 5–6 (September 29, 1980). The National Education Association (NEA) reiterated the concerns of JCET and added that sharing is not feasible for other reasons. For example, it stated that ITFS systems are configured to reach designated educational sites while MDS systems that are used to transmit pay television are configured to reach the greatest population possible. Comments of the National Education Association, General Docket 80–112, at 6–7 (September 25, 1980).

113. Several others raised another reason why time-sharing is not feasible. In its comments, the Archdiocese of Los Angeles made the following observations:

> "Education has for its object the formation of character". Under the second and third Commission sharing schemes, ITFS licensees would lose control over the content of certain transmissions from their facilities. Much of the programming being broadcast today via MDS is considered by many people to be objectionable—even, at times, pornographic. Proposals for construction of new ITFS facilities, and continued funding of present stations, will likely meet strong opposition from university regents, local boards of education, private institutions and concerned parent-teacher groups if they are placed in the position of having to purvey material which they consider disconsonant with their responsibilities as educators. Thus, these sharing schemes could discourage further ITFS growth—and perhaps result in a reduction of the present number of stations.
>
> Indeed, the Los Angeles Archdiocese is totally opposed to imposition of either of the latter sharing schemes. The Archdiocese would be forced into a difficult moral decision if it faced the prospect of its facilities being used for the transmission of programming which it considered offensive to Catholic values. If the Archdiocese lacked the ability to discriminate as to users of its facilities, it might well have to decide to give up its station altogether so as to avoid becoming party to transmissions contrary to the mission of the Church.

Comment of the Archdioceses of Los Angeles, General Docket 80–112, at 14–15 (September 26, 1980) (footnote omitted) (quoting Herbert Spencer, *Social Statistics*, pt. 1 ch. 2(1851)).

114. We agree with the majority of commenters who oppose any requirement that ITFS licensees share or lease their excess channel capacity. Contrary to the belief of those commenters, however, we believe that it is in the public interest to *permit* ITFS licensees to lease their excess channel capacity. The decision to lease excess capacity thus remains entirely up to the individual ITFS licensee. As a result of the current decrease in federal funding for ITFS, we believe it is appropriate to modify our rules to permit ITFS operators

to generate revenues by using their excess capacity for a variety of non-ITFS purposes.[31] As the excess capacity of ITFS operators is put to use serving the public, greater use of the available spectrum should result.[32]

115. We think that the changes that we are making today are appropriate for two basic reasons. First, the cost of constructing and operating an ITFS system represents a significant burden to licensees. In addition, the cost of education is increasing daily. ITFS provides a low-cost alternative to specialized instruction, adult education and other instructional modes. However, new revenue sources are necessary in order to give ITFS every chance to grow and succeed. Second, increased interest has been generated in the ITFS band including demand for broader use of the spectrum.

116. Thus, substantial benefits to the public may be derived from allowing ITFS licensees to use excess channel capacity, either by directly utilizing it themselves or through leasing it to others. The income derived from such service could enable stations to be on the air for a greater portion of the day and to increase programming availability. In addition, new revenues might prove sufficient to bring currently vacant channels on the air.

117. Increased revenue would widen ITFS' base of support and contribute to the service's ability to withstand a diminution in any one source of funding without being forced to significantly reduce its overall service to the community. If federal government funding declines, the success of licensees in recouping at least part of the loss may be crucial to ITFS growth and development. The option licensees have to lease excess ITFS channel capacity is consistent with several recent actions taken by the Commission. The Commission amended Part 74 of its rules to permit the shared use of broadcast auxiliary facilities with other broadcast and non-broadcast entities.[33] It also recently has authorized non-broadcast uses of non-main channel operations, such as teletext and FM subcarriers.[34] We are adopting policies in this proceeding for leased uses of ITFS excess channel capacity that are consistent with the decisions in the Part 74, teletext and FM subcarrier rule proceedings.

118. Therefore, we are amending Part 74 to permit use of

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[31] The Public Broadcasting Amendments Act of 1981 (Public Law (97–35) Section f(a)).

[32] The Commission today is also adopting a *Notice of Proposed Rule Making* that would further assist ITFS licensees in their operations. *See* Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service, FCC 83–244, (adopted) May 26, 1983.

[33] 48 Fed. Reg. 17081 (April 21, 1983).

[34] *See* Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, *Report and Order* in BC Docket No. 81–741, adopted March 24, 1983; and Amendments of Parts 2 and 73 of the Commission's Rules Concerning the Use of Subsidiary Communications Authorizations, *Report and Order* in BC Docket No. 82–536, adopted April 7, 1983.

facilities by ITFS licensees for non-ITFS purposes. This authorization includes use of the ITFS station's main broadcast channel and the use of non-main channel excess capacity including subcarriers and the vertical blanking interval (VBI). Furthermore, licensees are permitted to make this excess capacity available to others, if they so choose, on a profit-making basis. We will not, at this time, adopt specific time limitations on non-ITFS use of licensee excess channel capacity. By declining to specify any such limitations, we hope to maximize the spectrum efficiencies that shared use will provide. This will also afford ITFS licensees flexibility in offering their excess capacity to other entities. However, we do expect ITFS licensees to utilize each of their ITFS main channels substantially for legitimate ITFS use. Since we cannot anticipate in advance how much time is required for each licensee to address its ITFS needs, we do not wish to force ITFS channels to remain idle when other legitimate demands for the channels exist. Such an outcome is precisely the situation that we are attempting to avoid by allowing shared use of the channels. This policy is consistent with action taken by the Commission in amendment of Part 74, Subpart F of the Commission's Rules to permit shared use of broadcast auxiliary facilities with other broadcast and non-broadcast entities, 48 Fed. Reg. 17081 (published April 21, 1983). As in the proceedings discussed above, if ITFS licensees do make excess capacity available, the question arises as to whether the licensee is engaging in common carrier activity. After briefly explaining the legal requirements under which we must decide the common carriage issue, we shall apply those requirements to the two types of excess capacity at issue, in turn, below.

119. In *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir), *cert. denied* 425 U.S. 992 (1976) (*NARUC I*), the court specifically stated that a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. 525 F.2d at 641. The court continued, moreover, that the distinction between common and private carriers was not based on the services offered or the clientele served, but rather on "the manner and terms by which they approach and deal with their customers." Id. at 642. The court then stated that in determining whether a particular carrier should be accorded common carrier status, a finding must be made as to whether any legal compulsion to serve indifferently exists, or whether there are reasons implicit in the nature of the operation to expect an indifferent holding out.

120. With respect to leasing of the main ITFS channel, we see no reason to require ITFS licensees who engage in such leasing to be common carriers. One purpose of this proceeding is to make unused channels in the 2500–2690 MHz band available for use on a common carrier basis. We are reallocating channels from ITFS to MDS to

serve this purpose, and we believe experience with the reallocation is necessary before we take an additional step and find the need for common carrier channels is so great that all excess capacity should be offered on that basis. Moreover, the requirements of Title II may well discourage or inhibit ITFS licensees from making spare capacity available, if they could only do so as common carriers. For these reasons, we will not require that spare capacity on the main channel be leased on a common carrier basis.

121. With respect to the second test for classifying common carriers, whether there are reasons implicit in the nature of the operation to expect an indifferent holding out, we believe that main channel leasing should not, at least initially, be considered a common carrier activity. Our reasoning closely parallels the decision recently adopted in BC Docket No. 81–794, in which we stated that the selling of excess capacity on television broadcast auxiliary stations would not be treated as common carriage. *Shared Use of Broadcast Auxiliary Facilities*, 48 Fed. Reg. 17081 (April 21, 1983). We believe ITFS will not engage in a generalized holding out of their excess capacity, but instead will carefully select lessees for long-term contracts. The comments demonstrate that licensed facilities do not readily lend themselves to widespread MDS use. They have been tailored to the particular requirements of the licensee, and, if they do lend themselves to use by another, careful coordination will be necessary. The licensee also must consider its own growth requirements, and likely will limit the availability of the excess capacity so it will be able to use the facilities for its own primary purpose when the need arises. Individual contractual arrangements would better serve this purpose than would a general offer to deal with the public indiscriminately. This individualized selection of clients due to the need to protect the licensee's own use of the facilities was one factor, thought by the court in *NARUC I* to be inconsistent with common carrier status. 525 F.2d at 642. We find nothing inherent in the potential leasing activities of ITFS licensees that would lead them to make indifferent offerings of excess capacity on the main channel. Accordingly, we do not believe that ITFS licensees will act as common carriers.[35]

122. We recognize that permitting ITFS licensees to lease their main channels for other than traditional ITFS purposes may effectively result in a diminution of the channels reserved for traditional purposes, but we believe this risk is acceptable. First, only excess capacity may be leased. We presume the channels were obtained, and are primarily utilized for, satisfying a legitimate ITFS

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[35] If our initial analysis is incorrect, and ITFS licensees do in fact begin offering main channel excess capacity on an indifferent basis, it would be incumbent on the Commission to determine the extent to which traditional Title II regulation should be applied. *See NARUC I at 644; Shared Use of Auxiliary Broadcast Facilities at para. 26.*

requirement. Because these requirements appear to be increasing in a number of areas, we presume the traditional uses will continue. Second, the pleadings indicate, if anything, a reluctance on the part of licensees to engage in any form of sharing. Finally, any wholesale abandonment of the primary purpose of the facility could jeopardize the entity's license.

123. Just as we find ITFS main channel sharing analogous to our recent Broadcast Auxiliary proceeding, 48 Fed. Reg. 17081 (April 21, 1983), we believe that the regulatory status of subcarrier and VBI leasing can be resolved in essentially the same manner as in the recently adopted FM-SCA and Teletext decisions.

124. Depending on the nature of the information disseminated via an ITFS station's subcarriers or VBI, the regulatory status accorded the service may vary. As noted in the FM-SCA *Report and Order*, the provision of "broadcast-related services on subchannels is well established and does not raise any new issues of appropriate regulation". Thus, so long as the services provided over the station's subcarriers or VBI are broadcast related, no extraordinary regulatory treatment will attach to the profit-making activity.

125. However, other subchannel or VBI uses may be similar to services being provided by licensees in the private radio or common carrier services. To the extent that services offered via ITFS facilities are private radio or common carrier services, these ITFS-delivered services will be treated in the same manner, and with all the same benefits, obligations and responsibilities as the providers of similar services. Thus, with regard to non-broadcast related uses of the ITFS station's subcarriers and VBI, it will be necessary to determine whether the service offered constitutes private or common carriage under *NARUC* I and applicable statutes.

126. With one exception, the determination as to whether a particular non-broadcast service offered on an ITFS subchannel or VBI is private or common carriage will be made in accordance with the guidance given in *NARUC I*, as discussed above. Essentially, if the ITFS operator indiscriminately offers the station's subcarriers and VBI to other users, the operator will be regarded as a common carrier and will be treated accordingly. If, on the other hand, the licensee does not engage in an indiscriminate holding out, common carrier obligations will not attach and private carriage rules will apply. The one exception to utilizing the *NARUC I* test involves land mobile services.

127. With regard to land mobile services, the Communications Amendments Act of 1982, Section 120, establishes a demarcation between private and common carrier land mobile services, and indicates that the test contained in the new Section 331(c) of the Communications Act is intended to supersede the *NARUC I* standard. Public Law No. 97–259, 96 Stat. 1087. We believe that the test in the new legislation would apply to some of the communications

services that could be offered on ITFS subchannels or the VBI. The Act defines a "Mobile Service" as . . . a radio communication service carried on between mobile stations or receivers and land stations, ..., and includes both one-way and two-way radio communication services." Public Law 97-259 at Section 120(b)(2), 96 Stat 1097, 47 U.S.C. 153(n). It is clear that potential ITFS subchannel and VBI services such as paging would therefore be governed by the new legislation, and such services will be judged by the test in the new Section 331(c). The new statutory test is based on the manner in which a multiple licensed or shared private land station is interconnected with a telephone exchange or interexchange service or facility.[36] *See also* H.R. Rep. No. 765, 97th Congress, 2nd Session, pp. 52–56 (1082).[37] The statute also makes it clear that if it is a private system, it is exempt from state and local regulation. 47 U.S.C. 331(c)(3).

128. Once an ITFS licensee has determined whether the proposed service is private or common carriage, either under the *NARUC I* standard or, for land mobile services, Section 331(c) of the Act, the licensee, in order to provide a common carrier service, must seek the appropriate authorization from the FCC.[38] The ITFS licensee will be in the same position, entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of common carrier services.[39]

129. ITFS licensees seeking to provide private carrier service on

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[36] New Section 331(c)(1) of the Act provides, in pertinent part, that "private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly-authorized carrier."

[37] The Commission's interpretation of the test in the new legislation will be fully explored in our reconsideration of the *Second Report and Order*, Docket No. 20846, 89 F.C.C. 2d 741 (April 8, 1982), and our treatment of land mobile services herein is expressly subject to the outcome of that proceeding.

[38] These authorization and filing requirements are illustrated in greater detail in the FM-SCA *Report and Order* at paragraphs 25–27.

[39] In all cases, involving either private or common carrier services, the applicant will not be seeking approval for the technical facilities of the ITFS station. The Commission regards ITFS subcarrier and VBI use as a secondary privilege that runs with the primary ITFS station license. That right is conferred on the primary station licensee only. In this regard, it should be noted that an ITFS licensee that elects to use a subchannel for private or common carriage remains an ITFS licensee for all other purposes. Only the use of the subchannel for non-broadcast related purposes would be regulated in accordance with private radio or common carrier regulation.

an ITFS subchannel or VBI must notify the Licensing Division of the Private Radio Bureau at Gettysburg, Pennsylvania, 17325, by letter, prior to initiating service. In the letter, they must certify that their facilities will be used in this regard only for permissible purposes. *See* 47 C.F.R. Parts 90 and 94. When providing land mobile service, they must also certify that service will be offered only to users eligible under Part 90 of the Commission's Rules, and that any interconnection of the station with a telephone exchange or interexchange service or facility will be obtained in accordance with new Section 331 of the Communications Act, *supra*. Such notifications will not give rise to a comment period, and no separate authorization will be issued by the Commission. As in the case of common carrier services, the ITFS operator offering a private service will be in the same position, entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of such services.

E. *Selection Procedures*

130. Several of the commenters in this proceeding expressed the view that if the Commission decided to reallocate spectrum to the MDS, it should simultaneously act to ensure that the application processing procedure will not unduly delay the offering of multichannel MDS service to the public. The Ad Hoc Committee for Wireless Cable outlined the perceived problem as follows:

> Our primary concern in this regard is that the Commission might adopt a procedure involving comparative hearings for all of the allocated frequencies. It is inevitable that this will lead to interminable delays in conflict with the public interest. Recent Commission experience has established that a certain "gold-rush" mentality has accompanied reallocation of frequencies. The reallocation of frequencies to the Low Power Television Service spawned thousands of applicants and swamped the processing mechanism. Even the recently allocated spectrum for the Digital Electronic Message and Cellar Radio Service have been sought by more applicants than can be licensed.
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> Moreover, many of the applications would probably not meet minimum qualifications necessary to operate a multi-channel MDS system. The development, construction, operation and maintenance of multi-channel MDS systems will require substantial and sophisticated experience in construction and operation of microwave facilities. The time and effort needed to evaluate the qualifications of potential applicants and then compare these applicants would delay the introduction of the service indefinitely, thereby eliminating the prompt introduction of new and innovative programming and the competition such an introduction would bring. Moreover, it would place substantial burdens on Commission resources and personnel.

Ad Hoc Committee Comments, *supra* at 5–6 (footnotes omitted). The National Association of MDS Service Companies (NAMSCO), the trade organization for users of licensed MDS facilities, expressed the view that "without a concurrently established procedure for processing new MDS applications, the benefits of the long awaited action in this proceeding will be rendered academic." Comments of the

National Association of MDS Service Companies, General Dockets 80-112 and 80-113, at 5 (July 2, 1982).

131. In its proposal Microband suggested that these problems could be avoided if the Commission were to "[expand] the capacity of existing MDS channel 1 and channel 2 in the top 50 markets by separate allocation." Microband Proposal, *supra*, at 87. In particular, what Microband proposed was that we reallocate three ITFS channel groups to the MDS and that we allow only existing MDS channel 1 licensees, permittees and applicants to apply for one of the reallocated groups for 1 year after the date of the order. A second reallocated channel group would be similarly reserved for channel 2 applicants, permittees and licensees. The third group would be available to any applicant that met the requirements of Section 21.900 of the Rules, 47 C.F.R. § 21.900. *Id.* Appendix F at 3. Thus, what Microband proposed is that two channel groups be made available for existing MDS licensees, permittees, and applicants and that another channel group be made available for all other applicants.

132. In support of its plan, Microband claimed "that the Commission has routinely established separate frequency allocations where the need for the new service was immediate." Comments of Microband Corporation of America, General Dockets 80-112 and 80-113, at 9 (July 2, 1982) (hereinafter cited as 2nd Microband Comments). In Cellular Communications Systems, the most recent Commission decision cited by Microband to support this proposition, we did state that "the Commission in the past has routinely established separate *wireline and non-wireline* frequency allocations" *Cellular Communications Systems, 86 FCC 2d 469, 492 (1981), on recon.*, 89 FCC 2d 58 (1982) (emphasis added) (hereinafter *Cellular Order* and *Cellular Order on Reconsideration*). In the Cellular Order, we reviewed the line of cases now relied upon by Microband and concluded that there is:

> [a] firm legal foundation for establishing a separate *wireline* allocation in a situation where, . . . (1) there is an immediate need for service to the public, (2) this need can be addressed quickly by a *wireline company's* expertise, (3) the separate allocation licensing scheme is a reasonable means of avoiding long delays in the availability of *any* cellular service attributable to comparative hearings, and (4) we have taken reasonable steps to guard against anticompetitive practices.

Cellular Order, *supra*, at 493 (emphasis added). Before applying these tests to the present situation, we first note that, in the past, we have only authorized separate allocations for wireline carriers in various mobile communications services. Wireline carriers and non-wireline carriers were two distinct classes of applicants for the services. There are not two distinct classes of MDS carriers. For this reason, we believe that Microband's reliance on our policy of making separate frequency allocations for wireline and non-wireline carriers providers of the same service to support its plan is misplaced.

133. Disregarding this fundamental distinction, we nevertheless apply the tests articulated in the *Cellular Order* to the Microband plan. First, is there an immediate need for service to the public? Microband and other MDS licensees and their customers have argued that there is an unmet public demand for a multichannel premium television service that multichannel MDS will satisfy. We do not believe that this demand is analogous to the verified congestion that existed on two-way mobile systems prompting our separate allocation decision for the Cellular Service. *Id.* at 489. Rather, we believe what really is at issue here is the timing of multichannel MDS entry into the pay television market relative to the growth curve of cable television and other competitive services. As Microband itself noted, "the primary market for multiple channel MDS will shrink at a rate of ten to fifteen percent per year of delay due to increased cable penetration alone." Second Microband Comments, *supra*, at 12. What Microband is telling us is that while there is now a need for multichannel MDS, the need may decrease with the passage of time. Thus, we believe it is reasonable to conclude that there is a demand for the delivery of multichannel premium programming that multichannel MDS would be well-suited to provide; however, the need for the service does not justify the separate allocation suggested.

134. Next, do existing licensees and permittees possess some special technical expertise in operating multichannel MDS systems? It is not clear that operating a single channel system gives a licensee multichannel expertise. Even assuming that Microband and other single channel licensees have some technical expertise in operating multiple channel systems as a result of their experience with single channel systems, we do not see how those entities that have only filed applications can be said to have any expertise at all. It could be argued that the only entities with any real experience in operating multiple channel video systems are cable television operators. Thus, we conclude that the Microband separate allocation proposal would not bring a significant special technical expertise to the multichannel MDS service. In reaching this conclusion, we are comparing the technical expertise of those that the Microband plan would favor with the expertise that wireline carriers had in cellular and related technology. The applicants that the Microband proposal would favor do not have equivalent expertise in multichannel MDS.

135. Third, would the separate allocation be a reasonable means to avoid long delays in making multichannel MDS available and, fourth, would it adequately guard against anti-competitive practices? We are considering these two criteria together because we believe that one of the fundamental elements of reasonableness is competitive effect. The Microband separate allocation scheme reasonably could be expected to result in the early availability of multichannel MDS service. The Microwave Communications Association, an

industry trade organization of MDS carriers, MDS users, equipment manufacturers and others, analyzed the results of the Microband plan as follows:

> Microband owns 26 Channel 1 MDS stations outright and partially owns an additional 9 Channel 1 MDS stations in which it has management responsibilities, or a total of 35 MDS stations - 70% of the top 50 markets. Further, Microband is a Channel 2 applicant in an additional 13 markets. Thus Microband potentially could have multiple channel ownership interests in 48 out of the top 50 markets. Even more significantly, since most of the Channel 2 markets are mutually exclusive with more than one applicant (there are only three Channel 2 licensees), Microband (or a Microband related company) would be the *sole* multichannel licensee in 64% of the top 50 markets until the mutually exclusive Channel 2 markets . . . were resolved.

Comments of the Microwave Communications Association, General Dockets 80–113, at 10 (July 2, 1982).

136. American Home Theatre, the MDS customer in Salt Lake City termed the Microband scheme "flagrantly anti-competitive" and concluded that what Microband was seeking was "a substantial 'leg-up' on the provision of multichannel MDS service while new entrants to the market place would still be tied up in litigation in comparative hearings before the Commission." Comments of American Home Theatre, Inc. With Respect to Proposal of Microband Corporation of America, General Docket 80–112 and 80–113, at 7 (June 2, 1982). On the other hand, Microband claims that if its plan were to be adopted, it would own only twenty-two percent of the 150 multichannel licenses and that this would result in a decrease in its percentage of ownership. Second Microband Comments, *supra*, at 8–9. Of course, because we are only authorizing two multichannel operations, rather than the three Microband proposed, Microband would have 33% of the licenses. We believe the quoted Microwave Communications Association analysis presents a more realistic view of the ownership statistics that would result if the Microband proposal were adopted. We have concluded that the adoption of the Microband separate allocation proposal would unnecessarily and unreasonably concentrate control of multiple channel MDS systems in a few entities including Microband, and that it would also give such entities a substantial head start in the provision of multichannel MDS service in most markets. Moreover, we believe that other means are available to make multichannel MDS available expeditiously, and we therefore conclude that the advantages of the Microband proposal are outweighed by its detriments.[40]

137. Having reached this conclusion, we must now decide whether to adopt any special procedure for dealing with the expected

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[40] We recognize that our decision to authorize multichannel MDS could impact upon other services. However, there is no evidence in the record before us that would support protecting existing entities from competition and we expect the public overall to benefit from these authorizations.

large number of applications for the newly allocated channels. If we do nothing, the comparative hearing procedures of Part 21 of our rules will apply. As discussed above, many of those filing comments in this proceeding expressed the view that proceeding in this manner would embroil the applicants in lengthy comparative hearing procedures and thereby unnecessarily delay availability of the service to the public. Before discussing other procedures that could circumvent the problems caused by the comparative procedures, we feel that it is useful to consider Microband's view of the existing Part 21 procedures. In its proposal, Microband stated:

> This MX situation has been with the industry almost since its inception. Unlike some other segments of the communications industry, however, a solution to this problem has been found: merger of competing applications. In nine years, only four MX situations have actually been decided by resorting to comparative hearings. Microband believes that the joint venture solution, which has worked well to date, will continue to solve the MX problem with a minimum of expense to the applicants and to the Commission.

Microband proposal, *supra*, Appendix A, at 1, n. 1. Thus, Microband seems to contend that we should adopt a new procedure to avoid the problems of our comparative hearing procedures, and in the same proposal, tells us that our comparative procedures have worked rather well. This position is not necessarily inconsistent. The comparative hearing procedure can work well where there are only two or three entities applying for the same frequency. If there are 5, 10, or more mutually exclusive applicants for the same frequency, the comparative procedures work less well. In the first place, it is much less likely that 10 mutually exclusive applicants will reach an agreement to form a joint venture than if there are only two or three mutually exclusive applicants. Furthermore, in those situations in which it is necessary to hold a hearing among a large number of mutually exclusive applicants, it is likely that several of the applicants will be equally well qualified and thereby force us to make a choice on the basis of very minor differences in the applicants. For these reasons, we conclude that the comparative hearing procedure may not be the best method to resolve mutually exclusive multichannel MDS applications.

138. Some of those that predicted we would receive a large number of mutually exclusive applications if we authorized multichannel MDS suggested that we use a lottery procedure to grant multichannel MDS authorizations. For example, Contemporary Communications Corporation suggested that, "In the current procompetitive deregulatory environment, we believe the only fair method of selecting licensees is by lottery among applicants meeting threshold qualifications determined by the Commission." Additional Comments of CCC, *supra*, at 10.

139. Section 309(i) of the Communications Act authorizes us to grant licenses or permits "through the use of a system of random

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selection". 47 U.S.C. § 309(i)(l). On March 31, 1983, we adopted the *Second Report and Order* in General Docket 81-768 in which we provided specific rules to implement a lottery scheme. In adopting the Order, we noted that Congress intended that we use a lottery where it would best serve the public interest and that we should consider the following factors in determining whether a lottery would be in the public interest: whether there are a large number of available licenses; whether there are a large number of mutually exclusive applications for each license, whether there is a significant backlog of applications, whether the lottery would significantly speed up the process of getting the service to the public; and whether diversity of information sources would be enhanced. Using these factors, we initially determined that 5 services are amenable to the use of random selection techniques. The services were low power television, private land mobile radio, private operational fixed microwave, aviation and marine services, and domestic public land mobile.

140. The new legislation also directs us to use notice and comment rulemaking procedures each time we intend to use a lottery in a specific service. 47 U.S.C. § 309(i)(4)(A). Many of the commenters in this proceeding predicted that we would receive a large number of applications if we made spectrum available for multichannel MDS. We agree that this is a likely result. We are therefore proposing to use a lottery to select all MDS permittees, both multichannel and single channel, in a separate Further Notice of Proposed Rulemaking in this Docket.

141. In regard to using random selection procedures for MDS, we note that we had previously proposed several alternative methods for selecting from among mutually exclusive MDS applicants.[41] One of the methods proposed was a lottery. The other two methods proposed were an auction and a paper hearing. The *Lottery Notice* was primarily concerned with the question of our legal authority to employ alternatives to comparative hearings to resolve mutually exclusive situations. Since the new legislation specifically authorizes us to use a random selection procedure and provides Congressional guidance on when the expedited procedure should be used, there is no reason to consider further the selection procedure proposals contained in the *Lottery Notice*.

142. The only other issue raised in that proceeding concerned trafficking rules. In the *Lottery Notice*, we suggested that, if we were to adopt a lottery procedure, it would also be appropriate to eliminate or modify the existing anti-trafficking rules now applica-

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[41] In the Matter of Amendment of Part 21 of the Commission's Rules to Permit the Use of Alternative procedures in Choosing Applicants for Radio Authorizations in the Multipoint Distribution Service, *Notice of Inquiry and Proposed Rulemaking*, CC Docket No. 80-116, 45 Fed. Reg. 29,335 (May 2, 1980) (hereinafter *Lottery Notice*).

ble to MDS. *Lottery Notice, supra*, para. 74 and Appendix A. In Appendix A, we pointed out that the anti-trafficking provisions contained in Sections 21.27 and 21.39 of the Rules, 47 C.F.R. §§ 21.27, 21.39, are mandated by Section 310 of the Communications Act, 47 U.S.C. § 310. We further noted that Section 21.40 of the Rules, 47 C.F.R. § 21.40, was not required by the Act. This section gives us discretion to inquire whether a facility that has been operated less than 2 years by the proposed assignor or transferor had been acquired for the purpose of profitable sale rather than public service.

143. We recently considered the question of the continued usefulness of the anti-trafficking rules and policies with reference to broadcast licensees. *In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), Report and Order*, BC Docket No. 81-887, FCC 82-519, (released December 2, 1982) (hereinafter *Trafficking Order*). There we eliminated what was known as the "three year rule." That rule, which was similar to Section 21.40, required that we designate for hearing all applications for transfer or assignment of broadcast station licenses that had not been held for three years. *Id.* at para. 1. After reviewing the reasons for the rule and its effect during its 20 years of existence, we concluded that it was:

> appropriate to eliminate our . . . 'trafficking policy' and to limit Commission action in this area to enforcing the requirements of Sections 301 and 304 of the Communications Act. Such Commission inquiry will be restricted to whether any party has engaged in activity indicating action contrary to the statutory prohibition on license sales, such as attempting to profit on the transfer of a bare license. The Commission will continue to exercise its statutory authority under the Communications Act to determine that each transfer it approves is in the public interest.

Id; at para. 29. We also concluded that because Sections 301 and 304 state that radio station licenses do not convey a property interest, "profiting on the transfer of a construction permit is contrary to the letter and spirit [of these sections]." *Id.* at para. 32. Finally, we concluded that we should treat licensees that had obtained their license in a comparative hearing differently than other licensees. In particular, we held that a one year holding period after starting operation should be imposed on permits obtained through comparative hearings. *Id.* at para. 35.

144. Because the Part 21 common carrier trafficking rules stem from the broadcast policy, we have concluded there is no reason to continue to apply these rules to common carriers where we are no longer applying them to broadcast licensees. Therefore, for reasons analogous to those relied upon in the Trafficking Order, we have

decided to eliminate those portions of Section 21.40 that limit the free transferability of Part 21 licenses.[43] We shall retain those portions of Section 21.40 that limit the transferability of construction permits and we shall add new language to Section 21.40 to limit the transferability of station licenses that were obtained through comparative hearings. This action is independent of whether we ultimately decide to use a lottery for multichannel MDS. The new Section 21.40 is included in Appendix B.

145. Finally, we recognize that, although it is our belief that elimination of the trafficking rules will in general result in the more efficient use of the spectrum in that the ultimate licensee will be the entity that values it most highly, it is possible that situations could occur in which the licensee's best interest would be in not using the spectrum. For example, it is possible that a cable television company that had been awarded a cable franchise for a particular area but had not yet constructed its system would find it in its best interest to purchase the multichannel MDS license and not use the station, thereby preventing the establishment of MDS service in the area. This would preserve the largest possible customer base for the cable company. Because this is common carrier service, the licensee is required to render service on a reasonable basis in accordance with the obligations imposed by Title II of the Act. For this reason, we believe we have adequate regulatory tools to deal with this problem should it occur.

146. We have now resolved the only unresolved issue raised in the *Lottery Notice*. We are, therefore, terminating that proceeding. Comments relating to the use of a lottery in multichannel MDS should be filed in Docket 80-112.

F. *Application Procedures*

147. One of our primary concerns in making this reallocation is to ensure that no existing ITFS operation experiences unacceptable degradation in service as a result of the operation of a multichannel MDS station. For this reason, we are adding a new subsection to the rules requiring that multichannel MDS permittees demonstrate that they will not cause any harmful interference to any ITFS receiver site located within 50 miles of the proposed MDS transmitter location. 47 C.F.R. 21.902(d).

148. We have tried to anticipate other eventualities that could unduly delay the introduction of multichannel service to the public. One such eventuality, commonly referred to as "grid-lock", could be caused by the combination of a large number of applications and the operation of Section 21.31(c) of the rules, 47 C.F.R. § 21.31(c). Grid-

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[43] Section 22.40 of the Rules is equivalent to Section 21.40. In common carrier Docket 80-57, we are considering the revision and updating of Part 22. We will consider equivalent changes to Section 22.40 in that proceeding.

lock refers to the situation in which applications proposing to serve widely separated geographical areas are mutually exclusive. For example, if two metropolitan areas, A and B, were separated by 75 miles and several applications were filed for each area, it is unlikely that any of the applications proposing to serve area A would be mutually exclusive with those proposing to serve area B. If, however, even one application was filed that proposed to serve the area located midway between area A and area B, it is likely that it would be mutually exclusive with all the applications proposing to serve area A *and* all the applicaitons proposing to serve B. This means that all of the applications proposing to serve area A would be in a sense mutually exclusive with those proposing to serve area B. If another area C were located 75 miles from either A or B, a similar set of circumstances could result in all the applications filed for area C being mutually exclusive with those filed for both area A and area B and the connecting areas. It is not difficult to envision a set of circumstances in which an application that proposed to serve a location in Maine would be mutually exclusive with an application proposing to serve a location in Florida.

149. We have considered several methods to avoid this result. One of these was to enforce rigorously Section 21.902(a) of the rules, 47 C.F.R. § 21.902(a), that requires all applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities. We do not believe that this rule alone is enough to avoid the problem. For this reason, we have decided to limit the applications that will be considered to be mutually exclusive for purposes of inclusion in either a comparative hearing or a lottery—if we should decide to use such a selection procedure in this service—to those applicants that propose to locate their transmitters within a given Standard Metropolitan Statistical Area (SMSA) or within 15 miles of the boundary of the SMSA (if the transmitter is not located in another SMSA) or that propose to serve the SMSA. In those situations where the SMSA to be served is a part of a Standard Consolidated Statistical Area (SCSA), it will be considered with all other applications proposing to serve the SCSA.[43] We are requiring applicants proposing to serve any portion of an SMSA to specify what SMSA it intends to serve. In those situations where SMSAs that are not part of SCSAs are either adjacent or so close that a single transmitter could produce a signal strong enough to cause harmful interference in both SMSAs, we require that each applicant not only specify which SMSA it intends to serve but also to detail what steps it will take to prevent blocking cochannel use in the adjacent SMSA. Issues of mutual exclusivity for applications not proposing to serve SMSAs

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[43] We intend to use the list of SMSAs and SCSAs to be published by the Office on Management and Budget on June 30, 1983 as our source for SMSA definitions in this service.

will be resolved using only existing Part 21 Rules. However, we do require all such applicants to specify the name of the primary service area. Each applicant will only be allowed to file a single application for each service area.

150. We believe that by using techniques such as crosspolarization and frequency offsets that it will be possible to avoid cochannel interference in most situations. We stress again that we expect applicants to address this problem in their applications. *Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.*

151. We expect existing ITFS licensees to cooperate with would be MDS applicants to make channels available. We believe that cooperation between MDS providers and ITFS licensees could result in benefits to each. The ITFS licensees could benefit from the technical expertise of MDS operators and the MDS operators would benefit from access to the ITFS spectrum. Most importantly, the public will benefit from more intensive use of the spectrum.

152. All MDS applications must contain a statement that the applicant will comply with the following interference protection requirements:

1) With respect to the ITFS, the MDS operator must attempt to obtain the written consent of all licensees, permittees and applicants of cochannel and adjacent channel ITFS transmitters located within 50 miles of the MDS transmitter prior to commencing MDS construction facilities.

2) With respect to cochannel and adjacent channel MDS operations, the MDS applicant must provide the level of interference protection proposed in Docket 80–113 until a resolution of that proceeding has occured.

3) To assist us in enforcing Section 21.902(a) of our Rules, that requires applicants to make "exceptional efforts" to avoid blocking cochannel use in nearby cities and adjacent channel use in the same city, the applicant must explain what efforts it has made to comply with this section.

Applicants will be granted construction permits conditioned on their submitting to the Commission, prior to commencing construction, a statement from all cochannel and adjacent channel ITFS licensees, permittees or applicants that have transmitter sites within 50 miles of the proposed MDS transmitter that the operation of the multichannel MDS facility will not cause harmful interference to their ITFS operations or if it does that the ITFS operator will accept such interference. If the applicant is not able, after making reasonable efforts, to obtain such a statement it may in the alternative submit evidence that the operation of the proposed MDS would not cause harmful interference to the existing ITFS operations.[44]

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[44] In this regard it should be noted that lessees of the E or F group channels will not be protected from harmful interference caused by an MDS licensee operating on these channels.

153. Finally, as noted above, (*see* para. 88, *supra*) we do not believe it would be in the public interest to require the first group of applicants for the reallocated channels to submit the interference analysis required by Section 21.902(c)(1) of our Rules, 47 C.F.R. § 21.902(c)(1). For this reason, we are hereby waiving the requirement that the first group of applicants for the reallocated channels comply with Section 21.902(c)(1). If we subsequently decide to accept a second group of applications for these channels (*see* para. 154, *infra*) such applications must contain the interference analysis required by Section 21.902(c)(1).

154. Because it is possible that two new MDS construction permits will be granted simultaneously in some markets, and because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applicants to comply fully with Section 21.902(a). We will therefore allow MDS construction permit holders to apply for modifications to their facilities in order to minimize interference potential with other MDS and ITFS operations.

155. Section 21.43 our rules, 47 C.F.R. § 21.43, requires construction of an MDS facility within eight months of grant, although construction permit holders may request extensions. We believe that it is appropriate to grant extensions liberally to MDS construction permit holders in the E and F groups. The reason for this is that, particularly in major markets, many of the E and F channels will be occupied. In this case, the grant of an MDS construction permit is simply an authorization for the permittee to enter into negotiations with certain ITFS licensees. While the permittee may, subject to the interference protection requirements, commence operations on as few as one channel, the enterprise may not be viable unless a larger block is assembled. Hence, while we will look favorably on requests for time extensions of construction permits, such requests must include information on the permittee's efforts to assemble a viable block of channels and an estimate of the construction timetable.

156. In general, we will use existing Part 21 procedures to process multichannel MDS applications. However, we believe it is necessary to adopt procedures to deal with what we referred to in the *Cellular Reconsideration Order* as "one-upmanship". There we stated that:

> We want all participants to file applications which represent their best view of a service plan for the named SMSA. To do so, we do not find it necessary for participants to consult the plans of their potential competitors. Setting up a plan which would allow applicants to revise their filings after viewing the applications of others would encourage applicants to engage in "one-up-manship," which has harmful consequences. This would undermine our ability to compare proposals with some measure of confidence that the applicant had participated in its development. Plans based on another proposal would no longer represent the applicants' best idea of how to serve a given area but would, instead, represent applicants' use of the administrative process to obtain an advantage over competitors. Furthermore,

> allowing opportunity for one-up-manship would needlessly encumber an administrative process which we must streamline to its essentials if the American public is to receive cellular service without unnecessary delay.

Cellular Reconsideration Order, *supra*, at 89 (footnotes omitted). We recognize that there are significant differences between the technical planning required to operate a cellular communication system and that required to operate a multichannel MDS system. Our experience with both MDS and the more recently authorized Digital Electronic Message Service (DEMS) has taught us that some applicants merely copy applications that have previously been filed and resubmit them with the names changed. We believe that this kind of activity does smack of the "land rush" or "gold rush" mentality that concerned many of the commenters in this proceeding. Our experience with single channel MDS applications is that in many instances a local entity will perceive the need for service in its community and file the appropriate application only to have another entity file a competing application on the final day allowed by our Rules thereby delaying the introduction of service to the public. We do not believe that such activity is in the public interest. We will, therefore, initially only accept multichannel MDS applications on the 45th day after publication of this Order in the Federal Register.[45] We cited the well-established legal precedent for proceeding in this manner in the *Cellular Reconsideration Order* and noted that this procedure "treats all prospective applicants equally and fairly by giving them substantial advance notice of due dates for their applications." *Id.* at 90. After processing the first set of applications, we will determine whether to proceed to accept further applications in this manner or to allow applicants to file using the existing Part 21 cut-off procedures.

G. *Other Matters*

157. Several of the commenters in this proceeding questioned the need and wisdom of continuing to regulate MDS as a common carrier service. Michael Benages claimed that:

> The Commission's rules impose on the MDS licensee its status as a common carrier, but they do not alter the fact that in operation the licensee is functionally equivalent to [a] broadcast licensee, and most specifically, the licensee of a subscription television facility.

Comments on Proposal of Microband Corporation of America, by Michael Benages, General Dockets 80–112 and 80–113, at 7–8 (July 2, 1982). In the same vein Tekkom commented that:

> Common sense would dictate a current regulatory approach to MDS similar to that adopted for STV. STV is, as a practical matter, little different from MDS. In STV, the licensee can either operate the subscription television service or sell the

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[45] If the 45th day after release of this Order falls on a holiday, applications should be filed on the next business day. 47 C.F.R. §§ 1.4(i), (d).

> airtime to another under terms of a contract negotiated to meet the marketplace realities. The staff's adherence to a strict interpretation of tariff rules prevents MDS from being allowed to act on a cost efficient basis and, instead, imposes a regulator's view as to what is "*possible, practical and desirable.*"

Comment of Tekkom, Inc., *supra*, at 4–5. Contrasted to these views is the view expressed by the Ad Hoc Committee for Wireless Cable.

> [T]he Commission wisely chose to establish MDS as a common carrier service. By separating the ownership of facilities from decisions over programming, the Commission permitted the risks of this new venture to be spread among different entrepreneurs with differing focuses, interests and abilities. Whereas Carriers gained expertise in system construction and operation, Operators moved into each community and provided the service which they believed was most demanded in that community. The latter invested their resources in trucks, technicians, reception equipment, programming and advertising. They were also unencumbered by the costs of regulatory compliance. This separation of investment risks has maximized the speed with which MDS has grown.
>
> The existing MDS structure has worked well and has been to the benefit of the public: It should not be changed for the sake of change . . ..

Comments of the Ad Hoc Committee, *supra* at 11–12. Because we did not propose to change the regulatory status of MDS in this proceeding, we believe it would be inappropriate for us to act on this issue in this proceeding. Those who believe that this issue should be addressed further are invited to submit a Petition for Rulemaking.

158. The National Cable Television Association (NCTA) and Warner Amex Cable Communications, Inc. (Warner Amex) filed comments concerning another issue not raised in the *Notice*. Warner Amex and NCTA point to heavier regulatory burdens faced by cable television systems as compared to those faced by other providers of video services including MDS and conclude that the Commission should act to eliminate these disparities. The NCTA position is that:

> [I]t is crucially important that the Commission recognize that the new service that Microband proposes would enjoy significant regulatory advantages over cable that would distort competition between the two services. To promote its own objectives of fostering true competition and diversity, the Commission should accompany any authorization of Microband's proposed service with a comprehensive proceeding fashioned to level the playing field on which MDS, cable and the other old and new video services will compete.

Comments of the National Cable Television Association, Inc., General Docket 80–112 and 80–113, at 12 (July 2, 1982). Warner Amex concludes that:

> Before considering Microband's proposal and the issues in the above-captioned rulemaking proceedings, the Commission must first address the issue of regulatory parity among competing technologies. To ignore this issue any longer, while at the same time creating additional economic advantages for cable's competitors (via preemption), is unfair to the cable industry, its subscribers and the public interest generally.

Comments, Warner Amex Cable Communications, Inc., General Dockets 80–112 and 80–113, at 6 (July 2, 1982). It may not be possible (assuming it were desirable) to "level the playing field" on which multichannel MDS and cable "play." There are vast technological differences between multichannel MDS and cable that strongly favor cable. Cable systems have the capability of providing more than one hundred channels of television service. The multichannel MDS systems we are authorizing today are limited to four channels. Cable systems have the capability to serve all locations within a service area. Our experience with single channel MDS is that most operators, because of various propagation factors, have difficulty serving more than 50% of the locations within their service areas. Furthermore, the service areas of MDS operators are frequently much smaller than the service areas of cable companies. As far as regulatory burdens are concerned, MDS licensees are subject to the full panoply of Title II common carrier regulation. Cable has never been subject to these obligations. For these reasons, we find little merit to arguments raised by NCTA and Warner Amex as presented. Petitioners may wish to submit a petition for rulemaking addressing these issues in a substantiated, focused manner.

159. Turner Broadcasting Systems (TBS) urged that we act on its *Petition for Rulemaking* requesting the deletion of the cable television "must-carry" rules. TBS notes that Microband in its proposal claims that multichannel MDS operators will provide the "right mix" of channels on their systems to maximize subscribers and concludes that cable television systems, especially 12 channel systems, are not free to similarly provide the "right mix" of programming to their customers because of the must-carry rules. TBS's petition is now being studied by the Commission staff. However, we do not believe it would be in the public interest to delay this proceeding pending action on the TBS petition.

160. Finally, on December 21, 1979, Microband filed a *Petition for Rulemaking*, RM-3540, in which it requested that we investigate the feasibility of exchanging the existing MDS channel 2 allocation (2156–2162 MHz) with a 6 MHz band allocated to some other service. Microband suggested that we consider common carrier frequencies in the 2110–2130 MHz and 2162–2180 MHz bands or operational fixed frequencies in the 2130–2150 MHz, 2180–2200 MHz and 1850–1990 MHz bands. Microband's reason for submitting this petition was its concern that channel 2 operation would cause unacceptable adjacent channel interference with existing channel 1 operations. As discussed above, channel 1 and channel 2 are now being operated in Phoenix, Arizona and none of the interference problems suggested by Microband have materialized. Furthermore, since we are by this order removing the restriction limiting MDS operators to single channel per service area, we believe that many channel 2 operators can enter into joint ventures with existing channel 1 operators and thereby make two channel service available. For these reasons, we have concluded that there is no need to proceed with the rulemaking

suggested by Microband and we will by this Order dismiss its petition.

IV. *Regulatory Flexibility Act*

161. The Regulatory Flexibility Act of 1980 does not apply to rules adopted after January 1, 1981 when the underlying notice of proposed rulemaking was adopted before that date. The underlying *Notice of Proposed Rulemaking* for this proceeding was adopted March 19, 1980. Accordingly, there is no need for certification under the Regulatory Flexibility Act. See 5 U.S.C. § 601.

V. *Conclusion*

162. We believe that we have in this *Report and Order* arrived at equitable treatment of all concerned parties and at the same time have adopted policies that best serve the public interest. In particular, we believe that the policies and rules set out herein recognize and provide for the unique needs of the existing and potential users of the ITFS channels and also provide would-be providers of multichannel MDS service spectrum to meet anticipated public demand. This proceeding has required that we balance difficult competing interests in reaching a decision which should result in more intensive use of the spectrum while preserving legitimate needs of existing users.

163. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r), that Title 47 of the Code of Federal Regulations IS AMENDED as described in Appendix B. These amendments shall become effective thirty days after publication of this Order in the Federal Register and we will accept mutichannel MDS applications *only* on the forty-fifth day after publication of this Order in the Federal Register.

164. IT IS FURTHER ORDERED that the Microband Petition for Rulemaking RM-3540 IS DISMISSED and that proceeding IS TERMINATED.

165. IT IS FURTHER ORDERED that the proceeding in Common Carrier Docket 80–116 IS TERMINATED.

166. IT IS FURTHER ORDERED, that the portion of the application of Channel View, Inc. requesting authority to conduct a market experiment, File No. 8938-ED-MR-82, IS DENIED.

167. IT IS FURTHER ORDERED that the developmental applications of Contemporary Communications Corporation to construct and operate multichannel over-the-air pay video service facilities in New York, Chicago, Los Angeles, St. Louis, and Philadelphia, File No. BPEX-820802KH, ARE DENIED.

168. IT IS FURTHER ORDERED that Form 330P IS AMENDED as set forth in Appendix C effective upon obtaining approval of the Office of Management and Budget as required by the Paperwork Reduction Act. 44 U.S.C. § 3502(4).

169. IT IS FURTHER ORDERED that applications for Channel Groups E and F filed after 12:00 PM, May 26, 1983, must be consistent with the provisions herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Comments for General Docket 80-112

Illinois Institute of Technology
Memorial Hospital Medical Center of Long Beach, CA
Interact: Interactive Television Network, Hanover, NH
The American College of Physicians
Spring Branch Independent School District, Houston, TX
Joint Council on Educational Telecommunications
Indiana Higher Education Telecommunications System
San Diego City Fire Department
Association of Hospital Television Networks
Georgia Institute of Technology
Harris Corporation
Farinon Electric Operations
Purdue University
Oklahoma State Regents for Higher Education
Association of American Railroads
Communications Satellite Corporation
KLVX Channel 10, Las Vegas, NV
Connecticut Board of Education
State of MO, Dept. of Elementary and Secondary Education
Office of the Los Angeles County Superintendent of Schools
Northeastern University
Anaheim City School District
Superintendent of Public Instruction State of North Carolina
Board of Education, Chicago, IL
Bert Edwards
Ninth District PTA (California)
University of California, Santa Barbara
Instructional Television Center, Dallas Co. Community College
American Association for Community Junior Colleges' Task Force on the Uses of Mass Media Learning
Advanced Micro Devices Inc.
Colorado State University
Lawrence Livermore Laboratory
Daytona Beach Community College
Watkins-Johnson Company
The University of Alabama in Birmingham
Vista Unified School District, Vista, CA
Hillsborough County Public Schools
Sperry Univac Computer Systems
The Hospital Council of Western Pennsylvania
University of Colorado
Miami-Dade Community College
Hewlett-Packard Company
El Centro College, Dallas, TX
South Bay Union School District
Systems Control, Inc.

Bakersfield City School District
Satellite Business Systems
National Aeronautics & Space Administration
Intel Corporation
School Board of Pinellas County, FL
American College of Radiology, Chicago, IL
Eastfield College
Richland College
Long Beach Unified School District
San Dieguito Union High School District
Honorable, Senator Harrison Schmitt (NM)
Southern Pacific Communications Company
Ford Aerospace & Communications Corporation
Cherry Electrical Products Corporation
Lakeside Union School District
Indiana Higher Education Telecommunication System
California Media & Library Educators Association
TV College Consortium San Diego & Imperial Counties Community College Association
The School Board of Broward County, FL.
Argonne National Laboratory
The California State University & Colleges
Mark Controls Corporation
San Diego Regional Instructional Television Fixed Service System
San Diego County Superintendent of Schools
Florida Department of Education
Fresno County Department of Education
San Diego Unified School District
Rev. John Geaney, C.S.P. Unda - USA
San Diego Miramar College
South Carolina Educational Television Commission
National Educational Association
Southwestern College
Arizona State University
San Diego & Imperial Counties Community College Association
MiraCosta College
Teleprompter Corporation
National Association of Educational Broadcasters
National Public Radio
Satellite Syndicated Systems, Inc.
Public Service Satellite Consortium
University of South Florida
California Public Broadcasting Commission
Northstar Communications
Elburn MDS Co.
San Bernardino MDS Co.
Angeles MDS Co.
Microwave Communications Systems, Inc.
The National Association of Public Television Stations
Sylvania Systems Group
Oceanside Unified School District, CA
Board of Regents, The University of Wisconsin System
Dade County Public Schools
Illinois Institute of Technology
Kirkwood Community College
Central Committee on Telecommunications of the American Petroleum Institute
American Library Association
Superintendent of Public Instruction, State of California

A. Ruth Badgett
Homer H. Badgett
Nantucket MDS
Marion County Schools, Ocala, FL
Commonwealth Edison, Trustee of the Illinois Institute of Technology
Massachusetts Department of Education
California Department of Education
School Board of Palm Beach County, FL
Chula Vista City School District, CA
Caterpillar Tractor Co.
Association for Educational Communications & Technology
New Trier Township Television/Film Cooperative
Coronado Unified School District, CA
Cable Television Review Commission County of San Diego, CA
Pasadena Unified School District, CA
Southern California ITFS Advisory Committee
Jules Cohen & Associate
International Harvester
Illinois Institute of Technology
American Association of School Administrators
Ohio Educational Broadcasting Network Commission
Georgia State Board of Education
Schwartz, Woods & Miller
CBS, Inc.
Archdiocese of San Francisco
University of Maryland
National Telecommunications & Information Administration
Joint Council on Educational Telecommunications
National Association of MDS Service Companies, Inc.
Public Interest Satellite Association
Archdiocese of Los Angeles
National Instructional Telecommunications Council, Inc. and Catholic Television Network
U.S. Catholic Conference
The Leland Stanford Junior University
The Volusia County School Board
Motorola, Inc.
Corporation for Public Broadcasting
Center for Excellence, Inc.
Archdiocese of New York
University of California
Grossmont Community College District
University of Minnesota
Aiken Cablevision, Inc.
Colony Communications Corporation
Comcast Corporation
Cox Cable Communications, Inc.
Palmer Communications, Inc.
U.S. Department of Education
The Prism Company
Palomar College
St. Petersburg Junior College
David A. Fountain
University of California, San Francisco
University of Southern California
Illinois Institute of Technology
Jet Propulsion Laboratory
Richardson Independent School District

Huntsville City Schools
National Catholic Educational Association
The Association for Higher Education of North Texas
Office of the Governor of Georgia
Rocky Mountain Corporation for Public Broadcasting
School Board of Dade County, FL
Standard Oil Company of California
Norman M. Jackson
Microband Corporation of America
Centerstage
Humbert Cardinal Medirros, Archbishop of Boston
The Los Angeles Radiological Society
General Dynamics
Glendale District, Los Angeles County Medical Association
KHS78 Instructional TV, Mesquite, TX
(TAGER) The Association for Graduate Education & Research
Concordia College
Texas Wesleyan College
U.S. Catholic Conference
F. Raymond Zintz
Boston Catholic Television Center
Electronics, Missiles and Communications, Inc.
The Association for Higher Education of North Texas
University of Maryland
Catholic Television Network San Francisco
Richardson Instructional Television Center
Instructional Television of the Archdiocese of N.Y.
Corporation for Public Broadcasting
CBS, Inc.
Microband Corporation of America, "Urbanet" Proposal

Responses to Microband's "Urbanet" Proposal

Reverend Jesse L. Jackson, Operation Push, Inc.
The Archdiocese of Los Angeles
Ad Hoc Committee for Wireless Cable
American Home Theater, Inc.
Bogner Broadcast Equipment Corporation
Omega Communications, Inc.
Test, Inc.
Vista Unified School District
National School District, National City, CA
San Diequito Union School District, CA
Chula Vista City School District, CA
Cajon Valley Union School District, CA
San Diego Unified School District
Palomar College
California Media and Library Educators Association
National Cable Television Association, Inc.
Microband Corporation of America
Pay Television of Greater New York, Inc.
American Cable
Showbiz
Santa Ana Unified School District
Alfred E. Anscombe
Regional Educational Television Advisory Council of Los Angeles County
Telicare, Diocese of Rockville Centre
Ultravision Communications

State of Connecticut, Board of Education
California State University, Sacramento
The California State University System
University of Maryland - College of Engineering
Public Broadcasting Service
Turner Broadcasting System
Indiana Higher Education Telecommunication System
Mary Sue Manley
TRI-State Regional Planning Commission
Northeastern University
Multipoint Distribution Systems
Superintendent Fresno County Schools
California State College, Stanislaus
Legislative Commission on Science and Technology, State of N.Y.
CBS, Inc.
The Association of Hospital Television Networks
Microband Corporation of America
Long Beach Unified School District
Metropolitan Education and Cultural Communications Association
Northeastern University
Simmons College
Suffolk University
WGBH Educational Foundation
University of Massachusetts
Boston Catholic Television Center
Harris Corporation-Farinon Electric Operations
Aiken Cablevision, Inc.
Colony Communications Corporation
Comcast Corporation
Connersville Cable TV, Inc.
Cox Cable Communications, Inc.
Multimedia Cablevision, Inc.
Palmer Communications Incorporated
Televents, Inc.
U.S. Cable Corporation
The Association for Higher Education of North Texas
Catholic Television Network
Center for Excellence, Inc.
Illinois Institute of Technology
National Instructional Telecommunications Council, Inc.
The Leland Stanford Junior University
San Francisco Archdiocese
Movie Systems, Inc.
Walter B. Hewlett and Michel Guite
Robert A. Bednarek
The Corporation for Public Broadcasting
Department of Education, San Diego County
Richard L. Vega & Associates
First National Home Theaters, Inc.
Microwave Communications Associations Inc.
South Carolina Educational Television Commission
Michael Benages
Sunday School Board of the Southern Baptist Convention
Rev. George Byrne Diocese of San Diego
University of California, Berkely
Contemporary Communications Corporation
Indiana University
National Black Media Coalition

Sterling Recreation Association
National Association of MDS Service Companies
Oklahoma State Regents for Higher Education
Department of Communications, United States Catholic Conference
Sterling Recreation Organization Company
State of New York, Legislative Commission on Science & Technology
David S. Saxon, President University of California
University of California, Systemwide Administration
California Community Colleges ITFS Advisory Committee
Superintendent of Public Instruction, State of California
University of California, San Francisco
San Diego and Imperial Counties, Community Colleges Association
Tekkom, Inc.
KLVX Channel 10, Las Vegas, Nevada
Standard Communication
Gordon & Healy
Warner Amex Cable Communications, Inc.
Emerson College
National Association of Public Television Stations
Central Committee on Telecommunications of the American Petroleum Institute
Department of Education, State of Florida
Los Rios Community College District
TV 5 The Movie Channel
Grambling State University
Georgia Institute of Technology
Bay Area Community College Television Consortium
University of South Carolina
Telecommunications Systems, Inc.
Viking Communications
Lance Industries
Grossmont Community College District
Imperial Valley College
University of South Carolina
Marshall University
San Diego State University
Ninth District PTA (CA)
Mendocino County Superintendent of Schools
University of California, San Diego
Muzak Dynamic Sound
TDS Engineering Co.
Conifer Corporation
Lipper-LaRue
Twin Cities Public Television Inc.
Troy State University
Miami-Dade Community College
Townsend Associates
Southwestern College
Electronics, Missiles & Communications, Inc.
Archdiocese of New York
The School Board of Broward County, Florida
Channel Master
Coronado Unified School District
University of California, Davis
University of California, Irvine
University of California, Riverside
University of California, San Diego
San Diego Miramar College
John W. Hunt

California State Steering Committee for Curriculum Development & Publications
Woodrow Wilson Junior High School, CA
Lawrence Livermore National Laboratory
The School Board of Marion County, FL.
Taft Broadcasting Corporation
Southern California Instructional TV Fixed Service Advisory Committee
Superintendent of Public Instruction, State of California
Ms. Anne G. Wall
Don Ferkovich
David D. Pascoe
W. D. Stainback
Ms. Helen L. Patterson
Rosemarie Nelson
Temple University
Grossmount Union High School, CA
Catholic Television Network of Chicago
Ms. Mary M. Long, Meridian School
Ms. Linda A. Brown
Ms. Carol R. Esmay
Mr. Peter J. Saccone
Bernadine Hollers
Ms. Sabina R. Meyers
School Board of Palm Beach County, FL
Ms. Janice E. Peters
Miramar Ranch School
Lakeside Union School District
Ms. Deanna Oakes
Ballantyne Elementary School
Mr. Paul Dekock
Diocese of San Diego
Santee School District
Marquee Television Network, Inc.
Nevada Pay Television, Inc.
Educational TV Association of Metropolitan, Cleveland
American Association of State Colleges & Universities
Sandia National Laboratories at Livermore, CA
NASA
Edmund G. Brown, Jr.
California Postsecondary Education Commission
American Council on Education
American Association of Community and Junior Colleges
National Association of State Universities and Land-Grant Colleges
National University Continuing Education Association
Fresno County Department of Education
California Community Colleges
Assemblyman, Denes J. Butler, New York State
CBS, Inc.
Eastfield College

List of Reply Comments

American Broadcasting Companies, Inc.
Microband Corporation of America
Citizens Communications Center
U.S. Department of Education
National Association of Educational Broadcasters
The Corporation for Public Broadcasting
National Instructional Telecommunications Council, Inc.

National Association of Public Television Stations
Catholic Television Network
The Leland Stanford Junior University
Illinois Institute of Technology
Center for Excellence, Inc.
San Francisco Archdiocese
The Association for Higher Education of North Texas
Utilities Telecommunications Council
Central Committee on Telecommunications of the American Petroleum Institute
Teleprompter Corporation
Public Interest Satellite Association
Joint Council on Educational Telecommunications

APPENDIX B

Parts 2, 21, 74 and 94 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. In Section 2.106, for band designated in column 5 as 2535–2655 MHz, add "Multipoint distribution" to corresponding list in column 9 designated as Class of Station in existing Table of Frequency Allocation as follows:

§ 2.106 Table of Frequency Allocations.

• • • • •

Band (MHz) 5	*Class of Station* 9
2535–2655	Instructional television fixed. Operational fixed. Space. Multipoint distribution.

• • • • •

NG 47

In the band 2500–2690 MHz, channels in 2500–2686 MHz and the corresponding response frequencies 2686.0625–2689.8125 MHz may be assigned to stations in the Instructional Television Fixed Service (Part 74 of this Chapter); channels in 2596–2644 MHz and response frequencies 2686.5625–2689.6875 MHz may be assigned to Multipoint Distribution Service stations (Part 21 of this Chapter); and channels 2650–2656 MHz, 2662–2668 MHz and 2674–2680 MHz and response frequencies 2686.9375 MHz, 2687.9375 MHz and 2688.9375 MHz may be assigned to stations in the Operational Fixed Service (Part 94 of this Chapter). In Alaska, however, frequencies within the band 2655–2690 MHz are not available for assignment to terrestrial stations.

• • • • •

2. In Section 21.2, a definition for Multipoint Distribution Service response stations is added in appropriate alphabetical sequence to read as follows:

§ 21.2 Definitions.

• • • • •

Multipoint Distribution Service response station. A fixed station operated at an MDS receive location to provide communications with the associated station in the Multipoint Distribution Service.

3. Section 21.40 is amended by revising paragraph 21.40(a) and the introduction to paragraph 21.40(c) as follows:

§ 21.40 Considerations involving transfer or assignment applications.

(a) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses or construction permits whenever applications (except those involving a *pro forma* assignment or transfer of control) for consent to assignment of a common carrier construction permit or license, or for transfer of control of a permittee or licensee, involve facilities which have been operated for less than one year by the proposed assignor or transferor. Only licenses that were obtained following a comparative hearing are subject to this section. At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that the proposed assignor or transferor has not acquired an authorization or operated a station for the principal purpose of profitable sale rather than public service. This showing may include, for example, a demonstration that the proposed assignment or transfer is due to changed circumstances (described in detail) affecting the licensee or permittee subsequent to the acquisition of the permit or license, or that the proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests.

* * * * *

(c) For the purposes of this section, the one year period is calculated using the following dates (as appropriate):

* * * * *

4. Section 21.901 is amended by revising paragraphs 21.901(a), 21.901(b) and 21.901(d) as follows:

§ 21.901 Frequencies.

(a) Frequencies in the bands 2150–2162 MHz and 2596–2644 MHz are available for assignment to fixed stations in this service. Frequencies in the band 2150–2160 MHz are shared with nonbroadcast omnidirectional radio systems licensed under other parts of the Commission's Rules, and frequencies in the band 2160–2162 MHz are shared with directional radio systems authorized in other common carrier services. Frequencies in the 2596–2644 MHz band are shared with Instructional Television Fixed Service Stations licensed under Part 74 of the Commission's Rules. The response channels E1, E2, E3, E4, F1, F2, F3, and F4 listed in § 74.939(d) are also available for assignment to fixed stations in this band and are shared with Instructional Television Fixed Service stations licensed under Part 74 of the Commission's Rules.

(b) Applicants may be assigned a channel(s) according to one of the following frequency plans:

(1) At 2150–2156 MHz (designated as channel 1),

(2) At 2156–2162 MHz (designated as channel 2), or

(3) At 2156–2160 MHz (designated as channel 2A), or

(4) At 2596–2602 MHz, 2608–2614 MHz, 2620–2626 MHz and 2632–2638 MHz (designated as channels E1, E2, E3 and E4 respectively with the four channels to be designated the E-group channels) and the associated response channels E1, E2, E3 and E4 listed in § 74.939(d), or

(5) At 2602–2608 MHz, 2614–2620 MHz, 2626–2632 MHz, and 2638–2644 MHz (designated as channel F1, F2, F3 and F4 respectively with the four channels to be designated the F-group channels and the response channels F1, F2, F3, and F4 listed in § 74.939(d).

* * * * *

(d) Frequencies in the band 2596–2644 MHz and associated response channels will be assigned only in accordance with the following conditions:

(1) Prior to commencing construction of any facilities to use frequencies in this band permittees must submit to the Commission a written statement from all cochannel and adjacent channel Instructional Television Fixed Service Licensees, Permittees or Applicants with transmitters located within 50 miles of the permittee's transmitters that operation of the permittee's transmitter will not cause harmful interference to Instructional Television Fixed Service Operation or that the Instructional Television Fixed Service Licensee, Permittee, or Applicant will accept whatever interference occurs. If the permittee is unable to obtain such a statement from the ITFS Licensee, Permittee, or Applicant it may submit a Petition for Declaratory Ruling pursuant to Section 1.2 of this Chapter on the issue of whether harmful interference will occur. The Petition must be simultaneously served on the affected ITFS entity. In such cases, the Commission will determine if harmful interference will occur using accepted engineering standards. The MDS permittee must also detail what efforts it made to obtain the desired statement from the ITFS operator.

(2) The E-group channels will be assigned to a single applicant in each area and the F-group channel will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

(3) All applicants for frequencies in this band must specify the channels being applied for; however, the Commission may on its own initiative assign different channels in the band if it is determined that such action would serve the public interest.

(4) Notwithstanding the provisions of Section 21.31 of this part, applications for frequencies in this band will be accepted only on the date(s) specified by the Commission.

(5) Notwithstanding the provisions of Section 21.31(a) all applications that propose to locate transmission facilities within or within 15 miles of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. In the case of a Standard Consolidated Statistical Area (SCSA) all applications that propose to locate facilities within or within 15 miles of the boundary of any SMSA contained in the SCSA will be considered together. In those cases in which an applicant proposes to locate its transmission facilities so that it will be located in, or within 15 miles of, more than one SMSA, the applicant must specify which SMSA it intends to be its primary service area. Each application will be entitled to comparative consideration or to be included in a lottery in only one such service area.

(6) Licensees or permittees of the frequencies in this band may petition the Commission to authorize exchange of assigned channels to allow adjacent channel operation. For example, one licensee may be assigned channels E1, F1, E2, and F2 and the other licensee could be assigned channels E3, F3, E4, and F4. Such a petition will be granted if the petitioners show that the exchange will result in better service to the public.

(7) All applications for frequencies in this band must contain a showing of how interference with the operation of adjacent channels will be avoided and what steps the applicant has taken to comply with subsection 21.902(a) of this section.

5. A new paragraph (d) is added to existing Section 21.902 as follows:

§ 21.902 Frequency interference.

* * * *

(d) All permittees of frequencies in 2596–2644 MHz band must, prior to commencing construction of any transmission facility, file with the Commission an analysis demonstrating that the facility to be constructed will not cause any harmful interference to existing cochannel or adjacent channel Instructional Television Fixed Service receiver locations within 50 miles of the transmitter, or, in the alternative, submit a statement from the ITFS licensee that the interference is acceptable.

6. A new Section 21.909 is added to read as follows:

§ 21.909 MDS response stations.

(a) An MDS response station is authorized to provide communication by voice and/or data signals with its associated MDS station. An MDS response station may be operated only by the licensee of the MDS station or its subscriber and only at a receiving location of the MDS station with which it is communicating. More than one response station may be operated at the same or different receiving locations. All MDS response stations communicating with a single MDS station shall operate within the same frequency channel. The specified frequency channel which may be used by the response station is determined by the channel assigned to the MDS station with which it communicates. The specified frequency channel may be subdivided to provide a distinct operating frequency for each of more than one response station.

(b) Authorization of an MDS response station is subject to the following terms and conditions:

(1) The response station shall not cause interference to any station operating beyond the service area of the MDS station with which it communicates.

(2) The Commission's Engineer-In-Charge of the radio district in which intended operation is located shall be notified prior to the commencement of the operation of each response station. Such notice shall include:

(i) The authorized call sign of the MDS station, the transmitter location number (assigned by the carrier in sequence of use beginning with number one) and the response station location coordinates.

(ii) The exact frequency or frequencies to be used.

(iii) Anticipated date of commencement of operation.

(3) The Engineer-In-Charge shall be notified within 10 days after termination of any operation. The notice shall contain similar information to that contained in the notice of commencement of operation.

(4) Each station shall have posted a copy of the notification provided to the Engineer-In-Charge.

(5) The antenna structure height employed at any location shall not exceed the criteria set forth in Section 17.7 of this chapter.

7. The following definitions will be added at the end of the list of definitions in Section 74.901:

§ 74.901 Definitions.

* * * * *

Main channel: The main channel is that portion of each authorized channel used for the transmission of visual and aural information as set forth in Section 73.682 of this Chapter and Section 74.938 of this Subpart.

Subsidiary channel: A subsidiary channel is any portion of an authorized channel not used for main channel transmissions.

8. Section 74.902 is amended by adding a new paragraph (c) as follows and by redesignating existing paragraphs 74.902(c) and 74.902(d) as paragraphs 74.902(d) and 74.902(e) respectively.

§ 74.902 Frequency assignments.

* * * * *

(c) Channels 2596–2602, 2602–2608, 2608–2614, 2614–2620, 2620–2626, 2626–2632, 2632–2638, and 2638–2644 MHz and the corresponding response channels listed in Section 74.939(d) are shared with the Multipoint Distribution Service. No new Instructional Television Fixed Service applications for these channels filed after May 25, 1983 will be accepted. In those areas where Multipoint Distribution Service use of these channels is allowed pursuant to § 21.902, Instructional Television Fixed Service users of these channels will continue to be afforded protection from harmful cochannel and adjacent channel interference from Multipoint Distribution Service stations.

* * * * *

9. Section 74.931 is amended by revising paragraph (e) and by adding a new paragraph (f) to read as follows:

§ 74.931 Purpose and permissible service.

* * * * *

(e) The excess capacity of each channel licensed in this service may be used for the transmission of material to be used by others in addition to material specified in (a), (b), (c) and (d) of this section. Each station licensed in this service must use a significant portion of the main channel capacity of each authorized channel for the transmission of material specified in subsections (a), (b) and (d) of this section. All of the capacity available on any subsidiary channel of any authorized channel may be used for the transmission of material to be used by others. When an ITFS licensee makes excess capacity available on a common carrier basis, it will be subject to common carrier regulation. Licensees operating as a common carrier are required to apply for the appropriate authorization and to comply with all policies and rules applicable to the service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the ITFS licensee. Initial determinations by licensees are subject to Commission examination and may be reviewed at the Commission's discretion. Leasing activity may not cause unacceptable interference to cochannel and adjacent channel operations.

(f) Material transmitted by these stations may be intended for simultaneous reception and display or may be recorded by authorized users for use at another time.

APPENDIX C

1. Form 330P, Application for Authority to Construct or Make Changes in an Instructional TV Fixed Station and For Response Station(s) and Low Power Relay Station(s) is amended by adding the following:

* * * * *

Describe briefly the primary purpose of the requested authorization.

State the anticipated percentage of time for which the channel will be used by entities other than the licensee.

List the total number of existing authorizations and state the combined percentage of time for which these channels are presently used for transmissions of material for others.

May 26, 1983

Concurring Statement of
FCC Commissioner James H. Quello

In re: Frequency Reallocation to the Multipoint Distribution Service (MDS), General Docket 80–112 & CC Docket 80–116

As you know, my consistent position on this issue has been that there is a heavy burden of proof on those who seek to take away frequencies reserved for educational purposes. I am concerned that the Commission is not adequately taking into consideration the educational community's future needs for this spectrum as this nation moves into the information age. Nevertheless, the staff and some of my colleagues do want to make additional channels available for commercial video services. Given that this is inevitable, I believe that this document represents an exceptional balancing of competing interests in a very difficult area. I believe that if reallocation must result, this document appears to be a reasonable approach which maintains priority where it belongs—with educational entities.

I have been reluctantly persuaded to concur in this document because of the following provisions and assurances:

(1) all existing ITFS applicants, permitees, and licensees have been "grandfathered";

(2) at least 20 channels are reserved exclusively for ITFS;

(3) educators will be permitted for the first time to lease excess capacity so as to provide the potential for needed additional revenues;

(4) MDS applicants will receive only a conditional construction permit and must get an agreement in writing from the existing ITFS licensee before they can begin construction on the same channel or an adjacent channel;

(5) MDS applicants must protect ITFS operators against interference.

Finally, I must note that the Commission, in making its decision, had to give some weight to the lack of existing use of the ITFS spectrum. It is a significant argument that in a substantial number of states there are no channels in use and no applications on file.

While we cannot ignore the loss of potential for ITFS service resulting from this action, I strongly hope that the educational community will recognize the significant benefits which will accrue to the ITFS service as a result of this decision. We must all now look to the future and allot the highest priority to applying the ITFS service as an innovative tool for making our nation more productive and our people better able to cope with a rapidly changing world.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

I concur in the "reallocation" of certain ITFS channels for multichannel MDS use, but I do so with a number of reservations. In particular, while I agree with the allocation of spectrum for multichannel use, I think the Commission could have accomplished this in a way which is both less intrusive to ITFS operators and at the same time better insures the viability of the multi-channel service which the Commission purports to create.

As to the effect on ITFS, for example, I do not understand the necessity for the creation of two four-channel MDS systems rather than one system. This Commission has often spoken of the proliferation of competition in the video marketplace. With this multitude of services, a single four-channel MDS system would face competition whether or not the Commission authorizes a second four-channel system. And obviously, the authorization of a single four-channel system would have had a substantially lesser impact on existing ITFS users, particularly if the Commission had reallocated the three under-used OFS channels for MDS use rather than dipping into the more heavily used ITFS channels. I wish these options had been seriously explored by the Commission staff.

However, having made the policy choice to "reallocate" enough spectrum for two multi-channel MDS systems, the Commission should have proceeded to make multi-channel MDS as viable as possible. But I am fearful that the Commission's decision, fashioned in the name of compromise, does not bode well for the timely creation of multi-channel MDS systems, at least in the major markets. And if it appears that the Commission has so burdened multi-channel MDS that it stands little chance of getting off the ground, then I believe that the Commission should reevaluate its allocation of ITFS spectrum to MDS.

The burdens on potential MDS operators in this oddly configured "reallocation" are numerous. For example, even the "winners" of MDS lotteries[1] win only the right to negotiate with co and adjacent channel ITFS licensees within a 50-mile radius of the MDS station.[2] In fact, MDS permittees, before they may begin construction, must submit a statement from those co and adjacent channel ITFS users to the effect that "the operation of the multichannel MDS station will not interfere with the ITFS operation or that the ITFS operator would accept any interference that did occur."[3] Obviously this gives current ITFS operators something in the nature of a veto power over MDS systems, with the only bright spot in such a procedure being that the veto must be related to "harmful interference" to existing stations.[4] Thus, at least it would appear inappropriate under the negotiation process adopted by the Commission for an ITS operator to veto MDS systems simply because the ITFS operator does not agree with the programming proposed to be presented on the MDS system or for any reason other than a reasonable belief that the MDS system will interfere with the ITFS operator's existing facilities.[5]

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[1] The failure of the Commission to adopt lottery procedures now—which I believe the Commission could have done—also adds to the delay in providing multichannel MDS service. I can only hope that the further notice proposing lottery can be completed expeditiously so that MDS service may be provided to the public in something approaching a timely manner.

[2] Report and Order at para. 85.

In short, while I agree with the allocation of spectrum for multichannel MDS operation, I hope that the Commission has not preordained laggard construction and fitful performance by the multichannel systems; if the Commission has done so, then the disruption to existing ITFS users will have occurred for no reason.[6]

STATEMENT OF COMMISSIONER HENRY M. RIVERA CONCURRING IN PART, DISSENTING IN PART

RE: Report and Order in CC Docket Nos. 80–112 and 80–116.

This Report and Order has two principal aims: to create a new multi-channel video delivery service, and to assure adequate spectrum for future ITFS growth. With respect to these aims, the decision represents a basically fair balancing of the interests of the affected spectrum users and I concur in most of it. However, the Commission erred in failing to precisely define and limit the degree to which ITFS licensees may lease "excess" capacity and I dissent to that part of the decision. As I have previously indicated,[1] I am concerned about the potential *de facto* spectrum reallocation made possible by the Commission's failure to adopt clear guidelines governing excess capacity leasing. If *de facto* reallocation occurs, one of the aims of this Report and Order—assuring adequate spectrum for future ITFS growth—will be thwarted. In view of the apparently intense outside commercial interest in these microwave frequencies, this issue will be far more than academic, at least in the long term, as ITFS usage multiplies. While I certainly do not wish to deprive ITFS licensees of the new income-producing opportunities extended other licensees, I am concerned that the Commission's laissez faire approach here will prove detrimental to our ability to manage the spectrum in the future.

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[3] *Id.*

[4] *Id.* Rather than this clumsy and laborious process, I would have preferred the application of the "last-in" theory familiar both to the Commission and to broadcasters. *E.g.*, Sudbrink Broadcasting of Georgia, Inc., 65 F.C.C.2d 691, 692 (1977). Under this more familiar procedure MDS systems could have been permitted to construct but would have been required to correct any harmful interference to ITFS operators.

[5] It is also important to emphasize my belief that the Commission's decision grandfathers only "existing" ITFS facilities, i.e., those which have been granted, those which are operating and those which have been applied for. To extend grandfathering to inchoate systems is to invite confusion and to delay even further the provision of multi-channel MDS service. *See* Report and Order at para. 85.

[6] I must disagree with one small aspect of the Commission's decision. Consistent with the decision in Amendment of Section 73.3597 of the Commission's Rules, ___ F.C.C.2d ___ (BC Docket 82–887, released December 2, 1982), the instant decision substitutes a "one-year" transferability rule for the "three-year" rule now in force at least for those licenses "that were obtained through comparative hearings." Report and Order at para. 144. While it seems unlikely that this rule will have much effect given the proposed application of lotteries to choose MDS permittees, I continue to believe that any such limitation on the free transferability of licenses "is wholly antithetical to the deregulatory philosophy of this Commission." Amendment of Section 73.3597 of the Commission's Rules, ___ F.C.C.2d at ___ (dissenting opinion).

I also emphatically dissent to the majority's decision to sidestep the media diversity issues inherent in the new "wireless cable service" provided by multichannel MDS. My fellow commissioners apparently believe that there is no place for such concerns in a common carrier service. I disagree. While MDS is nominally regulated as a common carrier service, the majority should have faced the fact that to the viewer, the wireless cable transmission is indistinguishable from other home video mediums, no matter what their regulatory classification.[2] To the viewer, it is all "television". Whether we care to acknowledge it or not, MDS transmissions can influence social, cultural, political and moral values to the same extent as conventional broadcast television. Given this reality, the Commission should have explicitly evaluated options to assure that the new multichannel service will optimally further the robust ideological diversity we have worked so long to achieve in broadcasting.

Common carriers, by law, may neither discriminate among those wishing to use their facilities nor exercise control over transmission content. At first blush, these limitations would appear to mitigate many of the concerns underlying structural and behavioral regulation of broadcast licensees, who do control channel access and transmission content. However, the theoretical programming diversity benefits of common carrier regulation are constrained in MDS. As an initial matter, our rules allow an MDS licensee to provide up to fifty percent of its transmission time to an "affiliated subscriber".[3] Although carriers are prohibited from influencing the content of such transmissions, the efficacy of such a prohibition upon affiliated entities is highly questionable. Where such substantial influence actually is exerted, the diversity-related virtues of common carrier regulation, as well as the classification of MDS as a common carrier, are frontally undermined.

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[1] *See Report and Order Authorizing Shared Used of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities*, released April 15, 1983 (Docket 81–794) (Concurring Statement of Commissioner Henry M. Rivera).

[2] In point of fact, there is little apparent practical difference between MDS home video service and broadcast subscription television. In both services, a licensee typically leases transmission facilities to program distributors or their surrogates, whose goal is to reach as many members of the public as are willing to pay for the service. Neither service can be employed without special equipment. The STV licensee, unlike the MDS licensee, is entitled to deal with the lessee/programmer of its choice and is legally responsible for transmissions over its facility. However, the soundness of the disparate regulatory classifications applied to MDS and STV is open to question, given that an MDS licensee may lease most or all of its channel capacity to a single lessee. *See generally Report and Order* paras. 101–102; *Metrock Corp.*, 73 FCC 2d 802 (1979).

The MDS licensee's apparent freedom to enter long-term contracts with a single customer as to one or more channels in a given local market also substantially curtails, if not eliminates, the diversity-related benefits common carrier regulation might otherwise be expected to provide. In such circumstances, the programmer-customer is functionally indistinguishable from a broadcast licensee. Unlike a broadcaster, however, its discretion over programming is completely unfettered. As a result, the public's exposure to the widest possible diversity of viewpoints may be diminished, despite the fact that authorization of multichannel MDS is intended to promote that goal.

In the broadcast arena, the Commission has traditionally held the view that programming diversity can most effectively be maximized by diversity of ownership and control of broadcast outlets. It has therefore placed heavy emphasis upon structural regulatory policies which, among other things, promote diversity of ownership in local markets through one-to-a-market, duopoly and media cross-ownership rules narrowing curbing local media combinations.[4] The media diversity objective underlying local ownership restrictions in the broadcast service is no less compelling in MDS, which is widely viewed as an alternative to conventional broadcasting, and whose regulatory status and configuration are murky at best. The fact that the FCC has elected to regulate MDS as a common carrier service simply does not negate the reduction in diversity of viewpoint that occurs when an entity obtains the unfettered right to program an MDS channel in a market where that entity already controls another mass communications medium or when a single entity obtains the right to program multiple MDS channels.[5] The majority has apparently blessed such anti-diversity combinations in MDS, essentially because restrictions "would prevent market forces from determining the optimum mix of channels." *See Report and Order* paras. 101–102.

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[3] *See* 47 C.F.R. §21.903(b).

[4] Among the other structural broadcast regulatory rules and policies designed to promote programming diversity are those which proscribe regional broadcast ownership concentration, limit the total number of broadcast properties that can be commonly owned, emphasize diversification of ownership in the comparative licensing process, and mandate non-discrimination and affirmative action in broadcast employment. If the Commission had seen fit to examine more broadly the media-related implications of MDS and the policy options available to address those concerns, *see infra*, it could also have explored the extent to which the foregoing regulation should be applied to MDS.

For the reasons just outlined, the majority's failure to consider even minimal regulation in furtherance of First Amendment values was a serious mistake. The Commission could have easily provided a small measure of assurance that diversity would be furthered by formulating tariff requirements preventing MDS licensees from leasing channels to entities already owning other media interests in the same geographic market. Furthermore, the Commission could have considered tariff requirements precluding programmers from leasing more than one MDS channel per market. This would have demonstrated at least a minimal commitment to longstanding FCC policies in furtherence of diversity of voices within local markets. The Commission has previously confirmed its authority to reach the activities of a common carrier's programmer-customer through tariff provisions,[6] and it would not have been difficult to fashion such restrictions for MDS, whose service characteristics are reasonably well established.

The Commission could also have elected to fully explore what alternative or additional diversity-enhancing policies to apply to MDS in the further rulemaking notice to be issued regarding MDS lotteries. In the final analysis, this more comprehensive approach may well have been preferable. The options to be examined could have included various tariff prescriptions, including but not limited to those described above, a dual licensing scheme for MDS carriers and their programmer-customers, or reclassification of MDS as a broadcast service.[7] At the conclusion of that proceeding, if additional regulations were adopted, applicants could have been allowed to amend their applications to conform to these new rules as necessary.

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[5] Some of my colleagues contend that the FCC has never directly regulated programmers and that, therefore, regulation of MDS programmer-customers is legally foreclosed. Their basic operating assumption is incorrect. *Cf. Columbia Broadcasting System, Inc.* v. *FCC*, 629 F. 2d 1, 26 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981) (confirming FCC authority to apply Section 312(a)(7) to the major broadcast networks). However, there is a logical reason why the FCC ordinarily does not regulate programmers *per se*: its policies directly apply to the entities responsible for program selection and transmission, *i.e.* broadcast licensees. In any event, the Commission has broad discretion to regulate interstate communications by radio or wire to protect the public interest. *See, e.g.*, 47 U.S.C. §§ 152(a), 154(i), 303(g), 303(r); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). *See generally, National Broadcasting Co.* v. *United States*, 319 U.S. 190 209–21 (1943). In this instance, important policy objectives detailed previously counsel in favor of utilizing this broad discretion to impose diversity-related requirements upon MDS programmer-customers, either directly or indirectly.

[6] *See, e.g., Direct Broadcast Satellites*, 90 FCC 2d 676, 711 and n. 85 (1982). The Commission declined to impose limited broadcast-type regulation on DBS common carrier programmers because the service is novel and still in the developmental stage. *Id.* The same cannot fairly be said of MDS, which was created in 1974 and is currently provided in several markets around the nation.

My colleagues have not seen fit to follow either route, apparently out of fear that by doing so, the Commission would be expected to saddle MDS with the panoply of rules that apply to broadcast licensees. Any such fear was largely without foundation. This Commission has shown that it can be very creative in regulating the many communications services within its purview by rejecting outmoded or unnecessary rules while continuing those which further fundamental communications policy. That approach could have been followed here. Instead, the Commission essentially decided to remain blind to the actual service chracteristics of MDS and to important policy issues implicit in it. By blinking reality, the FCC has seriously undermined the credibility of its efforts to maximize diversity of ownership and expression. To this highly regrettable, if unexpressed, policy shift, I dissent.

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[7] No doubt a variety of options exist—I am not particularly wedded to any one of the foregoing at this juncture.

Common Carrier
Common Carrier, International
International Communications

Notice of Inquiry adopted re integrated digital service networks (ISDN), its evolution, current standardization efforts and possible U.S. implementations.
–Integrated Services Digital Networks
GEN. Docket No. 83–841

FCC 83–373

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTEGRATED SERVICES DIGITAL NETWORKS (ISDN)	GEN Docket No. 83–841

NOTICE OF INQUIRY

(Adopted: August 4, 1983 Released: August 10, 1983)

BY THE COMMISSION:

I. INTRODUCTION

1. Currently, a world-wide telecommunications effort is underway to specify standards for integrated services digital networks (ISDN). An ISDN is a network which is designed and constructed to provide a wide range of telecommunication and information services and to transport electrical signals in digital, rather than analog, form. Participants in this effort include numerous countries, telecommunications entities and professional organizations. It is envisioned that an ISDN or ISDNs will evolve in each nation from its existing network(s). In the U.S., several ISDNs could emerge from existing privately-owned telecommunications networks. National ISDNs are expected to emerge and interconnect over the next two decades, as communications signals will be increasingly digital. In recognition of this trend, and also in recognition of the technological trend generally towards the use of digital technology in telecommunications, existing telecommunications providers have increasingly begun to construct and install digital components in their networks.

2. The purpose of this Notice of Inquiry (NOI) is to provide background on ISDN developments to date, and on related telecommunications policy, and to discuss various issues raised by the potential implementation of ISDNs. We shall seek comment on the

appropriate role for the FCC to play in the ongoing ISDN standards development effort.[1] In particular, we solicit comment on how the FCC should best continue to promote its pro-competitive policies as ISDN evolves. Furthermore, this NOI is intended as a clearinghouse for comments of U.S. telecommunications service providers, equipment manufacturers, users and the public.[2]

3. As noted, we are cognizant that international and domestic standardization efforts involving the U.S. government, telecommunications providers, large users, and foreign entities are presently underway.[3] We do not intend that this proceeding hinder or conflict with these ongoing efforts, rather, this NOI seeks to complement existing efforts. In addition, the NOI will serve as another vehicle to apprise the Commission and the public of concerns which U.S. service providers, equipment manufacturers, users and the public may have about implementation of ISDN networks.

4. ISDN will emerge from existing telecommunications networks and represent the next stage in the evolution of telecommunications. Initially, telephone networks were designed to transport voice signal information in analog form. As computers began to communicate with one another, computer information which was in digital form was transformed into analog form in order to be transported over existing analog networks intended for voice signals.[4] However, with

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[1] In a recently released report, the National Telecommunications and Information Administration (NTIA) concluded that: "because of the far-reaching impact of ISDN on competition, equipment and service trade, and U.S. technological leadership, it is important that the U.S. Government provide a reasonably specific policy framework on which future U.S. efforts to develop ISDN standards could be based. Toward this end the FCC, which is presently considering a Notice of Inquiry, should initiate it without delay." NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, LONG RANGE GOALS IN INTERNATIONAL TELECOMMUNICATIONS AND INFORMATION, 130 (1983).

[2] The NOI raises and discusses many ISDN-related issues. To facilitate comment, a partial list of issues discussed in the NOI is presented as Attachment I.

[3] These planning efforts are widespread and dynamic. Since 1976 the International Telegraph and Telephone Consultative Committee (CCITT) has been the focal point of international ISDN planning efforts. In the United States, telecommunications companies, private sector organizations and the federal government have participated in ISDN planning activities. *See* Section II for further discussion.

[4] Because the bulk of the network consists of circuits intended for transmission of voice, the transmission of signals in digital form is not as efficient as if the network were originally designed to handle digital signals. Most circuits designed for voice use frequency division multiplex (FDM) to achieve the composite signal necessary to modulate a carrier for the purpose of transmitting multiple conversations over a single path. Circuits intended for digital use usually employ time division multiplex (TDM) which simplifies the encoding of individual bit streams onto a single composite bit stream. While data signals in digital form can be used to directly modulate a carrier via the FDM process, there are distinct advantages to be gained by using TDM. The advantages also extend to voice signals, which are first sampled, then encoded as digital signals by a process such

rapid development of digital technology in the past three decades, voice and data communications were transported over both digital and analog media. During recent years many national networks rapidly moved toward transporting voice and digital signals on digital media. This trend toward digitalization is occuring because it is believed that digital networks may reduce costs, increase service quality and provide new services to the user.

5. ISDN continues the trend towards use of digital transport facilities. An ISDN is characterized by the provision of numerous services, from low speed alarms up to high speed broad-band video services, and end-to-end digital connectivity between users for both the transport of voice signals which have been originated electrically in digital form, and the transmission of digital signals themselves. ISDN will permit users to communicate via the network(s) by interconnecting through a select group of standardized, multi-purpose user access interface arrangements. Currently, technical standards of telecommunications equipment and facilities can vary within a national network and among various nations' networks. This lack of uniformity requires equipment manufacturers to construct, and may require some users to buy, equipment tailored to meet each differing standard. ISDN efforts are aimed at changing this situation. One objective of ISDN planners is the creation of model ISDN interface characteristics after which each nation would pattern its own ISDN or ISDNs. This uniformity would permit national ISDNs to interconnect and form a worldwide system or systems,[5] and would promote ubiquity of terminal equipment used therein. Thus, users in one country could use their telephones and terminals in any country and be able to communicate with users anywhere in the world. Although this uniformity would simplify the interconnection of ISDNs with other countries systems, there is a question as to whether a single standard or set of standards for specialized systems would be appropriate for some users.

II. ISDN PLANNING EFFORTS

6. ISDN planning efforts are underway within the United States and internationally. Domestically, several voluntary standards development organizations and federal agencies have been involved in ISDN efforts. Internationally, the International Telegraph and

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as pulse code modulation (PCM). PCM involves the conversion of an analog signal, such as voice, to a digital format. This is ordinarily accomplished by generating binary-coded pulses to represent the quantized amplitude samples of the analog signals. The process of encoding voice signals by PCM has been used for many years and where bandwidth problems are not too severe is the preferred method of transmission. Thus, many national networks have been gradually shifting to digital transmission.

[5] There appears to be a possibility that separate terrestrial and space satellite worldwide ISDNs could evolve.

Telephone Consultative Committee (CCITT) and the International Organization of Standardization (ISO) are involved in developing ISDN-related standards.[6] We shall discuss the international efforts first.

A. *International efforts*

7. CCITT provides the central forum for international planning and discussion of ISDN.[7] In 1976, the Sixth Plenary Assembly of the CCITT proposed that CCITT begin formally to study ISDN.[8] The Seventh Plenary Assembly met in 1980 and gave Study Group XVIII primary responsibility for establishing general ISDN standards and guidelines. Several other study groups have specific responsibilities. *See* Attachment II. In addition to its ISDN study groups, CCITT is generating and has generated other standards which may have some bearing upon implementation of ISDN.[9]

8. CCITT's ISDN efforts are aimed at specification of uniform ISDN Recommendations. These Recommendations are intended as an outline of an ISDN model which nations can adopt and adapt to meet their individual needs. This CCITT model is expected not only

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[6] In addition, the Conference Europeene des Administrations des Postes et des Telecommunications (CEPT), the International Federation for Information Processing (IFIP), the European Computer Manufacturers Association (ECMA) and other agencies are also active in ISDN matters. CEPT outlined a common CEPT approach to ISDN in its Special Group ISDN (GSI) 1982 report on Integrated Services Digital Network Studies, Doc. T/CCH (82) 30, Doc. T/GSI (82) 71, Information for Industry, Stockholm, (November 1982).

[7] The CCITT is one of four permanent organs of the International Telecommunication Union (ITU). The ITU has 158 member countries of which the United States is one.

[8] CCITT's activities are structured around a four year cycle known as the "plenary cycle". CCITT establishes Study Groups to develop telecommunications disciplines or services. Study Groups convene, divide their subject into subparts and assign various groups of experts (working groups) questions to study and answer. These working groups meet, study their assigned questions and make recommendations to the Study Group. The Study Group convenes and reviews these recommendations and may adopt them. If adopted, the recommendations are then presented to the CCITT at the next Plenary Assembly. The CCITT Plenary Assembly convenes to review and approve or disapprove Study Groups' recommendations as well as plan the work to be undertaken during the next plenary cycle. Study Group recommendations which are approved by the Plenary Assembly become CCITT recommendations.

[9] For example, International Telecommunication Union, International Telegraph and Telephone Consultative Committee, Yellow Book, Volume III, Fascicle VIII.2, Data Communication Network Services and Facilities Terminal Equipment and Interfaces [hereinafter ITU Yellow Book Vol. III], Recommendation X.3 Packet assembly/disassembly (PAD) in a public network, at 10 (1980) outlines the interworking standards for start/stop mode data terminal equipment in a packet network. In addition, ITU Yellow Book Vol. III, Recommendation X. 25 Interface between data terminal equipment (DTE) and data circuit equipment (DCE) in the packet mode in public data networks, 100, Geneva 1976, (amended Geneva 1980) describes the interface standards for packet mode data terminal equipment in a packet network.

to detail the technical specifications of the ISDN network, but also to encompass all the facilities and equipment required by a user to gain access to the network.

9. In the seven years since CCITT began work on an ISDN model, much progress has been made. CCITT has developed, and continues to refine, its ISDN model. *See* Attachment III. Currently, the model has the user accessing the network through a series of defined interfaces. The user begins its call by using its telephone or terminal (denominated TE1). The call passes through two other interfaces (NT1 and NT2) before it is carried through the local loop[10] to the local exchange and onto the ISDN. In addition, CCITT has also begun to specify a system of protocols[11] for ISDN based upon the International Organization for Standardization's (ISO) open systems interconnection model (ISO/OSI). *See* Attachment IV.

10. The next CCITT Plenary Assembly will meet in November 1984. Initial recommendations which are submitted for final approval will be reviewed by the Plenary Assembly, and those that are approved will become CCITT Recommendations. It is envisioned than CCITT ISDN Recommendations will be relied upon by nations for the design and construction of their ISDN networks.

B. *Domestic efforts*

11. In the United States ISDN discussions and planning efforts are being carried on by groups in both the private and public sector. Among these groups are the United States Organization for International Telegraph and Telephone Consultative Committee (U.S. CCITT Committees, including the ISDN Joint Working Party), Federal Communications Commission, National Telecommunications and Information Administration, National Communications System, Defense Communications Agency, Electronic Industries Association, American National Standards Institute, and the Institute of Electrical and Electronics Engineers.

12. The United States Organization for International Telegraph and Telephone Consultative Committee (USCCITT) was established by the Department of State pursuant to the Federal Advisory

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[10] A local loop is a single channel connecting the customer and the local exchange office.

[11] Protocols have been described as: "the rules by which physically separated entities interact." Green, Introduction to Network Architectures and Protocols, IEEE Transactions on Communications, Vol. COM-28, No. 4, at 413 (1980). The Commission has described protocols as: "governing the methods used for packaging the transmitted data in quanta, the rules for controlling the flow of information, and the format of headers and trailers surrounding the transmitted information and of separate control messages." Amendment of Section 67.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 422 n. 37 (1980) (Final Decision), *reconsideration, aff'd sub nom.*CCIA v. FCC, 693 F 2d 198 (D.C. Cir. 1982), *cert. denied* 51 U.S.L.W. 3826 (U.S. May 16, 1983) (Nos. 82–1331 and 82–1332) [hereinafter *Computer II*].

Committee Act, Pub. L. No. 92–463, 86 Stat. 770 (1972), *as amended* Pub. L. No. 94–409 § 5[c], 90 Stat. 1247 (1976) to discuss and develop U.S. positions on matters before the CCITT. It consists of the U.S. CCITT National Committee (USNC) and four Study Groups. The USNC functions as a steering body over the four Study Groups and the ISDN Joint Working Party. Study Groups "A", "B", "C" and "D" are assigned specific topics. Study Group A is concerned with tariffs and service definitions. Study Group B examines terminal equipment and telex issues; C examines telephone matters; and D examines data networks and data communications matters.

13. In 1981, in response to the increased international ISDN activity, a domestic ISDN Joint Working Party (JWP) was established as an adjunct to the USNC. It was created to develop a domestic forum for discussion of U.S. positions on ISDN issues at CCITT, in view of the relevance of ISDN considerations to all four U.S. study groups. The JWP is chaired by a representative of the National Telecommunications and Information Administration (NTIA). The FCC, National Communications System and the Department of State, among other government agencies, participate in the JWP. In addition, many telecommunications companies and private sector organizations also participate in and make submissions to the JWP. If a contribution is approved by the JWP, it is coordinated with the appropriate Study Group and recommended for approval to the State Department as a U.S. CCITT contribution. If neither the JWP nor the appropriate Study Group approves a given contribution, the contributor may withdraw or revise its contribution or, if the contributor is recognized by the CCITT as a Recognized Private Operating Agency (RPOA) or a Scientific or Industrial Organization (SIO), it may submit its documents to CCITT Working Parties on its own motion but without the status of a United States government contribution.[12]

14. In addition to the FCC's involvement in the USNC and the Joint Working Party, the Commission established, in 1981, an intra-agency ISDN Coordinating Committee to monitor ISDN developments. During the last year and a half, observing that international ISDN planning efforts have accelerated rapidly, this Committee stepped up its own efforts to remain abreast of developments by participating more actively in international and domestic meetings.

15. In the private sector, voluntary standards-setting organizations composed of telecommunications professionals have been active. Organizations such as the Electronic Industries Association

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[12] There are 18 U.S. companies accorded RPOA status. The American Telephone and Telegraph Company (AT&T) and various IRCs are RPOAs. IBM is recognized as a SIO. In addition to RPOAs and SIOs, CCITT Study Groups are open to International Organizations (*e.g.* ISO), Specialized Agencies (*e.g.* World meteorological Organization), and any administration of the ITU which wishes to participate.

(EIA), the American National Standards Institute (ANSI), and the Institute of Electrical and Electronics Engineers (IEEE) develop recommendations and may submit documents to the JWP and the ISO.

16. Telecommunications carriers, enhanced service providers, equipment manufacturers and user groups are also involved in the development of ISDN standards both on a national and international level. These businesses often prepare ISDN-related documents that they submit to standards setting organizations. They may also submit their contributions to the JWP for incorporation as a U.S. contribution or, if as previously stated, they are recognized RPOAs or SIOs, they may submit their contributions directly to CCITT.

C. *Status of planning efforts*

17. At least nine CCITT Study Groups are working on ISDN related matters. *See* Attachment II. These study groups prepare Draft Recommendations which are often subject to review and revision. Given the fluidity of the process and the scope of the subject, an overview of important CCITT ISDN actions will be presented.[13]

18. In 1980, the Seventh Plenary Assembly published Recommendation G.705[14] outlining conceptual principles which would guide the international development of ISDN. These principles mandate, among other things, that the ISDN will contain intelligence for the purpose of providing service features that may be contained in the customer's terminals or distributed throughout the network; that layered sets of protocols for various access arrangements to the ISDN will control the networks and may vary as a function of the services required and the status of the evolution of a nation's ISDN, and that new services should be compatible with 64 kbit/s switched digital connections.

19. Although CCITT's ISDN model will utilize a layered set of protocols, CCITT has not agreed upon a system for categorizing protocols for ISDN purposes. However, ISO's open system intercon-

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[13] The following section will discuss various proposed amendments and revisions of CCITT Recommendations and Draft Recommendations. These amendments and revisions are mentioned for illustrative purposes only, and the discussion of these documents is not intended to indicate nor represent the position of the FCC or the U.S.

[14] International Telecommunication Union, International Telegraph and Telephone Consultative Committee, Volume III, Fascicle III.3, Digital Networks Transmission Systems and Multiplexing Equipment, Recommendation G.705, Integrated services digital network (ISDN), at 65–66 (1980). As CCITT ISDN efforts continue draft recommendations which will alter Recommendation G.705 are being developed.

nection model (ISO/OSI), discussed in para. 9, is being utilized by CCITT as a framework for designing ISDN protocols.[15] The ISO/OSI model identifies seven protocol layers. *See* Attachment IV. The implementation of each protocol layer requires the utilization of each lower layer protocol. Layer one, physical control, is the most fundamental protocol level. It provides the mechanical, electrical, functional, and procedural characteristics needed to establish, maintain and release physical connections between the network termination and the exchange. While layer one establishes physical connections with the network termination and the exchange, layer four protocols provide control signals from user terminal to user terminal across the network, and layer seven protocols permit data to be combined, converted, calculated and processed to become new data.

20. A number of significant ISDN developments have occurred in 1983. Two of the more important CCITT meetings were those of the Kyoto Meeting of Experts in February and the Geneva Meeting of Study Group XVIII in June. These meetings resulted in a detailed outline of ISDN Recommendations which was accepted in draft form. *See* Attachment V. This outline covers a broad range of ISDN characteristics, including many aspects of the network. Various sections deal with terminology, evolutionary principles, service capabilities, protocol models, numbering-addressing-routing principles, performance objectives, user-network and inter-network interfaces as well as other ISDN topics. This outline, if adopted at the November 1984 Plenary Assembly, would serve as the basis for implementing ISDNs and shape future CCITT ISDN work.

III. FCC STATUTORY OBLIGATIONS IN AN ISDN ENVIRONMENT

21. The Commission maintains jurisdiction over U.S. domestic and international common carrier facilities and service providers pursuant to Title I and Title II of the Communications Act of 1934.[16] Under Section 214 of the Communications Act of 1934 as amended, 47 U.S.C. 214 (1976), the FCC authorizes service providers to extend, acquire, and operate facilities, and evaluates Section 214 applications to insure against excessive plant additions which will unduly expand the rate base, thus causing higher revenue requirements. In the last decade, the Commission has initiated international facilities planning processes to examine U.S. carrier traffic forecasts and

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[15] Report of the Meeting of Group of Experts on ISDN matters of Study Group XVIII, Com XVIII, No. R 15-E. [hereinafter Kyoto Meeting of Experts] Draft Recommendation I.311, p. 139 (March 1983).

[16] Title III of the Act, 47 U.S.C. 301 (1976), *et. seq.*, extends the Commission's jurisdiction to radio and satellite facilities, covering common carriers to the extent that they hold radio licenses.

facility requests prior to the Section 214 authorization process. It has done so to provide overall policy guidance on the complex issues raised by large scale facilities investments, finding this approach preferable to reliance on *ad hoc* Section 214 oversight alone. In addition, the facilities planning process gives service providers the ability to develop long-term facilities plans and removes the uncertainty inherent in *ad hoc* authorizations.

22. A further basis for institution of this inquiry is the potential that our equipment registration rules (47 C.F.R. Part 68) may require amendment to accomodate digital interconnection with the telephone network in an ISDN environment. Since 1976, when the registration program initially became effective, most terminal equipment connected with the network has been registered as conforming with technical specifications to prevent harm, or has been used with registered protective apparatus. In some cases, we have considered use of tariff alternatives to registration of equipment under our rules, *see, e.g., Third Notice of Proposed Rulemaking*, Docket No. CC 81-216, FCC 83-268, 94 FCC 2d 5 (1983). While we do not decide here whether rule or tariff procedures would be appropriate for ISDN, it is fair to inquire in this proceeding, at least initially, whether such procedures may prove necessary or useful.

23. The Commission's jurisdiction over networks and service providers will remain unchanged by the evolution of ISDN. ISDN will require additional construction of facilities and service offerings. Thus, the Commission will continue to address policy issues and authorize facilities in an ISDN environment. While we do not seek to plan ISDN facilities, we here seek to review the large policy issues raised by ISDN at an early stage in the facilities planning cycle, rather than only acting on an *ad hoc* basis.

IV. FCC TELECOMMUNICATIONS POLICIES

24. The FCC was established to foster efficient nationwide and worldwide communications, and we have promulgated policies, discussed below, to meet that goal. We are faced with the challenge of ensuring that ISDN and other subsequent technological innovations are implemented on a national level in a manner that comports with our policies.

25. In response to dramatic technological change, the Commission has, over the last fifteen years, increasingly relied on the forces of the marketplace to complement traditional common carrier regulation, and to ensure that such regulation is not inappropriately or unnecessarily extended. The Commission, therefore, has promulgated pro-competitive policies and has begun to deregulate competitive telecommunications services. In a series of decisions the FCC has

fostered competition in the provision of customer premises equipment,[17] promulgated policies fostering new common carrier entrants,[18] permitted domestic resale and shared use[19] and authorized COMSAT to provide end-to-end service.[20] Although each of these decisions relates to a different aspect of common carrier operations, a single regulatory philosophy is common to them—a desire to foster competition while reducing governmental involvement.

26. In the last three years we have taken several significant steps to deregulate service providers such as resellers of domestic "basic" service[21] and "enhanced" service providers.[22] In *Computer II* the Commission classified communications services as being either basic services or enhanced services. Basic service is a common carrier offering of transmission capacity for the transport of information. Enhanced services are defined in § 64.702(a) of our rules as:

> . . .services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

In *Computer II*, the Commission retained Title II jurisdiction over basic services (including underlying basic services that support enhanced services), but found that enhanced services are not subject to Title II regulation. Thus, while the provision of basic services remained within Title II jurisdiction, the provision of enhanced services was deregulated.

27. Before deregulating enhanced services, the Commission considered the potential effect of such deregulation on competition and structured its decision to ensure that unregulated provision of enhanced service by common carriers would be fair. Tariff conditions were placed on all common carriers to assure that basic service providers that offered enhanced services would not gain unfair competitive advantage over enhanced service providers that did not

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[17] Carterfone, 13 FCC 2d 420 (1968); *see also*, Part 68 of the Rules and *Computer II*, *supra* note 11.

[18] *See* Second Report and Order in Domestic Communications, Satellite Facilities, 35 FCC 2d 844 (1972); Specialized Common Carrier Services, 29 FCC 2d 870, 920 (1971), *aff'd sub nom.*, Washington Utilities Transportation Comm'n v. FCC, 513 F2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); MCI Telecommunications Corporation v. FCC, 188 U.S. App. D.C. 327, 580 F.2d (1978), *cert. denied*, 439 U.S. 980 (1978).

[19] Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261 (1976), Resale and Shared Use, 83 FCC 2d 187 (1980).

[20] Authorized User Modification, 90 FCC 2d 1394 (1982), Authorized Entities and Users, 4 FCC 2d 421 (1966).

[21] Competitive Carrier, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (adopted February 17, 1983), FCC 83–69.

[22] Computer II, *supra* note 11.

own underlying transmission facilities. Common carriers which seek to offer enhanced services may do so subject to conditions which ensure that: a) costs of unregulated enhanced service offerings are not borne by ratepayers of carriers' regulated basic service; and b) a common carrier which provides enhanced services does not gain unfair advantage over an enhanced service provider that must purchase basic service from a common carrier.

28. All facilities-owning carriers must continue to offer such transmission facilities pursuant to tariff, and must take basic facilities to support their own offerings of enhanced services on the same tariffed basis as other competing enhanced service providers.[23] Thus, carriers owning underlying transmission facilities and providing enhanced services must "unbundle" their basic and enhanced service offerings. Since enhanced services are not subject to Title II regulation, carriers may not include their enhanced service offerings in their tariffs. Thus, the *Computer II* decision was designed to assure that basic services would be available to all enhanced service providers on the same tariffed basis, while establishing a dichotomy between the two types of services.

29. Under *Computer II*, American Telephone & Telegraph Company (AT&T) is subject to an additional structural requirement. Due to its market dominance, AT&T must establish a separate corporation to offer enhanced services and terminal equipment and must maintain structural separation between the separate corporation and the parent.[24]

30. The pro-competitive philosophy outlined above is also embodied in judicial and congressional actions. In the Modification of Final Judgment (hereafter *MFJ*) entered on August 24, 1982 in *U.S. v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 103 S. Ct. 1240 (1983), AT&T was required to alter fundamentally the structure and scope of its operations. Before the *MFJ*, AT&T owned and operated the long distance telephone interexchange facilities as well as twenty-one Bell Operating Companies (BOCs) which provide local exchange service. However, under the terms of the entered *MFJ*, AT&T consented to divest the BOCs. The BOCs will be limited to provision of exchange service, exchange and information access, provision of other natural monopoly services actually regulated by tariff, and the

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[23] Computer II Reconsideration, *supra* note 11, at 75, n. 19.

[24] And the separate corporation must take transmission facilities under tariff. Furthermore, *Computer II* policies developed prior to divestiture impose separation requirements on the Bell Operating Companies (BOCs) in their entirety. However, post divestiture, as a result of the consent decree, AT&T will divest itself of its operating companies. The Commission recently released a Notice of Proposed Rulemaking to determine whether and to what extent the structural separation conditions established in *Computer II* should be applied to BOCs after divestiture. *Bell Operating Companies*, 48 Fed. Reg. 13056 (March, 29, 1983).

provision, but not manufacture, of terminal equipment (unless these restrictions are subsequently modified by the court). The Commission is examining the divestiture under its Section 214 aegis.

31. In 1981 Congress passed the Record Carrier Competition Act of 1981 (RCCA), Pub. L. No. 97–130, 95 Stat. 1687 (to be codified in ___ U.S.C. § 222) which increased competition by eliminating the statutory bar preventing Western Union Telegraph Company from providing overseas services and by mandating full interconnection of domestic and international record carrier facilities to provide universal customer access to any carrier network. Pursuant to the terms of the RCCA, the Commission has prescribed interconnection arrangements for international and domestic record carriers which require carriers to grant all other carriers equal interconnection with their respective networks. *Interconnection Arrangements*, 89 FCC 2d 928 (1982), *see* also, *MTS and WATS Market Structure Phase III*, C.C. Docket No. 78–72, FCC 83–178, Transmittal No. 33184 (released May 31, 1983).

V. ISDN PLANNING EFFORTS AND FCC TELECOMMUNICATIONS POLICIES

32. The concept of an integrated services digital network and CCITT's ISDN planning efforts present the U.S. public and private sectors with a host of issues. In order to facilitate identification and discussion of the issues, this section will describe the international ISDN planning environment, examine the interaction between international ISDN design and U.S. ISDN(s) structure,[25] explore the effects ISDNs could have on U.S. groups and discuss what role, if any, the FCC should have in this area.

33. As outlined in Part IV, the FCC, the Courts and Congress have promulgated pro-competitive policies to guide our nation's telecommunications structure as it evolves in the new technological era. While the Commission has no intention of unnecessarily regulating the development or implementation of U.S. ISDNs, we believe it essential that we should monitor the progress of various specification efforts which are underway to ensure that our pro-competitive policies are furthered and not inadvertently frustrated. To that end, we are of the tentative view that we must monitor and participate in the international specification efforts which are now underway.

A. *The international ISDN planning environment*

34. The international scope of ISDN planning efforts will naturally reflect the telecommunications policies and market struc-

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[25] "U.S. ISDNs" refers to ISDNS which evolve from privately owned U.S. telecommunications networks and service providers. It is not meant to suggest governmental ownership or control.

tures of each of the participant countries. These participants have quite disparate domestic market structures.

35. Most telecommunications systems are owned and operated by national governments. Usually, these telecommunications systems are owned and operated by a ministry or Department of Post, Telegraph and Telephone (PTT). Countries relying on this system believe that telecommunications services can be most efficiently provided through a centralized administration-owned network. However, there are variations in this organizational structure. Recently, the United Kingdom's administration-owned telecommunication system was restructured and augmented with another telecommunications carrier. Other countries are also reviewing their telecommunications systems. While several countries have more than one entity involved in operating telecommunications networks, only the U.S., Canada and the United Kingdom have, or are considering, competitive entities. Some countries restrict provision of customer premises equipment to the entity or entities responsible for the provision of services while others permit multiple suppliers of equipment.

36. The United States is one of the world's leading users and exporters of telecommunications and data services, and the largest producer of telecommunications equipment.[26] Our telecommunications system consists of numerous service providers, including AT&T, the Bell System, Independents, international service carriers and a vibrant customer premises equipment market. Approximately $21.1 billion worth of U.S.-produced telecommunications and computer merchandise was exported in 1982.[27] The United States has long followed a private enterprise approach to the provision of public telecommunications services, and it promotes competition among telecommunications service providers in the belief that the resultant competition will benefit users in the form of decreased costs and increased choices and technological innovation.

37. Each nation involved in the ISDN planning process can be expected to work towards shaping ISDN to reflect its telecommunications market structure and philosophy. From the point of view of countries which promote a single, universal telecommunications system, ISDN could be considered an extension of existing centralized telecommunications systems. Viewed from this perspective, it

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[26] Grabhorn, Changes Ahead in World Telecommunications, Telephone Engineer & Management, vol. 87, no. 2, at 71 (1983).

[27] *See* U.S. Dept. of Commerce, Bureau of Industrial Economics 1982 U.S. Industrial Outlook, chs 24–26 (Jan. 1982). These exports brought a positive balance of trade of approximately $10.5 billion in 1982. The export and balance of trade figures cited above have been derived by aggregating industry statistics from the following Standard Industrial Classification (SIC) codes; SIC 3573 Electronic Computing Equipment; SIC 3661 Telephone and Telegraph Equipment; SIC 3662 Radio and Television Electronic Communications Equipment, and SIC 367 Electronic Communications Components.

appears logical for ISDN to support most, if not all, services. However, the United States' reliance on numerous telecommunications service providers that are subject to varying degrees of regulation for the provision of basic and enhanced telecommunications services, and our belief that competition among them benefits the public, requires that ISDNs operating in the United States be designed to accomodate our multiple service providers while still attempting to achieve the asserted benefits that ISDN promises.

38. This potential disparity in underlying policy necessitates that competing interests be accomodated in the CCITT's planning activities. Both the Kyoto Meeting of Experts and the Geneva Meeting of Study Group XVIII have produced documents that appear to take into account the different requirements of many countries.[28]

B. *The interaction between the CCITT's ISDN design and U.S. ISDNs*

39. To date, much of CCITT's specification efforts have been directed toward defining and outlining the ISDN and related user interfaces. The issues of how telecommunications functions will be apportioned between the ISDN and the user have begun to be addressed in international forums. However, these issues are closely related to the architecture of an ISDN, since the design of an ISDN and the services it will perform are interdependent.

40. The CCITT is seeking in its ISDN efforts to produce and adopt a set of ISDN specifications through a series of Recommendations. If the CCITT continues to pursue its present course, these Recommendations will outline performance specifications and will apportion telecommunications functions between the ISDN network and the user. For example, performance standards such as bit speed and bit error rates will have to be specified so that information can be efficiently sent from a terminal through the ISDN and to a designated terminal. In addition, CCITT's ISDN planning efforts will include the adoption of a protocol model and the apportionment of protocol handling between the network and the user. The CCITT may also recommend the degree of control the network users have to select and use network and non-network services according to a consensus on what functions the ISDN network should be allowed to perform and which are best left outside the network.

41. The recommendations CCITT formulates will directly affect U.S. ISDNs, service providers, equipment manufacturers and users.

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[28] The Kyoto Meeting of Experts, Draft Recommendation I.120, p. 218, 219 (March 1983) explicitly recognized that: "Other arrangements corresponding to national variants may comply partly or wholly with CCITT Recommendations on ISDN." Although this particular language was omitted in Geneva, many other draft recommendations acknowledge that nations may implement various portions of national ISDNs differently.

In order to interface with the ISDNs of other nations, a nation's ISDN(s) must be compatible with them at the point of interface. ISDNs will have to be designed to transmit data through interfaces with other nations' ISDNs in formats which are compatible with, or convertible to, internationally agreed upon specifications, to permit interworking. If the technical specifications of one nation's ISDN(s) vary from those of other nations, it might require translation in order to interface with other ISDNs. Absent such translation, non-conforming ISDNs would probably be unable to interface with other ISDNs.

42. CCITT ISDN planning efforts are designed to produce a uniform set of technical specifications which extend from the network down to customer premises equipment. However, in the U.S., competitive market forces could result in some deviation from these standards. If, in the U.S., customer premises equipment were to operate at standards which were technically incompatible with or inferior to CCITT adopted standards, it could result in traffic being restrictd to domestic termination points, unless an additional layer of hardware and/or software could be added. Some CCITT schematics recognize this possibility by including a terminal adapter for this purpose. *See*, Attachment III. We invite comment on the relationship between the CCITT's ISDN planning efforts and the design of U.S. ISDNs. In addition, we solicit comment on whether this hardware and/or software is technically and economically feasible. Further, we request comment on whether specifications of this adapter, if done through voluntary standard setting activities, would as a practical matter be adhered to absent governmental involvement and/or whether Commission involvement in this area is necessary.

43. As discussed in para. 26, *Computer II* divided telecommunications services into two categories, basic and enhanced services. At the Geneva Meeting of Study Group XVIII, Draft Recommendation I.200, Temporary Doc. No. 38-E, p. 11 (June 1983) [hereinafter Draft Recommendation I.200] created two categories of services that ISDNs would perform or support: (1) bearer services; and (2) telecommunications services. Bearer services may generally be described as those services that provide the capability for information transfer between ISDN interfaces (transport services) and defined in protocol layers 1–3. *See* Attachment IV. Telecommunications services are those that provide the capability for communications between users of specific user terminals. Both types of services may be provided within or outside an ISDN. We solicit comment on whether the bearer/telecommunications services approach can readily accomodate our market structure (which is comprised of multiple service providers offering regulated and unregulated services in an unbundled manner) and telecommunications policies.

44. The most practical approach to planning an ISDN model would seem to be one that accomodates the interests of U.S.

telecommunications service providers, equipment manufacturers and users during the international planning phase.[29] In particular, it would appear important to U.S. telecommunications service providers and users that CCITT's technical ISDN standards not preclude or restrict service providers' ability to interface with the other nations' ISDNs nor adversely affect users' ability to select among numerous service providers.[30] Unless an ISDN model is designed with sufficient flexibility, both U.S. and foreign users could be precluded from, or limited in, their ability to specify the service providers and services they wished to utilize. Also, users might register concern over whether ISDN will be designed to technically and economically accomodate private leased lines. If ISDNs cannot or are not designed to meet the needs of private leased line users, the question then becomes whether a circuit and/or packet switched network could provide suitable alternatives. For instance, would the substitution of permanent virtual circuits for private lines, satisfy current private line users? Is there some reason for the U.S. to seek, as a policy objective, the continued availability of dedicated leased channels in an ISDN environment? In addition, are there any ISDN developments which the Commission should be aware of that have, or could, raise issues of U.S. national security? We request comment on these issues. In addition, we solicit comment identifying other possible areas of U.S. concern; how U.S. interests can be affected by international ISDN standards, and how our interests can best be accomodated.

C. *Impact of various types of ISDNs on U.S. service providers, equipment manufacturers and users*

45. Competition among service providers and unrestricted user access to their basic service offerings are the cornerstone of our pro-competitive policies and goals. As indicated in paragraphs 24–31 *supra*, the Commission, Congress and the Courts have established

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[29] As discussed in para. 38, various draft recommendations appear to recognize the need to accomodate varying national implementations of ISDN.

[30] The United States, with our diversity of service providers, might not be able to conform to a technical specification that nations with a centralized telephone network could meet. For example, in the United States, the users' ability to utilize numerous service providers and the geographic span of the U.S. network often result in calls being routed over a higher number of connections than in other countries. Each connection adds to the time which it takes to complete a call. Thus, a specification, such as timing, which could be conformed to over a limited number of connections might prove impossible to conform to in our country. In addition, satellite common carriers could be precluded from relaying traffic from national satellite systems if restrictive time specifications were adopted which would have the effect of prohibiting "double hop" situations. Thus, if CCITT were to adopt a standard that might be too restrictive, and if U.S. service providers were to be bound by such a standard, they could be limited in the number of services they could provide, and users could be restricted in the routing and number of service providers they might utilize.

the framework for how these goals can be attained through initiatives such as *Computer II*, the *MFJ*, the RCCA and the *Interconnection Arrangements* decision.

46. As discussed in para. 28 *supra*, *Computer II* requires all facilities-owning carriers to continue to offer basic services under tariff. Common carriers owning underlying transmission facilities are required to offer their basic services as discrete services separate from their enhanced service offerings. Thus, under the regulatory framework of *Computer II*, users may obtain a carrier's pure transmission capability unencumbered by any enhanced services the carrier may offer. Maintenance of this transmission capability is the cornerstone of our efforts to foster the provision of numerous services on a competitive basis.

47. It is important, therefore, that ISDNs be implemented in the U.S. in a fashion which is consistent with our *Computer II* decision and other competitive policies. Pursuant to *Computer II*, basic services may be provided over ISDNs and ISDNs may also form the building blocks for provision of enhanced services.

48. *Computer II* and the *MFJ* will militate towards implementation of ISDNs in the U.S. which provide solely basic services and ISDNS which provide the user with the option of selecting its unbundled basic and enhanced service offerings. Pursuant to *Computer II*, AT&T may only provide enhanced services through a separate subsidiary. Thus, AT&T's interexchange facilities will function as an ISDN providing basic services alone, rather than supplying basic and enhanced services within its ISDN. Provisions in the *MFJ* may restrict the ability of the BOCs to support fully a non-basic ISDN. *See MFJ* Sections II.D and IV.I-J, 552 F. Supp. at 227–29. Furthermore, as noted, we are considering whether *Computer II* conditions now applicable to the BOCs should continue to be applied after divestiture. Other carriers will be able to establish ISDNs which provide both basic and enhanced service providing they comply with the service unbundling requirements outlined in *Computer II*.

49. U.S. ISDNs must evolve under a structure which accommodates our multiple vendor telecommunications market and our pro-competitive policies. Our regulatory framework is sufficiently flexible to permit existing carriers and enhanced service providers the ability to develop ISDN configurations with minimal additional capital investment and disruption of service, and would permit new telecommunications entities the option to provide a variety of services to users. In addition, users will retain their ability to select among basic service providers, determine which, if any, enhanced services they require, and decide which enhanced service providers they will use. This degree of selection will result from the users' ability to use an ISDN(s) for basic services and to supplement these basic services to meet their enhanced service needs. Users will be the

ultimate beneficiaries of an ISDN environment which accommodates the multi-vendor/multi-service environment fostered by our competitive policies.

50. As ISDNs evolve, the entire U.S. telecommunications market—service providers, equipment manufacturers and users—will be affected. We solicit comment on the potential impact of ISDN, as discussed in para. 49 *supra*, and request comment on additional ways in which ISDN could affect U.S. service providers, equipment manufacturers and users. These comments will help clarify various U.S. interests, which is essential if our interests and policies are to be effectively communicated internationally.

51. The challenge that confronts both the U.S. public and private sectors is the need to communicate our interests and policies effectively in international forums so that our needs can be accommodated during the planning phase in the design of an ISDN model. Section D will discuss what role, if any, the FCC should have in furthering our pro-competitive policies in an ISDN environment.

D. *Furthering pro-competitive policies in an ISDN environment*

52. As discussed in para. 35 *supra*, most foreign countries' telecommunications systems are government owned and they are operated by PTTs. Many of these nations do not place the same importance on competition as does the United States. Those countries may not have the same incentives to design an ISDN capable of accommodating interconnection by multiple service providers. If U.S. interests are to be taken into account in the international planning process, it would seem that the U.S. service providers, equipment manufacturers, users and the federal government would have to identify areas of concern and then make U.S. interests known.

53. This process of identification of U.S. interests and concerns on ISDN requires both public and private sector participation. As outlined in Part II, numerous groups from both sectors are actively involved in ISDN-related matters, and in particular, the Department of State's ISDN Joint Working Party provides a public forum for service providers and users to discuss their views.

54. One of the purposes of this NOI is to discuss the appropriate role of the FCC in ISDN matters. The Communications Act of 1934 charges the FCC with the responsibility for ensuring that construction of new facilities and the provision of regulated services are in the public interest. Pursuant to the Act, the Commission has adopted pro-competitive communications policies which mandate that marketplace forces be allowed to determine, to the maximum extent possible, the best methods of providing service to users. Thus, we believe that any FCC involvement in ISDN specification activities should be designed to complement existing planning efforts, with the

objective of fostering our domestic and international United States telecommunications policies, and not directed to the design considerations involved in the ISDN specification process as such. For example, it is not our intention to hinder the progress of international activities or unilaterally impose standards in lieu of CCITT's efforts. Rather, it is our tentative view that the public interest would best be served by assuring that U.S. policy is understood by all participants in the ISDN specification process, to the end that it will be accommodated in this process.

55. In order for the Commission effectively to continue to foster its pro-competitive policies, it appears necessary for us more actively to monitor and participate in international and domestic ISDN specification activities, with the focus noted above. Correspondingly, it would also be necessary for the Commission to become increasingly aware of the views of U.S. service providers, equipment manufacturers, users and the public on this matter. Therefore, we solicit comment on how the FCC can best ensure that ISDNs are structured to foster competition and serve the public interest. We request comment on how the competitive nature and structure of U.S. telecommunications can best be maintained without unnecessarily diminishing any alleged efficiencies which may be inherent in uniform ISDN specifications. In addition, we more specifically solicit comment on how the specification of ISDNs may best conform to the regulatory scheme adopted in *Computer II*. Furthermore, we request comment on how the Commission best can continue to promulgate pro-competitive policies as ISDN develops and how we can best represent divergent interests of U.S. service providers, equipment manufacturers, users and the public at international forums. We also expect that this NOI will generate comment on what short and long term ISDN goals the FCC should set for itself.

56. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 218, 303(g) and 403 of the Communications Act of 1934, 47 U.S.C. 701 (1976) that the aforementioned inquiry IS HEREBY INSTITUTED.

57. IT IS FURTHER ORDERED that the Secretary shall cause this Notice of Inquiry to be published in the Federal Register.

58. Interested parties may file comments 45 days from date of publication of the Notice in the Federal Register. Reply comments must be filed 60 days from the date of publication of the Notice in the Federal Register.

59. IT IS FURTHER ORDERED that the Commission's staff is hereby delegated authority to expeditiously compile a full and complete record of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

ATTACHMENT 1

ISDN will affect U.S. service providers, equipment manufacturers, and users. This Notice of Inquiry (NOI) has examined some of the issues which ISDN will present. In order to facilitate discussion, we have compiled a partial list of the issues discussed in the NOI. We do not intend to restrict comments to these subjects, rather, we are providing this to highlight certain salient questions with the expectation that it will provide a starting point for discussion. Comments which pinpoint specific issues and contain concrete recommendations are essential to the proper functioning of the proceeding.

1. ISDN planning efforts are currently underway in a number of national and international forums. Are there definable U.S. interests which are being, or could be, adversely affected by ISDN? In addition, are there any ISDN developments which the Commission should be aware of that have, or could, raise issues of U.S. national security? Are the interests of U.S. service providers, equipment manufacturers and users being represented or underrepresented? How can the FCC best assist in U.S. efforts to formulate a coordinated ISDN policy and represent U.S. interests? Do the technical specifications raise policy issues? If so, what issues are involved?

2. U.S. telecommunications policy is designed to promote a competitive U.S. telecommunications system. As part of this policy, we have taken steps to eliminate barriers to market entry and taken other measures to foster a marketplace with numerous interconnected telecommunications service providers. How can the FCC continue to promote competition in an ISDN environment? Could ISDN specifications be inconsistent with U.S. telecommunications policies? How can we ensure ISDN will be compatible with our telecommunications policies and objectives? How can ISDNs be designed to accommodate the U.S. web of numerous service providers?

3. Do the international ISDN draft recommendations appear to be sufficiently flexible to accommodate the regulatory structure outlined in *Computer II* and the Modified Final Judgment? If not, in what areas should the FCC concentrate its efforts to assure U.S. policies are accommodated?

4. The Communications Act of 1934 created the FCC for the purpose of making available to our citizens a rapid, efficient, low cost, nationwide and worldwide communications system. What ISDN issues must be addressed in order for the Commission to carry out this obligation? Is FCC guidance necessary or desirable? What sort of guidance should we provide? What form should this take? What should the Commission's short-term and long-term ISDN objectives be, and how can they be achieved? The Commission has many administrative procedures available by which ISDN could be addressed. Should ISDN-related issues be considered in rulemaking proceedings

and/or in *ad hoc* processes such as facility authorizations and tariff filings?

5. How will ISDN affect U.S. users, service providers and equipment manufacturers? How could U.S. users, service providers and equipment manufacturers benefit from ISDN? What services and benefits are unique to ISDN? What trade-offs are involved? Could ISDN specification efforts adversely affect users' ability to select service providers and services they wish to utilize? How will the development of ISDN affect private networks? Will ISDNs be designed to technically and economically accommodate existing services, such as private lines? Would the implementation by an ISDN(s) of a substitute service for private lines, such as permanent virtual circuits, satisfy current private line users? Is there some reason for the U.S. to seek, as a policy objective, the continued availability of dedicated leased channels in an ISDN environment?

6. ISDN specification efforts are aimed towards creating a uniform set of worldwide technical standards. To what extent should U.S. ISDNs conform to those standards? Are there technical, economic, or regulatory considerations which would mandate deviation from those standards? If so, to what extent is nonconformance possible or desirable?

ATTACHMENT II

CCITT STUDY GROUP ACTIVITIES

STUDY OF THE INTEGRATED SERVICES DIGITAL NETWORK (ISDN)

Examination of the Questions drafted by Study Groups III, IV, VII, XI, XVII and XVIII reveals that each Group intends to study various aspects of the ISDN. In order to avoid overlapping and possibly conflicting results the VIIth CCITT Plenary Assembly agreed that the areas of responsibility for the study of ISDN should be assigned as follows:

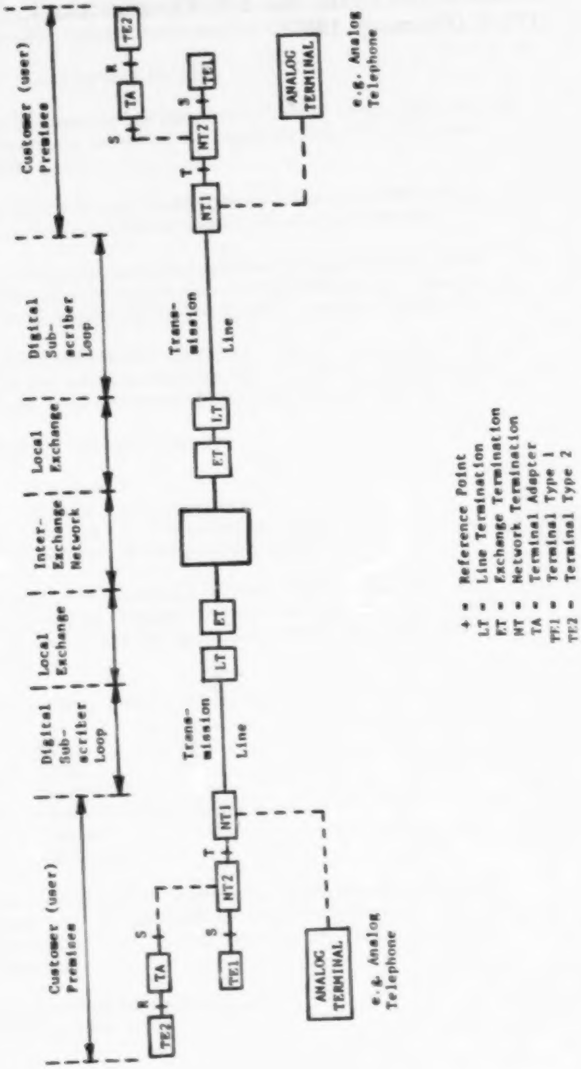
1.	Services and facilities interpretation and coordination (taking into account the requirements identified by Study Groups I, II, III and VII).	XVIII
2.	General ISDN aspects and guidelines, quality of service, numbering, performance targets, maintenance principles and miscellaneous subjects not more specifically identified (taking into account the requirements of Study Groups I, II, IV, VII, XI, XVII, and CMBD).	XVIII

Note: It is considered that Items 1 and 2 above are of high priority.

3.	Digital transmission standards and performance (local and inter-exchange). The study of hypothetical reference digital paths is in the competence of the specialized Study Groups of CCITT and CCIR, the study of reliability and availability is to be coordinated by CMBD. *Note:* Also of interest to CCIR.	XV/XVIII
4.	Switching aspects and parameters (taking into account the requirements identified by Study Groups VII, XVII and XVIII). *Note:* In the case of mixed mode switches (e.g. ISDN circuit and packet) other Study Groups will also be consulted.	XI
5.	Inter-exchange signalling system (Message Transfer Part (MTP) and appropriate User Part(s)) (taking into account the requirements identified by Study Groups VII and IX).	XI
6.	Subscriber-exchange signalling system (taking into account the requirements identified by Study Groups I, II, VII and XVII and coordinated by XVIII—see Item 2).	XI
7.	Subscriber-network interface	
	i) Interface B	XI
	ii) Interface A—Voice services	XI
	iii) Interface A—Non-voice services	VII/XVII
	iv) Interface A—Alternate voice/data	VII/XI/XVII
	Note: Close collaboration between Study Groups VII, XVII and XI will be required to ensure compatibility between 7 i), ii), iii), iv) and the subscriber signalling system identified in 6.	
8.	Interworking (inter-service and inter-network)	
	i) Data	VII
	ii) Telex	IX
	iii) Telephone	XI
	iv) Data over the telephone network	I/II/XVII
	v) Teletex	I/VIII
	vi) Facsimile	I/VIII
	Note: Collaboration between the Study Groups referred to above will be required to ensure compatibility in the carriage of the various services on ISDN and other networks.	
9.	Digital telephone instrument	XII
10.	Tariff aspects	III

SOURCE: International Telecommunications Union, International Telegraph and Telephone Consultative Committee, VII Plenary Assembly of the CCITT, Study Group XVIII, COM XVIII, No. 1-E, Contribution 1, Annex, 171–2 (February 1981).

ATTACHMENT III


Customer (user) Premises
Digital Sub-scriber Loop
Local Exchange
Inter-Exchange Network
Local Exchange
Digital Sub-scriber Loop
Customer (user) Premises
TE2
R
TA
S
TE1
S
NT2
T
NT1
Trans-mission Line
LT
ET
ET
LT
Trans-mission Line
NT1
T
NT2
S
TE1
S
TA
R
TE2
ANALOG TERMINAL
e.g. Analog Telephone
ANALOG TERMINAL
e.g. Analog Telephone
+ = Reference Point
LT = Line Termination
ET = Exchange Termination
NT = Network Termination
TA = Terminal Adapter
TE1 = Terminal Type 1
TE2 = Terminal Type 2

ATTACHMENT IV

APPLICATION LAYER (layer 7)

Layer 7 is the source of data, usually consisting of services which process data (i.e. data are combined, converted, calculated and processed to create new data). Airline reservations and on-line banking are just two examples of possible user applications.

PRESENTATION LAYER (layer 6)

Layer 6 provides data formats and data information, if needed. Examples of presentation layer services are data translation, data encoding/decoding, and command translation for virtual terminals.

SESSION LAYER (layer 5)

Layer 5 establishes, maintains, and terminates logical connections for the transfer of data between processes. Examples of session layer services are: dialogue control, message unit flow control, and segmentation of message data units.

TRANSPORT LAYER (layer 4)

Layer 4 provides end-to-end control signals from user terminal to user terminal across the network (e.g. network acknowledgment or received information).

NETWORK LAYER (layer 3)

Layer 3 provides the control needed for call establishment and clearing through the switching network nodes.

DATA LINK LAYER (layer 2)

Layer 2 protocols provide reliable transmission over a single data link including frame management, link flow control, and the link initiation/release procedures.

PHYSICAL LAYER (layer 1)

Layer 1 provides the mechanical, electrical, functional, and procedural characteristics needed to establish, maintain, and release physical connections between the network termination and the exchange.

SOURCE: International Organization of Standardization, Second Draft Proposal ISO/DP, ISO/TC, 97/SC 16 N 719 (August 6, 1981); Robin, Treves, An Introduction to Integrated Digital Networks, Electrical Communication, Vol. 56, No. 1, pp 14–15 (1981).

ATTACHMENT V

SOURCE: Report of the Meeting of the Group of Experts on ISDN matters of Study Group XVIII, Com XVIII, No. R 15-E, Draft Recommendation I. 110, p. 212 (March 1983).

Draft Recommendation I.110

GENERAL STRUCTURE OF THE I-SERIES RECOMMENDATIONS

PART I - GENERAL

Section 1 - Frame of I-Series Recommendations; Terminology

I. 110 General Structure of the I-Series Recommendations
I. 111 Relationship with other Recommendations relevant to ISDNs
I. 112 Vocabulary (with Annex: Glossary of ISDN-terms)

Section 2 - Description of ISDNs

I. 120 Integrated Services Digital Networks (ISDNs) (present G.705)

PART II - SERVICE CAPABILITIES

I.200 The structure is for further study. The contents could cover the following items:*)
- concept of services, functional elements, etc.
- information types
- compatibility checking
- connection types (e.g. circuit and packet switched, etc.)
- user-to-user signalling
- tariff principles (refer to D-series)
- charging functions
- additional network capabilities (e.g. closed user group).
- terminal portability

I.2xx Services supported by an ISDN

PART III - OVERALL NETWORK ASPECTS AND FUNCTIONS

Section 1 - Reference models

I.310 ISDN functional architectural model
I.311 ISDN protocol reference model

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*) - To be revised in accordance with the results of WT3 or 4

I.312 ISDN Hypothetical reference connections

Section 2 - Numbering, addressing and routing

I.320 ISDN numbering and addressing principles
I.321 ISDN routing principles
I.3xx Network connection types

COM XVIII-No. R 15-E

Section 3 - Overall performance objectives

The structure and contents are for further study. The following is given as an example:
I.330 Overall performance objectives relating to circuit switched connections
The structure is for further study. The contents could cover the following items:
- overall error performance (cf. G.821)
- overall controlled slip rate objectives (cf. G. 822)
- overall availability
- call set-up and clear-down time
- overall blocking probability etc.

I.331 Performance objectives relating to packet switched connections
The structure is for further study. The contents could cover the following items:
- overall error performance
- overall availability
- overall packet transfer delay
- overall packet loss probability etc.

Section 4 - Overall testing and maintenance principles

The structure and contents are for further study. (See also G. 704, X.150)

Section 5 - Evolution

The structure and contents are for further study.

PART IV - USER-NETWORK INTERFACES

Section 1 - ISDN user-network interfaces

1. *General*

I.410 General aspects and principles relating to Recommendations on ISDN user-network interfaces (I.XXW)
I.411 ISDN user-network interfaces - reference configurations (I.XXX)
I.412 ISDN user-network interfaces - channel structures and access capabilities (I.XXY)

Section 2. Application of I-series Recommendations to ISDN user-network interfaces

The intention of this sub-section is to identify the relevant I-Recommendations that constitute particular ISDN user-network interfaces.

I.420 Basic user-network interface
I.421 Primary rate user-network interface
I.42x C channel user-network interface

User-network interface for other channel structures (for further study).

Section 3 ISDN user-network interfaces: Layer 1 Recommendations.

The structure and contents are for further study. One example is as follows:

3. *General*

I.430 General aspects and structure of Layer 1 functions and protocols
- layer service characteristics
- modes of operation, e.g. point-to-point, point-to-multipoint
- requirements for specific user-network interfaces

3.1 *Basic user/network interface*

I.431 Basic user/network interface - Layer 1 specification
- functional characteristics
- procedural aspects
- mechanical aspects
- electrical aspects
- maintenance aspects

3.2 *Primary rate user-network interface*

I.432 Primary rate user-network interface - Layer 1 specification (see 3.1 above for aspects to be considered)

3.3 *C-channel user-network interface*

I.43x - C-channel user-network interface - Layer 1 specification (See 3.1 above for aspects to be considered)

Section 4 - ISDN user/network interfaces: Layer 2 Recommendations

4. *General*

I.440 General aspects and structure of Layer 2 functions and protocols (could include reference to a simplified subset)

4.1 *Layer 2 specification*

I.441 Specification of Layer 2 protocol (Provisionally Q.920)
- layer service characteristics
- methods of operation
- overview description of Layer 2 functions and procedures
- frame structure
- elements and description of the procedures
- procedure-oriented and state-oriented graphical presentation
- maintenance aspects
- performance characteristics

Section 5 - ISDN user/network interfaces: Layer 3 Recommendations

5. *General*

I.450 General aspects and structure of Layer 3 functions and protocols (will include reference to protocols for connections of PABX, LAN, etc. and could include reference to a simplified subset)

5.1 *Layer 3 specification*

I.451 Specification of Layer 3 protocol (provisionally Q.930)
- layer service characteristics
- definition and function of information elements
- formats and codes
- call control procedures (overlap with I. 472 needs resolution)
- procedures for additional user facilities
- maintenance aspects
- modes of operation of the procedures, e.g. point-to-point and point-to-multipoint
- performance characteristics

The structure and contents of the Recommendations concerning protocols for connection of PABX, LAN, etc. are for further study.

Section 6 - User related testing and maintenance principles

I.460 The structure is for further study. The contents could cover the following items:
- user related testing and maintenance principles
- test loops

- fault conditions and alarms
- testing procedures etc.
  (cf. G.704, X.150)

Section 7 - Support of existing interfaces

7. *General*

I.470 General (this section refers only to CCITT recommended interfaces)

7.1 *Support of X.21 and X.21bis DTEs*

I.471 Support of Recommendation X.21 and X.21bis DTEs by an ISDN *).
- hypothetical reference connections
- D-channel services
- mapping of X.21 and X.21bis interface signalling procedures to the D-channel services
- rate adaption and TA operation to effect synchronization

7.2 *Support of X.25 DTEs*

I.472 Support of Recommendation X.25 DTEs by an ISDN*
- hypothetical reference connections
- principles for DTEs accessing the B-channel (overlap with I.451 needs resolution)
- principles for DTEs accessing the D-channel (overlap with I.451 needs resolution)
- B/D-channel call handling

7.3 *Support of V-series DTEs by an ISDN*

I.473 Support of DTEs recommended in the V-series by an ISDN
- hypothetical reference connections
- principles for DTEs accessing the B-channel
- principles for DTEs accessing the D-channel
- rate adaption and TA operation to effect synchronization

PART V - INTERNETWORK INTERFACES

I.500 The structure is for further study. The contents could cover the following items:
- principles
- interworking between an ISDN, and
- other ISDNs
- analogue telephony networks
- packet switched data networks

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*) Draft text already provided by Study Group VII.

- circuit switched data networks
- mobile systems

etc.

Comparative Hearing
Cross Interest
Diversification of Control
Ownership and Management, Integration of

> Review Board affirms Initial Decision, grants television application where only preference awarded winning applicant was for superior integration. No diversification preference awarded for insignificant cross interests, and Board will not create novel comparative preference for "community organizations."
> –*Pittsfield Community TV Assn.*
> BC Docket No. 82–420

FCC 83R–61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of PITTSFIELD COMMUNITY TELEVISION ASSOCIATION Pittsfield, Massachusetts	BC Docket No. 82–420 File No. BPCT-811217KF
HOUSATONIC BROADCASTING CO., INC. Pittsfield, Massachusetts	BC Docket No. 82–421 File No. BPCT-811217KG
For a Construction Permit for a New Television Station	

Appearances

Howard M. Liberman on behalf of Pittsfield Community Television Association; and *B. Jay Baraff, Aaron Shainis*, and *Lee J. Peltzman* on behalf of Housatonic Broadcasting Co., Inc.

DECISION

(Adopted: August 24, 1983; Released: August 31, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. In this comparative case, after a trial type hearing, Administrative Law Judge Kuhlmann granted the application of Housatonic Broadcasting Co., Inc. for a new television broadcast station in Pittsfield, Massachusetts. Initial Decision, FCC 83D-15, released February 28, 1983. Housatonic was preferred because of the superi-

ority of its quantitative and qualitative participation of ownership in management. Exceptions have been filed by Pittsfield Community Television Association and oral argument was heard June 9, 1983. Upon review of the record and briefs, we affirm the Initial Decision, which correctly applied standard comparative principles to this case.[1]

2. *Diversification of Control*. No other media interests were attributed to either Housatonic or Pittsfield and thus the ALJ found them to be equal for diversification purposes. *I.D.*, paras. 4–21. Pittsfield now argues that it should have been given a moderate preference because of other media interests held by three of Housatonic's principals. Specifically, it states that William K. McDaniel, a 9.1% Housatonic stockholder, is a vice president and account supervisor of a New York City advertising agency, with responsibility for television advertising planning; that Gary Krakow, also a 9.1% stockholder, is the producer of "Early Today," an NBC daily television program; and that Pamela Peterson, another stockholder, owns "a fraction of one percent" of CBS, Inc.

3. We agree with the ALJ that these interests do not warrant the award of any preference to Pittsfield. With regard to Mr. McDaniel, we note that Pittsfield is relying on precedents which indicate that ownership of a local advertising agency, while not ownership of another medium of mass communications, could result in a minor diversification demerit because of the possibility of a potential conflict of interest. *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1499 (Rev. Bd. 1979); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 10 (Rev. Bd. 1973). Here, however, Mr. McDaniel has no ownership interest in the agency in question, which is non-local, and there is no evidence that it places advertising on stations in the Pittsfield area or market. Moreover, Mr. McDaniel has only a comparatively small ownership share in Housatonic. For these reasons, and even accepting, *arguendo*, Pittsfield's contention that Mr. McDaniel occupies a significant managerial position at the New York advertising agency, we conclude that the underlying potential for media concentration or serious conflict, which is the rationale for recognition of this interest, is absent, and that, therefore, no preference is called for. Moreover, *Eastern Broadcasting Corp.*, 30 FCC 2d 745 (Rev. Bd. 1971), cited by Pittsfield for the first time at oral argument, is also distinguishable. There, a cross-interest issue was added based on a specific showing that the applicant owned an advertising agency which served clients in the proposed community of license and placed advertising on at least two of that community's stations.

4. As for Mr. Krakow's role as producer of a network program, we have held only that ownership of a local production company may

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[1] A third application filed by Berkshire Television Inc., was dismissed pursuant to a settlement agreement. FCC 83R-30, released April 21, 1983.

bear upon diversification where such ownership is found to undermine the objectives of the Commission's diversification policy in a given case. *Golden State Broadcasting Corp.*, 54 RR 2d 349, 351 (Rev. Bd. 1983), *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723–4 (Rev. Bd. 1981), *review denied* FCC 83-31, released January 25, 1983. Here, however, Mr. Kraskow does not own or control a production company, does not occupy a significant managerial position at NBC where he only produces a single program, and Krakow has only a minority stock ownership in Housatonic. We do not perceive any resulting impairment of the Commission's diversification policies, and Pittsfield has demonstrated none. *Id.* Finally, Ms. Peterson's ownership of less than one percent of the stock of CBS, Inc. is too minimal to have any meaningful impact on diversification of control of the mass media. *See Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982). In sum, we affirm the ALJ's conclusion that neither applicant is entitled to a diversification preference.

5. *Participation of Ownership in Management*. Housatonic received 41% full-time participation credit and 18.2% part-time credit. Its full-time proposal was enhanced by local residence, broadcast experience, and female participation. By contrast, the ALJ credited Pittsfield with no full-time integration and 12.5% part-time integration. *I.D.*, paras. 22, 29. In its exceptions, Pittsfield argues that the ALJ mistakenly failed to credit its part-time proposal with enhancement for local residence, that he should have awarded only very slight credit to Housatonic for the part-time integration proposal of two of its principals because they would not be at the station on a daily basis but only on weekends, and that Housatonic is therefore only entitled to a moderate preference. Housatonic replies that it is entitled to a substantial preference.

6. We find that Housatonic is entitled to a moderate preference. Even after awarding Pittsfield the overlooked enhancement credit for the local residence of its part-time integrated principal, and agreeing that the part-time proposal of two of Housatonic's stockholders to work on the weekends is entitled to only slight credit, *see Greater Wichita Telecasting, Inc., supra*, 90 FCC 2d at 1051 and n. 6, we conclude that these part-time proposals (18.2% vs. 12.5%) are essentially offsetting and not decisionally significant. The factor of substantial importance here is that of proposed full-time participation by owners in station operations. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). In this regard, the ALJ quite correctly held that Housatonic's 41% full-time proposal manifestly outweighed Pittsfield's 0% proposal. Despite this 41% differential, however, we will award Housatonic a moderate rather than a substantial preference in keeping with our precedent that integration proposals are not entitled to maximum credit where less than a majority of stock ownership is fully

integrated. *See Ottumwa Broadcasting Co.*, 52 RR 2d 1447 (Rev. Bd. 1982); *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982); and cases cited therein, *review denied*, FCC 83–320, released July 7, 1983. *Horne Industries, Inc.* FCC 83R-49, released July 13, 1983 at note 44.

7. *Other Matters.* Pittsfield argues that it should receive a preference because of its status as a non-profit community association which consists of local residents who were "organized to apply for and construct the station and represent the community." Pittsfield Br. at 13. In this regard, Pittsfield relies on the Omnibus Reconciliation Act of 1981 (Public Law 97–35), which amended Section 309 of the Communications Act to authorize the Commission to employ a lottery in initial licensing cases, and the *Notice, Random Selection/Lottery Systems*, 88 FCC 2d 476, 485 (1981), where the Commission recognized the Congressional intent to include community organizations as among the "underrepresented" groups to be given preferences. Finally, Pittsfield contends that it should have received a preference for proposed auxilliary power at its transmitter site and main studio.

8. These exception are denied. First, we cannot accept Pittsfield's position that its status as a "community organization" entitled it to a special preference. Our past cases have declined to create new comparative categories on the basis of novel arguments. *See, e.g., Joseph Bahr*, 92 FCC 2d 114, 122–3 (Rev. Bd. 1982), *affirmed as modified*, FCC 83–321, released July 8, 1983 (no credit awarded applicant claiming to have existing organization, non-profit status, and history of working for minority employment in broadcasting); and *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 955 (Rev. Bd. 1982) (no enhancement credit awarded to applicant on the basis of principal's physical handicap). We adhere to this approach. Pittsfield has established no nexus between its organizational status and the furtherance of the Commission's objectives of diversification of control and best practicable service to the public, and for us to carve out a new comparative niche to accommodate this claim would be to engage in policy-making contrary to our limited function. *Id.* Moreover. as Pittsfield itself acknowledges, the Commission never implemented the lottery procedure it refers to. *See, Report Random Selection/Lottery Systems*, 89 FCC 2d 257 (1982). Indeed, Congress subsequently enacted a new law, which the Commission is now in the process of implementing, that does not contemplate that "community organizations" will receive preferences. *See* Public Law 97–259, enacted September 13, 1982; *see also Las Misionies De Bajar Television Co.*, 53 RR 2d 119, 122 (Rev. Bd. 1983) (lottery legislation "did not deal with or change existing comparative standards and policy.") Finally, we will deny Pittsfield's claim for an auxiliary power preference because it ignores the ALJ's finding, which it does not dispute, that its proposal was made after the pre-designation cut-

off date and therefore constitutes an impermissible comparative upgrading for which credit may not be awarded. *See Webster-Baker Broadcasting Co., supra*, 88 FCC 2d at 949.

9. *Summation*. The only preference awarded in this case is to Housatonic for its superior integration proposal. Neither applicant has received a diversification preference, Pittsfield's claim for credit for a new comparative factor has been rejected, as has its upgraded proposal for auxiliary power which, even if permitted, would only have resulted in a very slight preference and would not have been comparable to the moderate preference awarded Housatonic under the substantially more important comparative factor of integration. Housatonic is the clear comparative choice and a grant of its application will serve the public interest, convenience and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the application of Housatonic Broadcasting Co., Inc. (File No. BPCT-811217KG) for a construction permit for a new commercial television broadcast station to operate on channel 51 at Pittsfield, Massachusetts IS GRANTED, and the application of Pittsfield Community Television Association (File No. BPCT 811217KF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of BERKSHIRE TELEVISION, INC. Pittsfield, Massachusetts	BC Docket No. 82-419 File No. BPCT-811026KG
PITTSFIELD COMMUNITY TELEVISION ASSOCIATION Pittsfield, Massachusetts	BC Docket No. 82-420 File No. BPCT-811217KF
HOUSATONIC BROADCASTING CO., INC. Pittsfield, Massachusetts	BC Docket No. 82-421 File No. BPCT-811217KG
For a Construction Permit for a New Television Station	

Appearances

Martin E. Firestone and *Beverly D. Horn* on behalf of Berkshire Television, Inc.; *Howard M. Liberman* on behalf of Pittsfield Community Television Association; and *B. Jay Baraff* and *Aaron Shainis* on behalf of Housatonic Broadcasting Co., Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: February 18, 1983 Released: February 28, 1983)

1. The Chief, Broadcast Bureau designated these applications for comparative hearing on July 9, 1982, *Memorandum Opinion and Order*, 47 Fed. Reg. 32784 (July 29, 1982). The applicants are applying for a television construction permit for a new commercial facility to operate on Channel 51 at Pittsfield, Massachusetts. The following issues are considered in this decision:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. A prehearing conference was held on September 22, 1982. A hearing session was held on December 7, 1982 where written testimony was received into evidence. There was no cross-examina-

tion and the record was closed on the day of the hearing. *Order*, FCC 82M-3912, released December 9, 1982. Proposed findings and conclusions of law were filed by the three applicants on December 30, 1982 and replies were filed on January 14, 1983.

Findings of Fact

3. *Diversification*: *Berkshire Television, Inc.* has no mass media ownership but its Secretary, Martin E. Firestone, who owns 42.5 percent of Berkshire's stock, owns 25 percent of Multi Media Communications Corporation. Berkshire Exh. 4. Multi Media owns 89 percent of JEM Communications, Inc., permittee of WSJN-TV, Channel 24, San Juan, Puerto Rico and 100 percent of Vinco Communications Corp., which holds 6 percent of the Class B, nonvoting stock in Hess Broadcasting Corporation, permittee of Channel 15, Mobile, Alabama. *Id.* Mr. Firestone is also a less than 1 percent stockholder of Springfield Television Corporation, which is the licensee of television stations in Springfield, Massachusetts and Dayton, Ohio. In addition, Springfield Television is the parent of Springfield Television of Utah, which is the licensee of KSTU, Salt Lake City, Utah.[1] *Id.* Jean Kaddy and Raymond Goudreau, Berkshire principals, currently work for Springfield Television but they intend to resign if a grant is made to Berkshire. *Id.*

4. *Pittsfield Community Television Association* did not indicate whether it has interests in mass media. PCTA Exh. 1. However, it did state that three members of the association, Maurice E. Callahan, Jr., Robert Petricca, and Steven B. Schwartz have media or media related interests. *Id.* Mr. Callahan is president of an outdoor advertising business in Pittsfield, Maurice Callahan & Sons, Inc. Mr. Petricca is a principal in a long distance resale carrier, Petricca Industries. And Mr. Schwartz owns a media production agency and audio recording studio in Pittsfield. *Id. Housatonic Broadcasting Company, Inc.* has no media interests and neither does its stockholders. Housatonic Exh. 1, at 2.

5. *Integration of Ownership into Management*: *Berkshire Television* proposes to integrate two stockholders, Jean Ellen Kaddy and Raymond Goudreau. Berkshire Exh. 1, Table 1. Ms. Kaddy, who is a Director, President and Treasurer of Berkshire and holds 42.5 percent of its shares, proposes to work full time at the station. Berkshire Exh. 1, at Table 1; Exh. 2, at 1–2. While her testimony states that she will participate in management, there is no indication how this will be carried out. *Id.* Currently, Ms. Kaddy works in Springfield, Massachusetts. (The record does not reflect where she lives.) Since 1970 she has worked as an administrative assistant at

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[1] John A. Fergie owns as much of Multi Media and Springfield Television as Mr. Firestone. *Id.* He is the father of Jean Kaddy, who is President, Treasurer and a 42.5 percent stockholder of Berkshire Television.

WWLP in Springfield, which is licensed to Springfield Television Corporation. Berkshire Exh. 2, at 1. At WWLP she dispatches news, schedules traffic and programs, and apparently conducts public relations.[2] *Id.* Ms. Kaddy has not stated that she will move to Pittsfield.

6. Mr. Goudreau, who is a Director and 5 percent owner of Berkshire, proposes to work full time as Chief of Engineering. Berkshire Exh. 3, at 2. Mr. Goudreau also works for the stations owned by Springfield Television, where, since 1977, he has been Assistant Director of Engineering. *Id.* Before that, and since 1964, he has been a staff engineer at various stations. *Id.* The record does not reflect where Mr. Goudreau lives, nor has he indicated whether he would live in Pittsfield.

7. *Pittsfield Community Television Association*, which is a non-profit community association, proposes that three of the association's members would participate in the operation of the station. Steven B. Schwartz proposes to act as the station's full-time general manager and Edmund B. Grosso and Scott C. Taylor, Sr. would spend 20 hours per week as "Technical Advisory Managers." PCTA Exh. 2. Pittsfield Community Television Association has 18 members. PCTA Exh. 4, at Attachment A. It proposes that these members will take an interest in the station operation by giving advice, participating in program planning and other pursuits of the organization. PCTA Exh. 2, at 1. However, Messrs. Grosso and Schwartz were only made members of the association after designation and shortly before the hearing.[3]

8. The Petition for Leave to Amend filed November 26, 1982 by Pittsfield Community Television notified the Commission that one director, George Crane, had resigned on October 4, 1982 and that on that same day eleven new membership applications had been accepted.[4] Preceding the October 4, 1982 meeting Pittsfield Community Television had eight director-members, seven of whom were Board members and were listed in the application when it was filed and one, John S. Clark, who had become a director-member

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[2] Ms. Kaddy asserts that there is merit to the fact that she has "longstanding ties to the Western Massachusetts area." The policy in comparative hearings, however, attaches credit primarily to civic participation and local residence in the principal community and secondarily to residence within the service area. While the community encompasses an area which includes at least the primary service area of the proposed station, there is no evidence that the Commission recognizes unspecified "ties" to a section of a state. The record does not reflect whether Ms. Kaddy lives within Berkshire's proposed service area.

[3] Messrs. Grosso and Schwartz were accepted as members of Pittsfield Community Television on October 4, 1982, and then 53 days later—three days before the written case was due on November 29, 1982—Pittsfield Community Television petitioned to amend to reflect their membership.

[4] The new members were John A. Barry, Jr., Isadore Goodman, Steven Schwartz, Gordon Reynolds, Robert Petricca, Edward Grosso, Jr., Maurice Callahan, Susan Francese, Beverly Mancivalano-Schwartz, Pat Donovan, and Michael Casey.

sometime after the and one, John S. Clark, who became a director-member sometime after the application was filed.[5] Affidavit of Pittsfield's President, William H. McAlister, Jr., attached to Opposition to Motion to Enlarge Issues, filed September 13, 1982 by Pittsfield Community Television Association.[6]

9. Pittsfield Community's November 26, 1982 amendment changes the control of the association only insofar as it alters the Board of Directors, because, as Pittsfield Community's bylaws state, "affairs of the Association shall be governed by a Board of Directors composed of seven persons . . .." PCTA Exh. 6, at Bylaws Article IV, Section 1. The Board of Directors "shall have the powers and duties necessary for the administration of the affairs of the association . . .." *Id.*, at Section 2.

10. Pittsfield Community Television explained "that control of the association's affairs is vested in the board of directors." Opposition to Motion to Enlarge Issues, filed September 13, 1982 by Pittsfield Community Television Association, at 3. "[T]he affairs of the association are managed by [the] seven member board of directors." *Id.*[7] The members of the Board are Robert K. George, William H. McAlister, David J. Tierney, Scott C. Taylor, Andrew Campoli, Eugene Dellea, and John S. Clark. PCTA Exh. 7.

11. Of the three persons proposed for participation for a specific time at the station, only Scott Taylor is a member of the Board of Directors. PCTA Exh. 2. Mr. Taylor proposes to spend 20 hours per week as one of two Technical Advisory Managers. *Id.* He lives in Pittsfield where he is President of Taylor'd Sound, Inc. PCTA Exh. 3, at 1; PCTA Exh. 4, at 4.

12. *Housatonic Broadcasting* proposes that stockholders Gary M. Kaye, Gary S. Krakow, Pamela W. Peterson, Jonathan M. Heller, Ronald Richman and William K. McDaniel would be integrated. Housatonic Exh. 1, at 2–3.

13. Mr. Kaye, who is President, a Director, and an 11.4 percent stockholder of Housatonic, proposes to work as the full-time General Manager and Executive Producer. Housatonic Exh. 1, at 2. Housa-

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[5] An amendment was filed notifying the Commission about Mr. Clark's membership on February 9, 1982. The final date for submitting amendments in response to the January 7, 1982 "B" cut-off was February 10, 1982.

[6] Reference is made to the above pleading in Pittsfield's November 26, 1982 amendment adding 11 new members.

[7] Those persons who are only members of the Pittsfield Community Television Association meet annually to elect members of the Board of Directors and transact business. PCTA Exh. 6, at Article III, Section 2. However, a petition presented by 20 percent of the membership for a specific purpose requires a meeting of the membership. PCTA Exh. 6, at Article III, Section 3. Pittsfield Community Television also asserts, without reference to the bylaws, that a certificate of membership represents beneficial ownership in the Association and that it establishes "a right of participation in the program planning and other pursuits of the Association." PCTA Exh. 3, at 1 and Attachment B.

tonic Exh. 2, at 1. He would direct the overall station operation and he would be responsible for the programming content of the station. Housatonic Exh. 2, at 1–2. Since 1966 he has been employed at radio and television stations, and broadcast networks. *Id.*, at 3–4. He has worked as a news writer, announcer, reporter, editor and producer, a public affairs producer, television assignment editor for NBC News, and producer of NBC Radio News' coverage of the Republican National Convention in Detroit. *Id.* Mr. Kaye would move his full-time residence to Pittsfield if a grant is made. *Id.*, at 2.

14. Pamela W. Peterson, who is Treasurer, Director, and an 11.4 percent stockholder of Housatonic, proposes to work full time as the Chief Engineer. Housatonic Exh. 3, at 1. She would direct the day-to-day technical operation of the station and would be responsible for fiscal matters for the corporation. *Id.*, at 1,2. She is licensed as a First Class Radio Telephone Operator. *Id.*, at 2. Currently, she is manager of Long Term Planning, Technical Facilities, for the CBS Broadcast Center. *Id.*, at 4. Since 1967 she has worked at radio and television stations in technical, programming, and sales positions. *Id.*, at 3, 4, 5. She would move to Pittsfield if Housatonic's application is granted. *Id.*, at 2.

15. Jonathan M. Heller, a Director and 9.1 percent stockholder of Housatonic, proposes to work full time as Station Manager and Sales Manager. Housatonic Exh. 1, at 1, 2; Exh. 5, at 1. Mr. Heller would direct the business operations of the station. Housatonic Exh. 5, at 1. He would be responsible for the operations of the sales department, promotion, and business administration. *Id.*, at 2. All department heads other than programming and engineering would report to him. *Id.* Mr. Heller has worked in radio and television broadcasting since 1968. *Id.* He has been an announcer, traffic coordinator, and cameraman. *Id.* Mr. Heller would move to Pittsfield. *Id.*

16. Ronald Richman, who is a Director and 9.1 percent stockholder of Housatonic, proposes to work full time as Operations Director. Housatonic Exh. 1, at 2, 3. In this position, Mr. Richman would direct production of commercials and news. Housatonic Exh. 4, at 1. Mr. Richman has worked as a free-lance video technician for Broadcast News Service; he is the production supervisor for a cable television talk show; and he does free-lance production work for commercial and documentary film or video. *Id.*, at 2–3. He would move to Pittsfield. *Id.*, at 2.

17. Gary S. Krakow, who is Vice President, Director, and a 9.1 percent stockholder, proposes to work part time (20 hours per week) as News Manager of the proposed facility. Housatonic Exh. 1, at 2. Mr. Krakow would work on weekends and direct the news operations of the station. Housatonic Exh. 6, at 1–2. He works as the producer of NBC's early morning news program, Early Today. *Id.*, at 2–3. Mr.

Krakow has extensive broadcast news experience. *Id.* Mr. Krakow lives in New York City and would not move to Pittsfield. *Id.*

18. William K. McDaniel, who is Secretary, a Director and a 9.1 percent stockholder, proposes to work part time (20 hours per week), on weekends, as Promotion Manager of the proposed facility. Housatonic Exh. 1, at 3; Exh. 7, at 1. He would have full charge of the station's promotional activities. Housatonic Exh. 7, at 1. Mr. McDaniel is and has been an account supervisor for New York City advertising agencies where he has been and is responsible for media planning for national and local television advertising. *Id.* He lives in Rye, New York and would not move to Pittsfield. *Id.*

Conclusions of Law

19. *Diversification of Control of the Medium of Mass Communications*: Berkshire Television, Inc. has no mass media interests, but Martin Firestone, who is a Director, Secretary, and Berkshire's largest stockholder (42.5 percent, individually, and his wife, Elaine B. Firestone, holds an additional 10 percent), holds a 25 percent interest in Multi Media Communications Corporation. Multi Media owns 89 percent of JEM Communications, the permittee of WSJN-TV, Channel 24, San Juan, Puerto Rico, and 100 percent of Vinco Communications Corp., which holds a construction permit for Channel 15, Mobile, Alabama. Mr. Firestone also holds less than 1 percent of Springfield Television, which is the licensee of a number of television facilities. Housatonic Broadcasting and its stockholders have no cognizable mass media interests. Pittsfield Community Television Association did not state whether it holds other media interests. It did list the outdoor advertising interest of Maurice Callahan, one of its 18 association members, the long distance telephone resale business of Robert Petricca, another member, and the audio recording studio and media production agency of Steven Schwartz, also an association member.

20. Housatonic Broadcasting and Pittsfield Community Television Association are to be slightly preferred over Berkshire on the diversification criteria because of Martin Firestone's interest in the San Juan, Puerto Rico and Mobile, Alabama television facilities. Berkshire receives a very slight demerit for his interests. A slight demerit is assessed because the facilities are some distance from Pittsfield. Nevertheless, a demerit is warranted because it cannot be concluded that Mr. Firestone has no influence, or control, over the Puerto Rican facility since Berkshire has not indicated the importance of Mr. Firestone's holdings in terms of the other stockholders.

21. Pittsfield Community Television stands in the same position as Housatonic and it, too, is to be preferred over Berkshire because its Board of Directors does not have any mass media interests. The interest of Messrs. Petricca and Schwartz would not be cognizable for assigning a diversification demerit under any circumstances. *Mid-*

west Broadcasting Company, 70 F.C.C. 2d 1489, 1498–99 (Rev. Bd. 1979). However, the interest of Mr. Callahan in local outdoor advertising might be considered because of its potential for affecting the economic control of mass media if he held any control of the Pittsfield Community Television Association. But, Mr. Callahan is only one of 18 members of Pittsfield Community Television Association and he is not a member of its Board of Directors where "control of the association's affairs is vested . . . ."

22. *Full-time Participation in Station Operation by Owners*: Housatonic and Berkshire are to be preferred over Pittsfield Community Television on this criteria, and Housatonic is to be preferred over Berkshire for the following reasons: Housatonic's Gary M. Kaye, an 11.4 percent stockholder, Pamela W. Peterson, an 11.4 percent stockholder, Jonathan M. Heller, a 9.1 percent stockholder, and Ronald Richman, a 9.1 percent stockholder, propose to work full time in management positions at the station and they propose to live in Pittsfield. Each of them has experience in the television field, each holds a position of significance in the Housatonic corporation, and Ms. Peterson enhances the proposal because she is a woman. In addition, Gary Krakow, a 9.1 percent stockholder, and William K. McDaniel, also a 9.1 percent stockholder, would occupy management positions on a part-time basis and have had experience performing the jobs they would occupy. They would, however, work only on weekends and would not live in Pittsfield. Nevertheless, their participation means that 59.2 percent of the ownership of Housatonic would participate in the management of the station.

23. While Berkshire promises slightly more full-time participation by owners (47.5 percent compared to Housatonic's 41 percent), the part-time participation of two Housatonic stockholders who own 18.2 percent of its stock outweighs the slightly greater full-time proposal of Berkshire. Furthermore, Berkshire's full-time intergration proposal is vague about the responsibilities that would be handled by Jean Kaddy. Ms. Kaddy, who holds 42.5 percent of Berkshire's stock and is a coporate officer, "propose[s] integration into the management" of the station. Berkshire Exh. 2, at 1. Nowhere does Berkshire explain what it is that she would do at the station.

24. The *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965) requires that before full credit is given for an integration proposal, an assessment must be made of the policy functions the person would undertake and the likelihood that the person would play an important role in management. For example, the Commission has stated that it would accord significant weight to certain staff positions held by owners. *Id.* And "although positions of less responsibility will be considered . . . they cannot be given the decisional significance attributed to the integration of stockholders

exercising policy functions." *Id*. Ms. Kaddy can be credited with her promise of full-time participation in management but no assessment can be made that she would undertake a policy role or that her job will be important in the management of the station. Berkshire's proposal to integrate Raymond Goudreau, who is a Director, 5 percent stockholder, and proposed full-time Chief of Engineering, does not suffer from the same infirmity.

25. Qualitatively Housatonic's full-time proposal is also superior to Berkshire's. Berkshire's Kaddy and Goudreau do not live in Pittsfield and they have not stated that they would move there. In contrast, all of Housatonic's stockholders, who propose to work full time, have indicated that they would move to Pittsfield.[8] While both Kaddy and Goudreau have broadcast experience, so do all of the stockholders proposed for integration by Housatonic.

26. Ms. Kaddy, as a 42.5 percent stockholder, receives credit as an integrated woman, but so does Housatonic's Pamela W. Peterson. Neither Ms. Kaddy nor Ms. Peterson hold control of the applicant, and their ownership positions are relatively the same, since no other stockholder in either applicant owns a greater number of shares than they do.[9] (That is the case for Berkshire unless the 42.5 percent held by Berkshire's Martin Firestone is combined with his wife's shares.) However, Ms. Peterson's role in the policy formation and management of Housatonic is clearly defined and important and, therefore, the import of her female credit can be assessed. Overall on qualitative grounds Housatonic is entitled to a moderate preference over Berkshire because its stockholders proposed for full-time integration will move to Pittsfield and because Housatonic has given a well defined and important role to a woman who owns a significant share of the applicant.

27. Pittsfield Community Television Association proposes that three members of the association would work at the station, Steven Schwartz, Edmund B. Grosso, and Scott C. Taylor. Steven Schwartz, who would work full time, and Edmund B. Grosso, who would work

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[8] Berkshire states that "Mrs. Kaddy's long-standing ties to the Western Massachusetts area, with concomitant personal knowledge of area issues and problems, will also be valuable . . .." Berkshire Exh. 2, at 1–2. With regard to Mr. Goudreau, the testimony indicates that "his extensive ties to the Western Massachusetts area . . . indicate that he will be sensitive to the needs of the local area." Berkshire Exh. 3, at 2. The only example of sensitivity cited was the fact that Mr. Goudreau has been married for twenty-one years and has three children. *Id*. The Commission provides primary credit to residence in the community and a lesser credit to residence in the service area. *Waters Broadcasting Corporation*, 52 Radio Reg. (P&F) 2d 1063, 1065–66 (1982). But Berkshire's statements are too imprecise to credit: Berkshire does not claim that Kaddy and Goudreau live in the community of Pittsfield, or in the service area. They only refer to unspecified "ties" and an unexplained familiarity with Western Massachusetts.

[9] Cf. *Gilbert Broadcasting Corp.*, 52 Radio Reg. (P&F) 2d 429, 444 (1982) (where the Commission gave a greater preference to minority control).

part time, became members of the association on October 4, 1982. Scott C. Taylor, Sr., who would work part time, was a member of the association and its Board of Directors at the time the application was filed.

28. Whether any or all of these people should receive credit for their participation largely depends on their authority or ability to exercise control over the operation of the nonprofit Association. Pittsfield Community Television Association's seven person Board of Directors has the power and duty to administer the Association. The Board holds control and manages the Association's affairs. Members of the Association elect Board members and, in the ordinary course, have the right to vote on matters at an annual meeting. While Pittsfield Community Television Association claims in its Exhibit 3 that a member has a beneficial ownership and a right to participate, it is clear from its bylaws and earlier filings in this proceeding that the right is limited and that control of the Association's affairs on a day-to-day basis rests with the Board of Directors. The bylaws state that the Board of Directors will be made up of seven members, although until just before the hearing there were eight directors. Assuming authority rests with the Board, then any integrated Board member would receive 14.3 percent credit if there were seven members.

29. At the cut-off date Pittsfield Community Television Association's authority was distributed among the eight members of the Board of Directors. Now it proposes that one of its directors, Scott Taylor, would work part time at the station. At the cut-off date he held 12.5 percent of the Association's control. His part-time promise is insignificant when compared to Housatonic and Berkshire's applications.

30. Until October 4, 1982, Pittsfield Community Television Association had no members who were not also directors but then on that date it accepted eleven members who are not directors. It seeks integration credit for two of these new members who are not directors.

31. The other applicants oppose giving credit to these new members because they were added to the application after the "B" cut-off date—the date on which the applications could no longer be amended as a matter of right. Pittsfield Community Television's response to this argument is that it told the Commission when it filed that it might add new members and therefore it has the right to do so. Pittsfield Community Television offers no support for its assertion and there is none. Applicants cannot improve their comparative standing after the cut-off date by adding new owners who promise to integrate. See *Birmingham Family Television, Inc.*, 52 Radio Reg. (P&F) 2d 525, 526, 528 (Rev. Bd. 1982). Although Pittsfield Community Television may add new members who would manage the station, their promise is not of comparative importance

because it does not couple legal control with management since they are not directors. Adding members, therefore, does not improve Pittsfield Community Television's position.[10]

32. Pittsfield Community Television Association also seeks comparative credit for proposing auxiliary power. Housatonic points out, however, that Pittsfield's application contains no such proposal and to permit an amendment would be to allow Pittsfield to improve its application after the "B" cut-off date. In any event, the *Addendum to the Policy Statement*, 2 F.C.C. 2d 667 (1966) provides that auxiliary power is a factor only in AM and FM broadcast proceedings; therefore, no preference is warranted.

33. In sum, Housatonic is to be favored because its quantitative and qualitative integration proposal is better than Berkshire's, and superior to Pittsfield Community Television Association's. In addition, Housatonic's comparative standing on diversification is slightly better than Berkshire's. Berkshire's integration would be quantitatively better than Pittsfield Community Television Association's. Pittsfield Community Television is better on diversification than Berkshire, but this difference does not outweigh Berkshire's superior integration proposal.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed November 26, 1982 by Pittsfield Community Television Association IS GRANTED and the amendment IS ACCEPTED, subject to the condition that the changes effectuated in its membership and Board of Directors will not improve its comparative position.

IT IS FURTHER ORDERED that the applications of Berkshire Television, Inc. (File No. BPCT-811026KG) and Pittsfield Community Television Association (File No. BPCT-811217KF) ARE DENIED and the application of Housatonic Broadcasting Company, Inc. (File No. BPCT-811217KG) for a construction permit for a new commercial television station to operate on Channel 51 at Pittsfield, Massachusetts IS GRANTED.[11]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN, *Administrative Law Judge*

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[10] If the control of Pittsfield Community Television does rest with its members, then the November 26, 1982 amendment notifying the Commission of the change presents an even more serious question of whether control had transferred. See *Pacifica Foundation*, 36 F.C.C. 147, 152 (1964) (where an existing non-profit licensee was expected to, and did, apply for a transfer of control of even a noncommercial facility).

[11] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Application, Acceptance of

> Petition for review of Bureau's action returning application denied. Since the applicant's proposed service area already receives the signals from two full-service stations, the applicant's provision of a first local service does not meet the Commission's freeze exemption criteria for new proposals and the application is therefore dismissed.
> –*P.M. B/cing Co., Inc.*

FCC 83–362

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

P.M. BROADCASTING COMPANY, INC.

For Construction Permit For a New Low Power Television Station in Portsmouth, New Hampshire

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1983 Released: August 3, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration a petition filed by P.M. Broadcasting Company, Inc. (PM), for review of the Mass Media Bureau's return of the above-captioned application on August 4, 1981. The application was returned because it was filed after the imposition of the Commission's freeze on the acceptance of new low power television applications and failed to meet any of the exemptions to that freeze.

2. By way of background, on April 9, 1981, with insufficient staff and computer capability to handle the approximately 5,000 TV translator and low power television applications already on file, the Commission stopped accepting new applications. However, exceptions were made for: existing translators operating on Channels 70 through 83 seeking to change frequency to a lower channel; existing translators seeking to change channels to eliminate interference to full-service stations; or new proposals to serve areas receiving fewer than two full-service stations. *Order Imposing Freeze*, 46 Fed. Reg. 26062, published May 11, 1981, 49 RR 2d 433. In its *Report and Order* in BC Docket No. 78–253, 49 Fed. Reg. 21468, published May 18, 1982, 51 RR 2d 477, establishing a low power television service, the Commission did not lift the freeze, but did eliminate the freeze

exemption for proposals to serve areas currently receiving fewer than two full-service stations. Instead, applications were grouped into categories by market size. Those applicants proposing to locate their transmitting antennas more than 55 miles from the coordinates of any of the top 212 television markets are placed in Tier I and are now freeze exempt. Applicants other than those in Tier I are grouped in Tiers II and III by market size. Under the tiered system, processing of the first tier must be completed before processing of the second tier begins, and so on. The freeze will be lifted only for the limited purpose of receiving competing applications to the applications published on cut-off lists.

3. In its application for review, PM acknowledges that its proposed community of license, Portsmouth, New Hampshire, already receives coverage from two full-service television stations. One station is licensed to Boston, Massachusetts, and the other to Portland, Maine. In addition, PM notes that Portland, Maine, the 79th largest television market,[1] is located approximately fifty miles from Portsmouth. Nevertheless, PM contends that its application falls within one of the exceptions to the freeze order because PM's proposal would bring the first local television service to Portsmouth. According to PM's reasoning, the provision of first local service is equivalent to a proposal to cover areas that directly receive fewer than two full-service television stations.

4. We are unable to accept PM's contention that its application is freeze exempt. In adopting the freeze exemption for areas receiving fewer than two full-service television stations, we noted that the exemption encompassed two of the five service priorities listed in the *Sixth Report and Order* in Docket Nos. 8736 and 8975, 9174 and 8976, 41 FCC 148, 167 (1952):

> (1) To provide at least one TV service to all parts of the United States and
>
> (2) To provide a choice of at least two TV services to all parts of the United States

Moreover, we stated that it was "our opinion that, in the context of TV translator and low power stations, these two service priorities of the Sixth Report and Order are of paramount importance because they would facilitate service to areas most in need of it, the primary goal of our interim policy." In establishing that freeze exemption, we declined to include the other service priorities specified in the *Sixth Report and Order*, such as, the priority for the provision of at least one television station for each community. In our opinion, the inclusion of that latter service priority would have nullified the purpose of the freeze since we anticipate that, in light of the small and undefined coverage areas of low power stations, many applicants could claim that they were providing the first local service to their area of license.

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[1] Public Notice encaptioned "Television Channel Utilization", FCC mimeo number 3331, dated April 16, 1982.

5. The reason for imposing our April, 1981 freeze on the acceptance of low power applications was to establish an orderly and effective procedure for the processing of the unanticipated large volume of applications. Since that time, we estimate that an additional 7,000 applications have been filed under our existing freeze exemptions. In view of the steady influx of Tier I low power applications and the commensurate burdens imposed on our staff, we believe it is in the public interest to continue to maintain a freeze on the acceptance of low power applications.

6. Here, we find that PM's application fails to meet any of the freeze exemptions specified in our April 1981 *Order Imposing Freeze* since the applicant proposes to serve an area that presently receives two full-service stations. Moreover, the application may not be accepted under our present Tier I freeze exemption since PM proposes to locate its station less than 55 miles from a television market. Finally, in view of the considerable number of pending applications, we believe that PM's provision of a first local service does not justify the requested waiver or a lifting of the Commission's freeze on the filing of low power television applications. We simply will not be able to establish the new low power television service in an efficient, orderly manner if waivers are readily granted. Under these circumstances, we find that the Bureau's dismissal of the P.M. Broadcasting Company, Inc. application was proper and we hereby affirm that action.

7. Accordingly, IT IS ORDERED that the request for waiver of the Commission's *Order Imposing Freeze* filed by P.M. Broadcasting Company, Inc., IS DENIED.

8. IT IS FURTHER ORDERED that its petition for review of the Mass Media Bureau's action returning its application IS DENIED.

9. IT IS FURTHER ORDERED that the Mass Media Bureau send a copy of this Memorandum Opinion and Order by Certified Mail - Return Receipt Requested to the party named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Rate or Tariff Unlawful
Satellite Domestic Communications
Tariff, Suspension

On remand from the Court of Appeals for the District of Columbia Circuit, the Commission explains further its decision that RCA's tariff revisions for its Domestic Satellite Services are unjust and unreasonable under Section 201(b) of the Act.
–RCA American Communications, Inc.
CC Docket No. 80–766

FCC 83–370

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of RCA AMERICAN COMMUNICATIONS, INC.	CC Docket No. 80–766
Revisions to Tariff FCC Nos. 1 and 2	Transmittal Nos. 191 and 273

MEMORANDUM OPINION AND ORDER

(Adopted August 3, 1983; Released August 5, 1983)

BY THE COMMISSION:

1. On July 21, 1982 the D.C. Circuit Court of Appeals remanded the record of the captioned proceeding to the FCC for an unambiguous statement of the rationale for our decision. *RCA American Communications, Inc.* v. *FCC*, Case Nos. 81–1558, et al. (*Judgment* entered July 21, 1982). This order is intended to provide the statement required by the Court.

2. This controversy began in April 1980 when RCA American Communications, Inc. (Americom) filed revisions to its domestic satellite service tariffs. The revisions proposed changes both in the rates and in the terms and conditions on which Americom's satellite services would be offered. They would have raised the rates for Americom's satellite service, changed the length of the service terms, eliminated less expensive grades of service, effectively prohibited customer termination of service and changed the time limits for notice of a customer's intention to renew the service. The general impact of these revisions would have been to alter substantially the conditions under which customers had committed themselves to take service from Americom. See *RCA American Communications, Inc.*, 84 FCC 2d 353, 360–62 (1980).

3. Because we were concerned that the proposed changes might not be reasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. 201(b), we suspended the Americom tariffs for five months pending investigation. *Id.* Although we noted that the tariff filing process presupposes that carriers be permitted to initiate tariff changes, we determined that there were a number of reasons for carefully scrutinizing the Americom proposal. These included the carrier's dominant position in the industry, the sweeping changes it proposed in virtually every significant term and condition of the service, the potential hardship to relying customers, and the possible unfairness to the customer in allowing the carrier to make changes in the middle of the term while binding the customer to all the tariff provisions until its expiration. *Id.* at 356–59. We concluded that, under these circumstances, the reasonableness test of Section 201(b) involved considerations of fairness to carrier and customer alike.

4. After investigation, we declared the proposed revisions unjust and unreasonable in violation of Section 201(b) of the Communications Act. *RCA American Communications, Inc.*, 86 FCC 2d 1197 (1981). Our decision centered in large measure on our conclusion that the reasonableness of a proposal to revise material provisions of a long-term tariff in the middle of its term "must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time." *Id.* at 1201. We determined that "if a carrier can make a showing of substantial cause, its decision to alter tariff terms will be considered reasonable." *Id.* at 1201–02. Applying this test, which has come to be known as the "substantial cause for change" test, to the Americom proposal, we found that the carrier had not established the reasonableness of reducing the length of the service terms, eliminating part-time and one-year service and prohibiting customer termination of service. *Id.* at 1203–06.

5. Americom challenged this finding in the D.C. Circuit Court of Appeals. It argued that the substantial cause test was a separate hurdle that required it to justify changing existing tariff terms in addition to proving reasonableness under 201(b). Relying upon *American Telephone and Telegraph* v. *FCC*, 487 F. 2d 865 (2d Cir. 1973), Americom asserted that such a requirement unlawfully interfered with the carrier's right to initiate and implement new tariffs. Commission counsel, responding to Americom's arguments, explained that the test employed in the FCC's order was not a new barrier to the filing of tariff changes. Rather, the brief said, it was an FCC recognition that, under the circumstances presented in this case, reasonableness was not a function of cost alone, but also of other factors such as customer reliance upon the long term provisions of the existing tariff.

6. In its *Memorandum* accompanying the *Judgment*, the Court

agreed with the FCC that the "reasonableness" determination required under section 201(b) need not be confined to mere consideration of the carrier's costs of providing service. It said:

> reasonableness ultimately depends on the special facts of each case. . . . [w]e see no reason why the Commission, in a thoughtful and properly supported exercise of its expertise, could not decide that substantial customer reliance expenditures have been induced by a particular type of tariff, and that these should play a significant role in defining the zone of reasonableness within which the carrier is free subsequently to modify its rates and practices."

Memorandum, p. 4. Nonetheless, the Court concluded that it was not clear from our order that we had employed the "substantial cause for change" test merely as factor for defining the zone of reasonableness under 201(b). The Court found that some language in the order supported Americom's characterization of the test as an additional hurdle for the carrier to overcome. Thus, the Court remanded the record of this case to the Commission "for an unambiguous statement of its rationale for invalidating [Americom's] revised tariff." *Memorandum* p. 6.

7. In response to the Court's *Judgment*, we take this opportunity to specify that we returned Americom's tariff revisions because we found them unjust and unreasonable under 201(b) of the Communications Act. It is well established that we have broad authority to interpret the Communications Act and determine when a tariff is just and reasonable. See *Nader* v. *FCC*, 520 F. 2d 182, 192 (D.C. Cir. 1975). We used that authority in this instance by employing the substantial cause for change test as a tool for defining the appropriate zone of reasonableness applicable to the Americom tariffs. The circumstances that surrounded the Americom filing clearly indicated that customer fairness was an appropriate factor to be considered under the Section 201 reasonableness test. In particular, the peculiar characteristics of the domestic satellite industry, Americom's position in that industry and the nature of the tariffs and proposed changes before us indicated that customer equity was an important consideration in this case. Accordingly, and for the reasons specified in paragraphs 14–28 of our May 21, 1981 *Order* in this proceeding, we reaffirm our finding that Americom failed to establish the reasonableness of the tariff changes it proposed.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

ISM Equipment
Lighting, Radio Frequency
Lighting, Specifications

Notice of Inquiry adopted seeking information to aid the Commission in formulating regulatory policy for lighting devices using radio frequency (RF) energy. Part 18 Subparts H and E (by reference) currently applies to RF lighting devices. These rules, however, are not considered appropriate for new RF lighting devices.
–RF Lighting Devices
Gen. Docket No. 83–806

FCC 83–360

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of FCC Regulations concerning RF Lighting Devices.	Gen. Docket No. 83–806

NOTICE OF INQUIRY

(Adopted: July 28, 1983 Released: August 5, 1983)

BY THE COMMISSION:

Introduction

1. This Notice of Inquiry is issued to assist the Commission in determining what, if any, minimum regulatory requirements are necessary to minimize the interference potential of radio frequency (RF) lighting devices. In this Inquiry we are seeking information concerning the emission characteristics of RF lighting devices and the degree to which these products may become sources of harmful interference to authorized radio communication services. If a significant potential for interference exists, information submitted in response to this inquiry will aid us in determining what technical standards are necessary to control emissions to a level which would minimize interference.

2. Parallel with our effort in this Inquiry, we encourage the RF lighting industry to study the need for and, if found necessary, adopt voluntary industry standards to minimize the interference potential of their RF lighting devices. The Commission considers that voluntary industry standards would be preferable to government imposed regulations, particularly in an evolving area of technology. An

additional purpose of this Inquiry is to seek information on the ability of the RF lighting industry to regulate the interference potential of their devices.

3. If government regulations are needed, information gained from this Inquiry will be useful to the Commission in developing the minimum regulations necessary for the control of harmful interference from these RF lighting devices. We plan to investigate the least burdensome technical or administrative (i.e. labelling, user information, equipment authorization, etc.) regulations which could accomplish our goal of providing for use of this new technology while adequately protecting radio communication services against undue interference. We should stress at the outset that any regulatory requirement will be viewed as a last alternative to a workable voluntary standard.

RF Lighting Devices

4. RF lighting is an energy efficient lighting system currently being developed. AC power is taken from the power line, converted to RF energy[1] and applied to a fluorescent tube to produce light. Such RF lighting is claimed to be up to 3 to 4 times more energy efficient than incandescent lighting and than conventional fluorescent lighting using electromagnetic ballasts. Although this fact has been known for some time, it is only recently that electronic or RF ballasting has become cost effective. Developments of RF lighting are moving in several directions. One development is in the direction of a self contained lamp to be screwed into the standard incandescent bulb socket. A second development is producing an electronic or solid state ballast to replace the conventional electromagnetic ballast in the standard fluorescent fixture. A third development is looking toward the distribution of RF energy over a dedicated set of wires to the individual fluorescent fixtures. In this Notice of Inquiry we will use the term "RF lighting device" to encompass all the developments enumerated above.

5. The SL-18 RF light bulb developed by North American Phillips Lighting Corporation, is typical of the first development enumerated above. This bulb contains a folded fluorescent tube and has the necessary electronic circuitry built into the glass envelope. The electronic ballast produced by International Energy Conservation System and Soli-Tronics typify the second development described above. The operation of a fluorescent tube with an electronic ballast is similar to that of a tube using a conventional electromagnetic ballast. The difference lies in the internal circuitry. In the electronic ballast the 60 Hz AC line voltage is first rectified to DC.

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[1] Most electronic ballasts operate between 20 and 40 kHz. However, the Commission is aware of the development by Litek International Corp. of an electronic ballast for a fluorescent light bulb which operates at 13.56 MHz.

The DC voltage is applied to an inverter whose output is RF energy at a frequency above 20 kHz. The RF energy is then applied to the fluorescent tube through an RF choke[2] to strike an arc which in turn excites the fluorescent coating to emit light. The rectifier, the inverter and the RF choke are all in the same package which looks exactly like the conventional electromagnetic ballast and is installed in the same way by the electrician. In this connection, we are aware that in some commercial and industrial RF lighting systems, instead of using an individual electronic ballast in each fixture, the system uses a centrally located piece of equipment that provides the AC to DC to RF conversion with the RF energy distributed to the individual lighting fixtures over a dedicated set of wires. In other such system, only the rectifier is centrally located with the DC voltage distributed to the individual lighting fixtures, each of which contains a simplified electronic ballast.

6. The General Electric Co. has taken a different path in its development of an RF light bulb—the GE Electronic Halarc light bulb. Unlike the electronic ballasts for fluorescent tubes where RF energy is used continuously while the bulb is on, the GE bulb uses RF energy only for a few seconds in the initial start-up mechanism of the bulb. GE intends for this bulb to replace the standard household incandescent bulb. This bulb allegedly uses 1/3 the energy of an incandescent bulb and lasts 4 or more times longer. As mentioned previously, several RF fluorescent type bulbs have also been designed to fit in the same socket as a regular incandescent bulb. Compared to the incandescent bulb, these RF fluorescent bulbs are much more energy efficient (allegedly only using 1/4 the energy).

7. While these RF lighting bulbs have residential application, it is expected that the major use of RF lighting sources will initially be in the commercial and industrial area to replace the standard flourescent fixtures or incandescent lamps. Commercial and industrial purchasers of lighting devices are more apt to take all costs into account including long term energy costs. The residential consumers, on the other hand, may not be as willing to spend additional money for an expensive RF light bulb even though it may save them money over the long run.[3] However, in the future, with increasing residential consumer awareness, the rising costs of energy, and the probable narrowing of the price differential between standard and RF bulbs, the new RF lighting devices could reach a significant portion of the

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[2] The RF choke is necessary to limit the current that flows when the arc is struck and serves the same function as the magnetic coil in the conventional electromagnetic ballast. The RF choke need not be set out as a separate component, but it is usually incorporated in the circuitry that produces the RF energy.

[3] Currently developed household RF light bulbs are expected to sell for a significantly higher price than the standard incandescent bulb. However when considering the money saved in reduced energy consumption over the life of the bulb, an individual could justify paying more for an RF light bulb.

residential market and could become a significant part of the overall lighting market.

Present Requirements

8. Currently, under the Commission's Rules, RF lighting devices meet the definition for industrial, scientific and medical (ISM) equipment regulated by Part 18.[4] Under these rules RF lighting devices fall within the category of Miscellaneous Equipment in Subpart H which includes, among other devices, apparatus in which RF energy is applied to materials to produce physical, biological or chemical effects such as ionization of gases, etc.[5]

9. Part 18 requirements, however, were never intended to apply to mass produced or consumer items. Rather, these requirements were designed to govern large industrial equipment such as industrial heaters. The current radiated emission limit for Part 18 equipment may not provide sufficient protection against interference to consumer devices. In addition, for most Part 18 equipment, there is no conducted emission limit. These liberal standards, accordingly, are inappropriate when applied to products having a widespread use in commercial and residential locations.[6]

10. In the proceeding in Docket 20718 instituted by a *Notice of Inquiry* in 1976 followed by a *Notice of Proposed Rule Making* in 1978, we had proposed to reduce the allowable radiation emissions from ISM equipment, add a new power line conducted interference limit, and simplify the equipment authorization requirements for ISM equipment.[7] In that proceeding, we noted that the rules in Part 18 pose an administrative burden on manufacturers of certain ISM equipment. One of the most burdensome is the requirement for detailed certification and re-certification every three years for medical diathermy and miscellaneous ISM equipment operating on non-assigned ISM frequencies.[8] When the Part 18 rules were

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[4] Section 18.3 (f) defines ISM equipment as "[d]evices which use radio waves for industrial, scientific, medical or any other purposes including the transfer of energy by radio and which are neither used nor intended to be used for radio communication".

[5] Section 18.3 (d). RF lighting devices contain materials and gases which are excited to emit light by the application of an RF voltage.

[6] Products which are widely distributed in a residential and commercial environment require tighter emission limitations because of the greater chance of their operation in close proximity to or on the same electrical circuit as a radio or TV receiver.

[7] Docket 20718: In the matter of overall revision of Part 18 governing Industrial, Scientific, and Medical (ISM) equipment. *Notice of Inquiry* adopted March 9, 1976 and released March 15, 1976 (41 FR 11626). *Notice of Proposed Rule Making* adopted September 19, 1978 and released September 29, 1978 (43 FR 46326). *Second Notice of Proposed Rule Making* adopted January 1, 1979 and released January 29, 1979 (44 FR 9771).

[8] The non-assigned ISM frequencies are all frequencies other than those specifically assigned for ISM purposes as listed in Section 18.13. The assigned ISM frequencies

adopted, equipment subject to recertification was usually large and very frequently unique. Under these conditions recertification was not considered to be overly burdensome, and it insured that the equipment would continue to comply with our technical standards. However, with the introduction of mass produced and particularly residential consumer items, such as RF lighting devices, we recognize that recertification every three years poses an impractical requirement and had proposed to eliminate this requirement in the proceeding in Docket 20718.

11. In 1980, the Commission granted a waiver of the recertification requirement to the General Electric Company to allow it to produce a limited quantity (up to 10,000) of the GE Electronic Halarc light bulb.[9] Later, at the beginning of 1981, we revised this waiver to eliminate the limitation on the numbers of bulbs that could be produced under the waiver.[10] Three other manufacturers of RF lighting devices have recently filed similar requests for waiver of the re-certification requirement. These petitions for waiver are being considered in a companion *Order Granting Limited Waiver*. These petitions demonstrate the need to develope a policy concerning RF lighting devices.

Discussion

12. The interference potential of RF lighting devices is considered the central issue in this inquiry. Any future regulatory action that we take is directly dependent upon the potential that these devices have to become sources of interference to licensed communication services. Since these devices are relatively new, there is a lack of information on their interference potential. We trust that this inquiry will aid in supplying us with the needed information concerning this question. In addition to responses from the RF lighting industry, we seek comments from other parties particularly those associated with licensed radio communication services which may be affected by emissions from RF lighting devices. We are specifically looking for supporting data, e.g., mathematical analysis, emphirical results, and modelling, to substantiate any claims of interference potential or lack thereof.

13. In addition, test data would be helpful to the Commission in

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are:

13.56 MHz ± 6.78 kHz
27.12 MHz ± 160. kHz
40.68 MHz ± 20. kHz
915 MHz ± 13 MHz
2450 MHz ± 50 MHz
24.125 GHz ± 125 MHz

[9] *Order Granting Limited Waiver* adopted July 17, 1980 and released July 23, 1980 (FCC 80–418, 45 FR 51649).

[10] *Order Expanding Limited Waiver* adopted January 29, 1981 and released February 4, 1981 (FCC 81–25).

corroborating any predictions concerning interference potential. In this respect, measurements were performed on several sample RF light bulbs at the Commission's Laboratory.[11] Emissions from these bulbs were found to be very broadband with measurable emission spanning the frequency range from 10 kHz up to 80 MHz. Our test data showed that the RF light bulbs were able, for the most part, to meet considerably tighter emission limits, such as those applicable to computers, than the limits now in the Part 18 rules. At the same time, we noted that these bulbs were capable of interfering with AM broadcast radio reception. We question whether technical standards designed to limit emissions from ISM equipment in general would be adequate to protect the communications services from harmful interference caused by RF light bulbs especially when considering the unique broadband nature of the emission from these bulbs.

14. In controlled laboratory tests, AM radios received objectionable interference via radiation up to a distance of several meters away from the RF light bulbs tested. In addition, emissions on the power line also resulted in interference to AM radios especially those connected to the AC power line. Tests performed in several homes verified that a potential does exist for harmful interference to AM radio reception. However, because of house wiring differences and other factors, results varied from one home to the next. The home tests are inconclusive at this point, but we are hopeful that the larger real world survey to be accomplished through the associated waivers using a substantial number of bulbs will provide us with a reasonable assessment of the actual degree of interference potential posed by RF lighting devices to AM broadcast and other services. In any case, we are particularly interested in comments regarding the interference potential presented by RF lighting devices to AM radio reception or any other radio service.

15. Further, we are interested in gathering information about the emission characteristics presented by different types of RF lighting devices. We are also interested in comments regarding appropriate technical emission standards, both radiated and conducted, which could restrict emissions from RF lighting devices to levels that would not cause harmful interference. Comments concerning an appropriate measurement procedure to determine compliance with any proposed emission standard would also be beneficial to this inquiry.

Questions

16. The following questions are representative of our concern about RF lighting products. In addition to the FCC generated questions, the list also includes questions contributed by the

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[11] *See* the Technical Memorandum from Philip M. Inglis to the Chief, Authorization and Standards Division, dated February 25, 1983, file No. 31030/EQU/4-0.

Lighting Division of the National Electrical Manufacturers Association (NEMA).[12] Commenters are requested to identify each question being answered with the appropriate designator. We also invite comments not directed to any particular question as long as it is related to the general subject matter of this proceeding. Answers should include adequate justification and data, when appropriate.

REGULATION AND STANDARDS

Q1. What kinds of RF lighting devices and systems are on the market or are being developed with a description of each? Also, is there any information available concerning the interference potential of each such device or system.

Q2. How should RF lighting devices be regulated? Should the FCC regulate such devices as part of an official rulemaking or should the Commission give the lighting industry a chance to develop a voluntary industry standard through an organization such as NEMA?

Q3. What are the principal categories of RF lighting devices? Should each category be regulated differently? Should there be different categories by lamp type or industrial use? Or should there be different standards for differing environments, for examples, one standard for residential use, one for factory use, one for sensitive areas such as hospital intensive care units, etc.?

Q4. Should there be standards which apply to *groups* of low powered lamp systems, such as areas with many fluorescent fixtures, and other standards that are applicable to high powered systems that may have fewer lamps, such as 20 kilowatt short-arc xenon area lighting? Should some systems have standards which apply both to elements of the system and to the system as a whole?

Q5. Should there be one standard that includes both conducted and radiated interference or should there be separate standards?

Q6. Should there be specific standards for fixtures or systems intended to reduce radiated RFI? (Should lighting specifiers or consumers be given the option of selecting lighting products with "interference ratings"?)

Q7. Should manufacturers label each product, particularly consumer RF lighting devices, to provide user information to educate consumers and users about the interference potential of the device.

Q8. Should standards include operation of systems in an abnormal mode, (such as rectifying lamps, shorted or open lamp elements)?

Q9. Should RF lighting products be moved from Part 18 of FCC Rules and Regulations to Part 15? Should a totally separate, new Rule Part be established for RF lighting devices?

Q10. Should the lighting industry, through a representative committee, establish limits on RF emission? If so, which organization is best suited and able to lead the lighting industry in establishing and policing the standards that the industry imposes upon itself? If industry accepts the responsibility of policing itself, what is the best manner to enforce the standard developed to ensure the EMI product quality will be maintained.

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[12] Our concern of the potential interference from RF lighting devices had been raised in discussions with the Lighting Division of NEMA. As a result of these discussions, NEMA contributed a list of questions for which answers are required before a sound regulatory policy can be developed for RF lighting devices.

Q 11. Would an administrative program of notification and verification by the manufacturer be acceptable to assure adequate compliance? See 47 CFR Part 2, Subpart J, for an explanation of the Commission's equipment authorization program.

Q 12. Should the standards be based upon existing international or foreign government standards? If so, which ones? Should it be a guideline for establishing the one in the United States.?

EMISSION LEVELS AND LIMITS

Q 13. What is the effect of the use of multiple RF lighting devices in one location on the interference potential?

Q 14. Should there be different limits for interference which may occur for brief periods, such as lamp starting or warm-up, than for more persistent or continuous emissions, as during lamp operation? If so, should intermittent and continuous cases include both conducted and radiated emission limits? Should a derating curve of emission intensity versus emission duration exist?

Q 15. Should bands of frequencies be alloted solely for use by RF lighting devices and systems? If so, how many and at what frequencies? Should RF lighting devices and systems be restricted to special frequencies?

Q 16. Should harmonic content of interference be specified as well as amplitude (intensity) and direction (spatial characteristics)?

Q 17. Should emission level limits, whether imposed by rulemaking or by industry standards, reflect different environments such as residential (consumer), commercial, or industrial? If so, what is the justification and rationale? If not, why not?

Q 18. How additive are the effects from multiple sources? Does industry data indicate some relationship in actual installations? Do multiple unit installations represent a significantly greater potential for interference than do individual devices?

Q 19. What emission level limits are appropriate for RF lighting devices? Discuss radiated and conducted limits and a rationale for recommended limits. Discuss an appropriate model for developing such limits.

Q 20. Should emission limits be established for a "system" consisting of a lamp, ballast, and fixture? Or should emission limits be set for lamp and ballast combinations?

Q 21. How shall lighting systems be treated that distribute RF energy to the fixtures over a set of dedicated wires instead of using individual electronic ballasts in each fixture? What limit shall be placed on the radiation of RF energy from the wiring? On the RF energy fed into the wires?

MEASUREMENTS

Q 22. What is an appropriate test methodology for determining the interference potential for each type of RF lighting device? Are both conducted and radiated measurements required? What are the conditions for each? Or, is some other test methodology more suitable?

Q 23. Should there be different test equipment for different frequency ranges? What should the measurement procedure be? Should consideration be given to polarization of the radiated interference? In what units should the measurements be recorded and reported?

Q 24. What line impedance stabilization network (LISN) should be used for conducted measurements? How should conducted measurements of RF lighting devices be taken?

Q 25. What should the setup be for radiated RF emissions? What type of antenna should be used? Should the testing be done in a special test chamber or in a working installation? What distances should be employed and should different distances be used for different frequency bands?

Q 26. Under what operating parameters should RF lighting devices be measured?

Q 27. What detector function and bandwidths should be used for measurements? Should the same detector and bandwidth be used across the entire frequency spectrum?

Q 28. Is measurement of radiated emissions in near rather than far fields an issue for these products?

Q 29. Can existing testing methods be incorporated or adopted? Which ones?

Q 30. Over what frequency range or bands are conducted and radiated emissions to be monitored?

Q 31. What test methodology is suitable for measuring compliance of distributed RF lighting systems?

SUSCEPTIBILITY AND INTERFERENCE

Q 32. What government and non-government radio communication services would be susceptible to emissions from RF lighting devices, and to what degree should protection be provided for each authorized radio service?

Q 33. What are the emission characteristics and signatures of the various RF lighting devices? How does a susceptible receiver respond to these characteristics?

Q 34. What products are likely to be interfered with by such RF lighting devices? What levels of protection will preclude harmful interference?

Q 35. What has been the industry history and experience to date on interference from traditional (non-RF) lighting devices?

Q 36. What are the ambient levels of radiation and conducted radio noise that already exist in typical residences and commercial structures? Does RF lighting significantly raise the radiated or conducted levels in actual field installations?

Q 37. What has been the industry experience with such RF lighting systems to date? What about the neighbors of such systems? Have there been instances of harmful interference from existing RF lighting installations?

TECHNOLOGY

Q 38. What does the emerging RF lighting industry predict as far as future directions of RF lighting sources? What frequencies of operation are likely to be employed?

Q 39. What emerging communications products might find these new RF lighting devices to be a potential problem?

Q 40. Do emissions from current products meet any existing RFI limits?

ECONOMICS

Q 41. What is the economic benefit to the user and the public from these new RF lighting devices and systems?

Q 42. What amount of interference suppression is cost effective for such products? Is suppression strictly a cost issue for manufacturers or are there other factors that determine the degree of emanation control?

Procedural Matters

17. Pursuant to Sections 4(i) and 302 of the Communications Act of 1934, as amended, IT IS ORDERED that this Inquiry IS HEREBY INSTITUTED.

18. In accordance with the provisions of Section 1.415 of the Commission's Rules, interested parties may file comments on or before October 31, 1983. Reply comments must be filed on or before December 16, 1983. Pursuant to the procedures set forth in Section 1.419 of the Commission's Rules, an original and five copies should be filed by formal participants with the Secretary of the Commission. Participants wishing each Commissioner to have a copy should include six additional copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All comments should be clearly marked General Docket No. 83-806, and will be available for public inspection in the Public Reference Room at the Commission's headquarters. All written comments should be sent to: Secretary, Federal Communications Commission, Washington, D.C. 20554. For further information on this proceeding, contact Herman Garlan at (202) 653-8247. For general information on how to file comments, contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Lighting, Ratio Frequency
Rules, Waiver of

Petitions for waiver of equipment authorization requirements of Section 18.142 of rules for new radio frequency (RF) lighting devices granted. Interim relief granted in order not to delay introduction of energy saving technology.
–*RF Lighting Devices*

FCC 83-361

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Petitions for waiver of Section 18.142 of the FCC Rules by
- North American Philips Lighting Corp.
- International Energy Conservation Systems,
- Brigham Young University/Soli-Tronics

ORDER GRANTING LIMITED WAIVER

(Adopted: July 28, 1983 Released: August 5, 1983)

BY THE COMMISSION:

1. In the past year, the Commission received three petitions for waiver of the detailed certification and re-certification requirement of Section 18.142 for certain radio frequency (RF) lighting devices. The petitions were submitted by: North American Philips Lighting Corporation (NAPLC) on July 15, 1982, International Energy Corporation (IECS) on June 7, 1982, and Soli-Tronics in Conservation Systems (IECS) on June 7, 1982, and Soli-Tronics in cooperation with Brigham Young University on January 24, 1983. The NAPLC and IECS petitions were put on public notice on July 30, 1982 and August 5, 1982, respectively. The American Radio Relay League, Inc. (ARRL) and General Electric Company (GE) filed comments on the NAPLC and IECS petitions for waiver. Since the Soli-Tronics request is essentially identical[1] to that of IECS, it was believed that comments submitted on the IECS petition would also

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[1] IECS requests a waiver for its "Ballastronic" electronic ballast. Soli-Tronics requests a waiver for the following models of electronic ballasts: Model Nos. 4024, 4120, 4124 and 8120.

apply to the Soli-Tronics request and that a separate public notice for Soli-Tronics was not necessary.

2. All three petitions are concerned with new RF lighting devices using electronic ballasts for fluorescent type bulbs. NAPLC requests a waiver for its SL-18 lamp which is similar in size and shape to a household incandescent bulb. The SL-18 bulb consists of both the fluorescent tube and an electronic ballast built into the glass envelope of the lamp. On the other hand, IECS and Soli-Tronics produce only electronic ballasts for installation in fluorescent fixtures. For convenience we will refer to both the SL-18 lamp and each electronic ballast made by IECS and Soli-Tronics as an RF lighting device.

3. The standard ballast used for fluorescent lights operates at 60 Hz - the standard power line frequency. However a fluorescent light bulb with an electronic ballast is stated to be 20 to 40 percent more energy efficient than the standard fluorescent fixture. In comparison to the household incandescent bulb, RF lighting devices are claimed to be even more energy efficient. NAPLC states that its bulb, which can be inserted into a standard incandescent socket, uses only one-fourth of the energy of a standard incandescent bulb. Since the NAPLC bulb can fit incandescent sockets and is approximately the size of an incandescent bulb, it will have residential as well as commercial and industrial uses. The RF lighting devices developed by IECS and Soli-Tronics were developed with the commercial/industrial market in mind, but can be expected eventually to reach the residential market.

4. According to the petitions, the RF circuitry in the electronic ballast operates continuously at a high frequency between 20 and 40 kHz.[2] The first step in the operation of the electronic ballast is to convert alternating current (AC) from the power line into direct current (DC) by using a rectifier circuit[3] The DC voltage is then applied to an inverter which converts the DC energy to RF energy at a frequency between 20 and 40 kHz. This RF energy is applied to the fluorescent tube(s) by the same basic technique as that used in conventional fluorescent fixtures. The RF energy excites the gaseous compound within the tube causing the fluorescent coating material to glow and emit light.

5. Since RF energy is applied to excite gases and materials, these new RF lighting devices are considered to be miscellaneous industri-

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[2] Although most RF lighting sources operate between 20 and 40 kHz, the Commission is aware of an RF excited fluorescent lamp designed by the Litek Company which operates on the frequency of 13.56 MHz.

[3] The Soli-Tronics Model 4024 electronic ballast does not contain a rectifier to convert from AC to DC voltage. It is designed to be used in a DC distribution system where the AC to DC conversion is done at one point in the lighting system and DC voltage is then distributed to each electronic ballast and associated fluorescent fixture.

al, scientific and medical (ISM) equipment subject to Part 18 Subpart H of the FCC Rules.[4] By reference, miscellaneous equipment is subject to the requirements in Subpart E (medical diathermy equipment) of Part 18. Since the RF lighting devices operate on frequencies that are not assigned for ISM purposes, Section 18.142 is the particular regulation in Subpart E that applies. This regulation requires that each piece of equipment (RF lighting device in this instance) must be certificated (tested) and re-certificated at intervals of three years. It is evident that this requirement is completely unsuitable for RF lighting devices. Accordingly, the Commission is seeking alternative regulatory requirements. (See paragraphs 7–9 below).

6. Section 18.142, and Part 18 in general, were intended to apply to large, high power industrial, scientific and medical equipment produced in small quantities. This regulation was designed to ensure that such equipment continued to comply with the technical requirements. However, the detailed certification and re-certification requirement in Section 18.142 poses an extremely severe administrative problem to the marketing of a mass produced item such as an RF light bulb. Each bulb would have to be certificated and the user or purchaser would need to re-certificate each bulb every three years. Re-certification of an RF light bulb would provide hardly any additional protection against interference over that provided by a prototype certification prior to marketing.

7. In a separate proceeding, FCC Docket 20718, we proposed to extensively revise and update the rules in Part 18.[5] Among other contemplated changes, the proposal included deletion of the re-certification requirement, addition of a simplified certification procedure as a prerequisite for marketing, the imposition of more stringent radiated emission limits and the addition of a conducted emission limit. A tighter emission limit is particularly appropriate for mass produced commercial and consumer products such as RF lighting devices.[6] However, although consumer ISM equipment was discussed in Docket 20718, the Commission at that time did not have

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[4] Miscellaneous (ISM) equipment is defined in Section 18.3(d), as equipment in which radio frequency energy is applied to materials to produce physical, biological, or chemical effects such as heating, ionization of gases,. . .which do not involve communications or the use of radio receiving equipment.

[5] Docket 20718: In the matter of overall revision of Part 18 governing Industrial, Scientific and Medical (ISM) equipment. *Notice of Inquiry* adopted March 9, 1976 and released March 15, 1976 (41 FR 11626). *Notice of Proposed Rule Making* adopted September 19, 1978 and released September 29, 1978 (43 FR 46326). *Second Notice of Proposed Rule Making* adopted January 1, 1979 and released January 29, 1979 (44 FR 9771).

[6] The current standards in Part 18 were intended to protect communication services from ISM equipment usually operated in industrial areas significant distances away from communication services.

any information on RF lighting devices. Accordingly, no specific provisions for RF lighting devices were proposed.

8. In a companion *Notice of Inquiry* we are seeking to acquire information so that we may knowledgeably proceed with minimal regulations for RF lighting devices to minimize the potential for harmful interference.[7] However, while that inquiry is pending, the Commission recognizes that technological advancements such as energy saving RF light bulbs and electronic ballasts should not be delayed access to the market as long as adequate control is maintained over the interference potential of this new technology.

9. In July of 1980, the Commission granted a limited waiver of the detailed certification and re-certification requirement in Section 18.142 to GE for 10,000 Electronic Halarc light bulbs.[8] In January of 1981, we removed the limit on the number of GE Halarc light bulbs which could be produced and marketed under the waiver.[9]

10. In an attempt to determine the interference potential of RF lighting sources, tests were performed by the Commission on the NAPLC SL-18 RF light bulb both at the FCC Laboratory and at the homes of several members of the Commission's staff.[10] Measurements taken at the laboratory indicate that emissions from this bulb are very broadband extending from 10 kHz up to approximately 80 MHz. The laboratory results show that AM Broadcast was the only broadcast service which may experience any significant interference from the SL-18 bulb. In controlled laboratory conditions, radiated interference to AM radios was noted up to distances of two meters from the bulb. With the bulb plugged into the same outlet as the radio, interference was noticed at greater distances indicating that power line conducted emissions from RF lighting sources may be of greater concern than radiated emissions.

11. Results gathered from subjective interference tests performed by using the SL-18 RF light bulbs in the homes of several Commission staff members varied significantly. Objectionable interference to AM reception in some homes was confined to situations when the AM radio was plugged into the same AC receptacle, or operating very close (within a few feet) to the bulb. However, a few individuals reported more widespread interference to AM reception in their homes. NAPLC submitted test results indicating that its

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[7] *Notice of Inquiry*, In the matter of FCC Regulations concerning RF Lighting Devices, FCC General Docket No. 83–806 adopted July 28, 1983, released August 5, 1983.

[8] *Order Granting Limited Waiver* adopted July 17, 1980 and released July 23, 1980 (FCC 80–418).

[9] *Order Expanding Limited Waiver* adopted January 29, 1981 and released February 4, 1981 (FCC 81–25).

[10] The tests are described in a Memorandum from Philip M Inglis to the Chief, Authorization and Standards Division dated February 25, 1983, file No. 31010/EQU/4–0.

light bulb did not pose a significant potential for interference to AM broadcast reception.[11] In a portion of NAPLC's tests run in several actual homes, interference was noted only in cases when the bulb was extremely close (within a foot or so) to an AM radio or when plugged into the same electrical outlet as the AM radio. Other parts of the NAPLC test report show that emission levels from the SL-18 bulb are below levels emitted by conventional fluorescent fixtures. Further, NAPLC alleges that no interference complaints have been received for a similar RF bulb marketed in Europe.

12. The limited tests performed up to this point only show that in some situations interference can occur to AM broadcast reception due to emissions generated by an RF lighting device. However, the number of times such situations will occur and the severity of any resulting interference is dependent upon many factors such as location and environment of product use, proliferation of the product, emission characteristics, the prevailing conditions at the particular location of use (i.e. susceptible receivers).

13. With respect to the location and environment of use, the RF lighting devices developed by IECS and Soli-Tronics will be operated for the most part in commercial office buildings and industrial plants. Compared to consumer equipment used in residential areas, these commercial/industrial RF lighting devices will usually be further away from susceptible receivers, and therefore less likely to cause interference problems. As noted previously, the Soli-Tronics RF lighting devices can be operated in two different types of system configurations, and each configuration may present a different interference potential. In one configuration, standard AC voltage is distributed to each lighting fixture which contains an electronic ballast which generates RF energy and applies this energy to the fluorescent tube. In the other configuration one main rectifiers is used for the entire system. The DC voltage is distributed to each lighting fixture which contains a simplified electronic ballast—an electronic ballast without the individual rectifier. It is claimed that the single large rectifier is more efficient than the multiplicity of small rectifiers, thus further improving the energy efficiency of the system. Each configuration could result in different levels of RF energy on the distributed wiring directly affecting the interference potential of the system.[12]

14. On the other hand, due to its capability of replacing a regular incandescent bulb, the NAPLC RF lighting device will eventually have application in residential as well as commercial/industrial environments. Because of the greater possibility of close proximity

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[11] Test report regarding the SL-18 Lamp filed by NAPLC on April 8, 1983.

[12] The Commission is aware of another RF lighting system which is composed of one main unit that performs all the voltage conversions (AC to DC to RF) and then distributes the RF voltage to all the fluorescent fixtures in the system.

operation to AM radios, residential operation of the light bulb may lead to more interference complaints. However, since the NAPLC bulb is more expensive than the standard household incandescent bulb, NAPLC contends that, at least initially, most of these bulbs will be used in commercial and industrial locations.

15. With regard to emission characteristics, the NAPLC, IECS, and Soli-Tronics RF lighting devices all operate on the same basic principle and so are expected to have similar emission characteristics. It is important to note that the emissions characteristics from these devices is broadband and as a result has a different interfering affect than most other ISM equipment, which exhibit narrowband emissions. Accordingly, the existing emission limitations in Part 18 are not directly applicable to RF lighting devices and can not be relied upon by manufacturers as a valid guideline to design to hold emissions from their products to tolerable levels. Our evaluation of the NAPLC bulb appears to substantiate this contention. The lab results show that the NAPLC RF lighting source did meet currently established standards for other equipment such as personal computers, etc.; however, significant interference was still caused to AM radio reception in the same household.

16. In view of the large number of variables affecting the interference potential of RF lighting devices, a determination of the actual interference potential presented by these products is most practical through experience gained in actual use. However, the commenters, both ARRL and GE, are concerned about widespread interference problems which may develop and urge the Commission not to grant a waiver for these new RF lighting devices until an adequate showing is made concerning their interference potential. The limited testing performed in several homes with the NAPLC RF lighting source does not provide the Commission with a large enough statistical base to draw accurate conclusions about the interference potential. Based on our experience with the limited waiver granted to GE, we believe that a real world interference survey based on the use of 10,000 RF lighting devices from each petitioner manufacturing electronic ballasts and 100,000 RF light bulbs by NAPLC would provide a valid assessment of interference potential for each type of RF lighting device.[13] [14] At the same time, by limiting the prolifera-

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[13] Footnote 5, supra. GE actually made improvements to reduce the interference potential of its bulb with the aid of the actual market survey conducted with a limited number of bulbs. See the reports submitted by GE as a requirement under its waiver. These reports are available for inspection in the RF Devices Branch file No. 4–3–7.

[14] The selection of the number of units to be initially authorized is based on several factors. The first is the need to have a sufficiently large test sample to adequately determine the interference potential of RF lighting sources in a variety of locations and environments. The second is our concern to limit widespread interference. Considering these two factors and our concern not to hamper a manufacturers marketing plan, we have selected 10,000 units for electronic

tion of these new RF lighting sources, we maintain an adequate control over interference potential, thereby reducing the concern expressed by the commenters. Moreover, by granting the waiver, and relieving the petitioners of burdensome administrative requirements, we permit this energy saving technology to develop and be introduced into the marketplace without delay.

17. We are also imposing the radiated and conducted limits in for computing devices Subpart J of Part 15 of the Rules on RF lighting sources marketed under the terms of this waiver. While we recognize that these limits may not be completely satisfactory, as stated in paragraph 15 above, we believe some minimal technical limits are necessary to place a cap on the interference potential of these devices. RF lighting devices intended for use in industry and commercial environments will be subject to the technical limits for a Class A computing device. RF lighting marketed for use in residential areas will have to meet the limits for a Class B computing device. It may be possible that the subject RF lighting devices will have to add additional EMI suppression in order to comply with these limits. We believe that this is not an unreasonable burden for manufacturers of these bulbs. Alternatively, however, the manufacturer must satisfy the Commission that its bulb or ballast is not a major interference source.

18. Accordingly, we are limiting this waiver of the equipment authorization requirements in Section 18.142 for a total number of 10,000 (100,000 for NAPLC) RF lighting devices for each petitioner to be used in field testing and market evaluation. Each petitioner is required to submit periodic reports concerning all interference problems resulting from operation by its RF lighting device. The results of the experience derived from actual use of these RF lighting sources will also be useful to the Commission by providing real world data to supplement information generated through the associated *Notice of Inquiry*. In addition, the Chief Scientist is delegated authority to waive the requirements of Section 18.142 for other manufacturers of RF lighting devices subject to the same conditions herein. Further, the Chief Scientist is delegated authority to increase the number of RF lighting devices covered by this waiver if significant interference problems do not result.

19. The Commission hereby grants a limited waiver to NAPLC, IECS and Soli-Tronics subject to the conditions below:

(a) This waiver authorizes the manufacture and marketing of 10,000 electronic ballasts each by International Energy Conservation Systems and Brigham Young University/Soli-Tronics and 100,000 RF lighting bulbs (SL-18) by North American Philips Lighting Corp. to be used in field testing and evaluations.

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ballasts and 100,000 units of the SL-18 bulb. The larger number for the NAPLC is based on the detailed test program plan submitted by the firm as a supplemental information to their petition

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(b) A report of measurements of both the conducted and radiated emissions from the RF lighting device along with ten samples of the lighting device shall be submitted to the FCC Laboratory for examination.

(c) Grantee shall make a study of the cumulative effect of a large number of devices installed in one plant and all connected to a single wiring system on the amount of radio frequency interference created and how this correlates with the radio frequency interference caused by a single device. A report of this study shall be submitted within six months.

(d) Reports of all radio frequency interference (RFI) experiences resulting from the operation of RF lighting devices under this waiver shall be submitted to the Commission at intervals of three months.

(e) The RF lighting device (or system) shall be certificated by the Commission pursuant to Subpart J of Part 2 to show compliance with technical requirements in Subpart J of Part 15 for Class A equipment if the RF lighting device (or system) will be used in a commercial/industrial environment or for Class B equipment if the device will be used in a residential environment.

(f) The following information shall be printed on the package containing the RF lighting device so that it will be clearly visible to the purchaser.

This device is being sold pursuant to a waiver of FCC rules as part of an experiment to determine whether it causes harmful interference to AM radios in or around the user's dwelling. Any interference should be reported to (fill in company name, contact person, and address).

(g) If a significant interference problem is caused by the devices authorized under this waiver, the Chief Scientist is authorized to instruct the manufacturer of the device in question to discontinue marketing the device until corrective measures are taken. Marketing may be resumed only on instructions from the Chief Scientist.

20. Pursuant to Section 1.3 of the Commission's Rules, since good cause has been shown, the NAPLC, IECS and Soli-Tronics petitions for waiver of the re-certification requirements of Section 18.142 ARE GRANTED subject to the conditions set out in paragraph 19 above. This waiver shall terminate 30 days after the effective date of any rules adopted by the Commission concerning operation of RF lighting devices.

21. IT IS FURTHER ORDERED that the Chief Scientist is authorized to increase the number of RF lighting devices covered by this waiver and to grant, subject to the same conditions, similar waiver requests which are filed by other parties and adequately justified. The petitioner must file the following minimum information.

(a) A detailed description of the RF lighting device.

(b) A statement why the present rules are unsatisfactory and why it is in the public interest to grant the waiver.

(c) A statement that the RF lighting device will comply with the conditions set out in paragraph 19 above.

22. Pursuant to Section 1.427(b) of Part 1 of the Commission's

Rules, since it relieves a regulatory restriction, this ORDER shall become effective on August 5, 1983.

23. Further information about the waiver may be obtained from Herman Garlan at (202) 653–8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Financial Qualifications
Ownership and Management, Integration of
Remand

Proceeding remanded on a financial issue and on a comparative issue to explore integration proposal.
–*Washington's Christian TV Outreach, Inc.*
BC Docket No. 81–528

FCC 83R–62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

WASHINGTON'S CHRISTIAN TELEVISION OUTREACH, INC. Washington, D.C.	BC Docket No. 81–528 File No. BPCT-5042
CENTURY COMMUNICATIONS, INC. Washington, D.C.	BC Docket No. 81–529 File No. BPCT-800117KE
CAPITAL COMMUNICATIONS OF WASHINGTON, INC. Washington, D.C.	BC Docket No. 81–530 File No. BPCT-800118KF
GRANT BROADCASTING CORPORATION Washington, D.C.	BC Docket No. 81–533 File No. BPCT-800118KK
URBAN TELECOMMUNICATIONS CORPORATION Arlington, Virginia	BC Docket No. 81–536 File No. BPCT-800118KN
WASHINGTON TELEVISION, INC. Washington, D.C.	BC Docket No. 81–537 File No. BPCT-800118KO
WSCT-TV, INC. Washington, D.C.	BC Docket No. 81–538 File No. BPCT-800118KP

For Construction Permit For New UHF
Television Broadcast Station

MEMORANDUM OPINION AND ORDER

(Adopted: August 25, 1983; Released: August 31, 1983)

BY THE REVIEW BOARD:

1. This proceeding is before the Board on the exceptions (and associated pleadings) of seven applicants for the Construction Permit for UHF Channel 14, Washington, D.C.[1] That television frequency became available when the Commission revoked the license of the previous occupant of that channel, WFAN-TV. *United Television Co., Inc.*, 46 FCC 2d 698 (1974). The applications of the successor-aspirants were designated for consolidated comparative hearing by the Commission on August 19, 1981.[2] Notwithstanding the multiplicity of applicants and issues in this proceeding, and a litigiousness intensified, no doubt, by the perceived value of the prize, Administrative Law Judge Edward J. Kuhlmann (ALJ) well-superintended the hearing and delivered in workmanlike course a 51-page *Initial Decision*.

2. After reviewing the exceptions, briefs, and the record in the case, as well as hearing oral argument by the parties on June 28, 1983,[3] the Board is of the view that further limited evidentiary exploration is needed with respect to several matters, all of which could be decisional in this important case. Although the Board is institutionally disinclined to casually remand a proceeding for further hearing, thereby protracting somewhat the comparative process, *see, e.g., Valley FM Radio*, 53 RR 2d 1195, 1196 (Rev. Bd. 1983), the Board has done so where uncertain inferences from the extant record would be critically inferior to deliberate factual fortification. *Cf. Bernard J. Winner*, 75 FCC 2d 300 (Rev. Bd. 1979). While the Board might help alleviate certain of the factual uncertainties in this existing record by requesting "paper" submissions on these troublesome questions, *see generally*, 47 C.F.R. § 0.365(a), the Board is largely without those procedural devices best suited for eliciting more definitive evidence, *see* 47 CFR Part 1, Subpart B ("Hearing Procedures" - discovery, testimony and cross-examination, *etc.*), and that imbue our adversary process with the unique potential

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[1] One of the applicants, however, Urban Telecommunications Corporation, has specified Arlington, Virginia as its city of license and seeks a dispositive comparative preference based on Section 307(b) of the Communications Act, 47 U.S.C. § 307(b). *See Initial Decision* ("*I.D.*"), FCC 83D-2, released January 24, 1983 (E.J. Kuhlmann, ALJ). Our use of the Washington, D.C. designation with respect to the location of the channel implies no decision on the § 307(b) issue.

[2] *Hearing Designation Order*, BC 002820, *reprinted at* 46 Fed. Reg. 43737 (August 31, 1981).

[3] *See* Transcript of Oral Argument in re *WSCT-TV, Inc.*, BC Dkt. Nos. 81-528 *et seq.*

to lay bare factual conditions and to peer beneath artful legal rodomontade. Hence, rather than leave the resolution of the open decisional questions to disembodied collegial intellection, the Board has decided in this case to heed its own Polonian caveat that "it is better to be safe than sorry,"[4] and to remand the proceeding so as to assure to the extent possible the precision of the factual bearings on which the ultimate decision will turn.

3. In the *I.D.*, and by way of brief background, the ALJ concluded that the "deciding factor" in this case was the integration criterion and that grant of the application of WSCT-TV, Inc. (WSCT-TV) would best serve the public interest because the "level of participation" proposed by WSCT-TV's owners in station operations was "the highest of all applicants." *I.D.*, para. 156. He ranked the applicants as follows: (1) WSCT-TV; (2) Washington's Christian Television Outreach, Inc. (WCTO); (3) Washington Television, Inc.; (4) Capital Communications of Washington, Inc.; and (5) Century Communications, Inc. Urban Telecommunications Corporation (Urban) and Grant Broadcasting Corporation were omitted from the comparative rankings because the ALJ found that neither applicant had established its basic qualifications.

4. *Urban's Financial Qualifications.* Our initial concern relates to the disqualification of Urban under a financial issue. Urban proposes the full-time integration of its solitary black stockholder, Theodore R. White, and - if found qualified - would be a likely front-runner in this contest on other relevant comparative criteria. In disqualifying Urban, the ALJ reasoned that a financial issue had been specified initially by the Commission, that Urban made no attempt to correct the inadequacies in its original financing plan until a few days before hearing, and that instead of reforming its original showing, the applicant presented an entirely new plan for review. *I.D.*, para. 136. The amended Urban financial proposal relied upon a lease arrangement with AMVEST Leasing and Capital Corporation (AMVEST), under which AMVEST would provide up to $2,500,000 to purchase the equipment which would then be leased to Urban. Its proposal also contemplated a bank loan to $922,916.67 ($1,000,000 minus interest of $77,083.33) from the National Bank of Commerce of Washington, D.C. (NBC), that loan to cover the ($732,840.35) lease payments as well as operating and miscellaneous expenses. But, the ALJ held that Urban did not demonstrate that AMVEST itself had the ability to lease the equipment; or, even if the AMVEST arrangement were credited, that the ($1,000,000) loan from NBC would be available. In that latter regard, the ALJ noted that inasmuch as the Urban loan exceeded the statutory limit that NBC could loan unitarily, NBC would need to rely on correspondent banks to supply the balance; he found that there was no assurance

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[4] *WHW Enterprises, Inc.*, 89 FCC 2d 799, 808 (Rev. Bd. 1982).

that any correspondent banks would participate in the loan. Thus, he concluded that Urban was financially unqualified.

5. We believe that the ALJ was hasty in completely disqualifying Urban under this issue and hold that Urban should be afforded an appropriate opportunity to support its amended financial plan. Although the *I.D.* observes that Urban waited until just before the commencement of the hearing to rectify its financial proposal, Urban correctly claims that it filed its amendment concerning AMVEST within 30 days after the financial issue was designated and advised that it was actively negotiating to secure a bank loan. Hence, while an amendment containing the NBC loan commitment letter was not filed until the eve of the hearing, the parties were not seriously prejudiced thereby since the signatory of the NBC letter testified at the hearing. Next, though the ALJ exercised his broad discretion in requiring that Urban establish AMVEST's ability to lend (such ruling being supported by Section III, para. 4 of the application form then being utilized), Urban had a colorable basis for uncertainty as to whether it was required to prove that entities such as AMVEST were *prima facie* financially qualified to lease equipment to applicants. For example, in *Cypress Communications, Inc.*, 88 FCC 2d 994 (ALJ 1981), *aff'd* 88 FCC 2d 990 (Rev. Bd. 1982), an applicant (ultimately the successful applicant) was found financially qualified despite the fact that, as here, it had not submitted a separate financial showing for the leasing corporation on which it was relying to establish its own financial qualifications; it merely submitted a letter from the financing corporation stating that it was a *bona fide* institution, and nothing to the contrary had been submitted by the other parties. *See* 88 FCC 2d at 1015. Moreover, in *Cypress*, the particular financing corporation involved had been noticed by the Commission as a qualified financial institution in another proceeding. *Id.* Here, Urban proffered AMVEST's Annual Report (1981) which indicated that it had financed over $21 million of equipment during 1981, and more than $170 million since 1970.[8] Further, as in *Cypress*, AMVEST has been noticed as a lending company in another Commission proceeding, *see Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 28–29 (Rev. Bd. 1982); and, perforce, it even appears that one of the other competing applicants in this very case (WCTO) is also relying on AMVEST for a similar leasing arrangement. That applicant's financing was never challenged, nor was it called upon, as was Urban, to prove AMVEST's independent ability. *See* Urban Exh. 10 (rejected by ALJ). In view of all of the above, we believe that Urban should be afforded an equitable opportunity to make its showing; and, in that connection, if AMVEST has been presumed qualified to finance another applicant

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[8] The Annual Report was not admitted into evidence because Urban did not produce a sponsoring AMVEST witness.

herein, it seems only fair to treat all applicants alike. Similarly, with respect to the NBC commitment letter, several authorities have been cited which appear relevant, *e.g.*, *Cherokee Broadcasting Co.*, 8 FCC 2d 138 (Rev. Bd. 1967); *CBS, Inc.*, 49 FCC 2d 1214 (Rev. Bd. 1974). While those cases may be somewhat distinguishable, both the Commission and the Board have noted the difficulty faced by minority applicants in securing financing. *See*, respectively, *Muncie Broadcasting Corp.*, 54 RR 2d 42, 47 (1983); *Bison City TV 49*, *supra*, 91 FCC 2d at 30 n.5.[6] As in the latter case, Urban's swift disqualification appears unduly harsh under the totality of circumstances present, and we will reverse that ruling. *See generally Anax Broadcasting, Inc.*, 87 FCC 2d 483, 487–88 (1981).

6. *Syncom Agreement*. Our next concern involves the integration proposal of the top-ranked applicant, WSCT-TV, which the ALJ found was entitled to 78.04% full-time, and 13.77% part-time, quantitative integration credit.[7] WSCT-TV, Inc. is wholly owned by Formula Telecommunications, Inc. (Formula); the two corporations have, in the main, common officers and directors, and 91.81% of the owners of Formula propose to work at the new facility. The ALJ awarded WSCT-TV with the above integration percentages notwithstanding arguments raised by the competing applicants that a financing contract between Formula and Syndicated Communications, Inc., and its wholly owned subsidiary Syndicated Capital Corp. (collectively "Syncom"), compelled that WSCT-TV's integration proposal be reduced by as much as 26% to reflect inchoate Syncom equity in Formula. Such a reduction, of course, would significantly diminish WSCT-TV's chances of success in this proceeding. The Syncom agreement, dated January 14, 1981, provides, in pertinent part, that:

> . . . in consideration of a loan of $10,000 dated January 9, 1981 made by Syncom to [Formula], [Formula] agrees to provide Syncom *with a right to purchase warrants and to participate in the financing* . . . *of [Formula's station* . . . as outlined in Syncom's commitment letter to [Formula] dated December 17, 1980. [WCTO Exh. 1, Agreement (emphasis added).]

The referenced December 17, 1980 letter is, in part, a loan commitment from Syncom to Formula whereby Syncom promises to loan Formula up to $500,000: the first $300,000 is to be available upon grant of the Construction Permit; the other $200,000 is to be available during the first year and one-half after closing on the first portion of the loan. The Syncom letter further states that, upon making the loan, Syncom would receive warrants entitling it to purchase from 10% to 26% of the Formula's common stock, the precise percentage contingent on Formula's success in raising $1,000,000 in additional equity participation. Syncom, it seems, would receive warrants for the full 26% if Formula does not either raise $1,000,000 in additional equity or if Formula borrows the ($200,000) second portion of the loan. Furthermore, the deal gives Formula the right to acquire (call) the warrants held by Syncom; and, Syncom has the right to sell (put) its warrants to Formula at fair market value during the fifth through the tenth year after the loan closing. The cost to Syncom of purchasing the Formula warrants would be, apparently, a penny a share (a maximum of $20); and, the cost of converting the warrants into Formula common stock would be only ten cents a share (a maximum of $200).

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[6] Not to the contrary is *Coastal Bend Family Television*, 54 RR 2d 367 (Rev. Bd. 1983). There, the applicant not only misstated grievously its original financial qualifications, it did not submit an amended (and again flawed) financial plan until 11 months after the hearing had been ended. In this case, Urban cannot be charged with a similar lack of diligence.

[7] The *I.D.* shows the figure as 77.64% (*I.D.*, para. 158) rather than 78.04%, but the former figure is apparently the result of a slight mathematical miscalculation.

7. The ALJ found the Syncom interest in Formula too indefinite to attribute to it a cognizable equity ownership interest. *I.D.*, para. 161. Thus, he rejected the contention that the January 14, 1981 agreement gave Syncom a currently vested right to the warrants, and he accepted WSCT-TV's contention that it neither relies upon the loan from Syncom nor has it indicated that it, in fact, will borrow the money from Syncom. He also noted that even if Syncom lends money to Formula and receives the warrants, Formula would have the right to have Syncom return the warrants in exchange for their fair market value from the fifth to the tenth years. *Id.*, at para. 162.

8. Almost all of the competing applicants urge in their exceptions that the ALJ fatally erred in disregarding the potential impact of the Syncom agreement on WSCT-TV's ownership integration level. Essentially, they argue: (1) that the decision on whether to participate in WSCT-TV's financing was transferred exclusively to Syncom by the January 14, 1981 agreement; (2) that Syncom therefore has an irrevocable right to acquire an equity interest in Formula of at least 10%, and as much as 26%, for a nominal price; (3) that George Corbin III, a stockholder of Formula (and WSCT-TV's proposed general manager) testified that there were no plans to solicit additional equity participation (Tr. 1661) which would, therefore, accord Syncom the unimpeded right to acquire the full 26% of the warrants; (4) that Syncom's right of equity participation is imminently exercisable; (5) that consideration for Syncom's purchase rights was supplied, in part, by a January 9, 1981 loan of $10,000 to Formula, money which Formula evidently needed *post-haste* (*see* WCTO Exh. 14, Agreement); (6) that given the value of a television station in a major market and the nominal cost to Syncom to convert the warrants to Formula common stock, it must be conclusively presumed that the conversion will occur; and (7) that should Syncom convert the warrants to stock prior to the fifth year, Formula's right to repurchase the warrants would be lost since the right apparently applies only to warrants. Exceptors also argue that

should Formula decide to raise additional outside equity, its instant ownership level would be further diluted. WSCT-TV responds that it (*i.e.*, Formula) has the sole right to decide whether Syncom can participate in its financing, and that Syncom cannot exercise the warrants until after ten years because of the put/call provisions.

9. We believe that essential questions remain as to whether Syncom's relationship with WSCT-TV's parent, Formula, portends an integration level that is either illusory or too ephemeral to credit as the dominant basis of a license award.[8] It has been held that the Commission will take cognizance of options that are adverse to the interests of its applicants in the absence of evidence that the options will not be exercised. *See Radio Laredo, Inc.*, 87 FCC 2d 353, 354 & n.14 (Rev. Bd. 1981), *review denied*, FCC 82-62, released February 3, 1982, *aff'd sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982).[9] Here, neither the fact that WSCT-TV claims that it does not need to borrow funds from Syncom to be basically qualified, nor that Formula possesses the right to have Syncom return the warrants after five years is necessarily dispositive if, indeed, Syncom has a vested right both to *require* Formula to allow it to participate in the financing of the station and to *convert* the warrants into common stock, in part, because there is no assurance that Formula will have the ability to later repurchase at market value. Further evidentiary hearing, as well as findings of fact and legal conclusions based thereon, are necessary to determine Syncom's rights and intentions with respect to a future ownership interest in Formula. We therefore direct the parties to revisit the vital question of Syncom's current legal rights (based upon appropriate principles of contract law); and, if necessary, to address the consequent question of whether an ownership integration plan which may well not exceed the inaugural license term is fully creditable under the Commission's comparative tenets or whether it should be diminished.

10. *Anderson Commitment*. Our final area of concern involves the integration proposal of Washington Television, Inc. The ALJ found that applicant entitled to 70.1% full-time quantitative integration credit for the proposed management participation of Dr. Joann Anderson, a 53.6% shareholder, and of Lonnie Murray, a 16.5% owner.[10] Dr. Anderson pledges to work as the station's general

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[8] We also note that if it is determined that Syncom has a true vested interest in the applicant, Syncom's other mass media ownership interests might also be attributable to WSCT-TV.

[9] An option, or in this case a warrant, creates substantial uncertainty as to the ultimate ownership structure of an applicant and is therefore taken into account in determining an applicant's ownership structure, *i.e.*, the applicant's integration structure may be comparatively evaluated in its most unfavorable light. *See Radio Laredo, Inc.*, 87 FCC 2d 364, 376 (ALJ 1980), *aff'd Radio Laredo, Inc.*, *supra*.

[10] Only WSCT-TV and WCTO were awarded more quantitative integration credit than Washington Television, Inc., and the ALJ questioned the validity of two (20%) of WCTO's proposed integrated principals.

manager; but, virtually all of the competing applicants except to the integration credit awarded for Dr. Anderson's proposed integration, contending that her proposal should have been rejected because she failed to effectuate an integration pledge previously made to the Commission. Specifically, they invoke a 1974 application for a new FM station at Tallahassee, Florida filed by Amrad Corporation, wherein Dr. Anderson, a principal, was proposed as the full-time general manager of the facility. A competing application was filed, but the case was settled and Amrad's unopposed application was granted. Apparently, however, only one week after Amrad's grant, Dr. Anderson accepted a fellowship to pursue a graduate degree at Florida State, and she thereafter became a full-time student rather than the station's full-time general manager. She responds, though, that she did simultaneously work at the station on a part-time basis (on nights and weekends). The ALJ found that there was no evidence in the Commission's records that Dr. Anderson (or the station) ever notified the Commission of the change, *I.D.*, para. 109; nor does it appear that Dr. Anderson conditioned her prior full-time integration pledge on her potential academic schedule. Exceptors urge, in essence, that we recall the adage "once burnt, twice smart," and refuse to credit Dr. Anderson's latest integration proposal.

11. Inasmuch as this case must be remanded for other evidence, we believe that the above circumstances warrant additional inquiry to help determine whether Dr. Anderson's latest integration proposal should be accepted. The Commission, long ago, declared that it expects "the integration or principal participation representations made in the comparative hearing process to be discharged in good faith (with whatever revisions are felt necessary in light of changed circumstances)." *Tidewater Teleradio, Inc.*, 24 RR 653, 657 (1962). "Representations made to [the Commission] . . . are not to be put forth as a part of 'gamesmanship' or for tactical advantage: They must be seriously advanced and seriously regarded in actual operation." *Id.* Moreover, such representations cannot automatically be abandoned by a successful applicant upon the withdrawal of its competition. *Alexander S. Klein, Jr.*, 88 FCC 2d 583, 586–87 (1981). Here, the Board cannot determine on the basis of this record whether Dr. Anderson has met the *Tidewater* test, the record being almost barren of evidence concerning the circumstances surrounding the acceptance of the fellowship by Dr. Anderson—particularly the extent of her foreknowledge of the matter. Thus, pertinent examination should be made of such factual questions as when Dr. Anderson applied for the fellowship, the likelihood of its grant, when she was first apprised of its grant, and whether the Commission was, in fact, timely informed of her decision not to effectuate her integration pledge.

12. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the presiding Administrative Law Judge for prepa-

ration of a Supplemental Initial Decision consistent with this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WASHINGTON'S CHRISTIAN TELEVISION OUTREACH, INC. Washington, D. C.	BC Docket No. 81-528 File No. BPCT-5042
CENTURY COMMUNICATIONS, INC. Washington, D. C.	BC Docket No. 81-529 File No. BPCT-800117KE
CAPITAL COMMUNICATIONS WASHINGTON, INC. Washington, D. C.	BC Docket No. 81-530 File No. BPCT-800118KF
GRANT BROADCASTING CORPORATION Washington, D. C.	BC Docket No. 81-533 File No. BPCT-800118KK
URBAN TELECOMMUNICATIONS CORPORATION Arlington, Virginia	BC Docket No. 81-536 File No. BPCT-800118KN
WASHINGTON TELEVISION, INC. Washington, D. C.	BC Docket No. 81-537 File No. BPCT-800118KO
WSCT-TV, INC. Washington, D. C.	BC Docket No. 81-538 File No. BPCT-800118KP
For Construction Permit for New UHF Television Broadcast Station	

Appearances

Joseph E. Dunne, III, James Gammon, and *Richard G. Gay* on behalf of Washington's Christian Television Outreach, Inc.; *Lewis I. Cohen, Morton L. Berfield,* and *Roy W. Boyce* on behalf of Century Communications, Inc.; *Benito Gaguine, Russell C. Balch,* and *Heidi P. Sanchez* on behalf of Capital Communications of Washington, Inc.;

Jonathan Ginsburg and *E. William Henry* on behalf of Grant Broadcasting Corporation; *Alfred C. Cordon, Dennis J. Kelly, Pat Silver* ard *Mark S. Allen* on behalf of Urban Telecommunications Corporation;[1] *Steven C. Schaffer, Malcolm G. Stevenson,* and *Lawrence M. Miller* on behalf of Washington Television, Inc.; *Michael H. Rosenbloom* and *Richard H. Waysdorf* on behalf of WSCT-TV, Inc.; and *Allan Moskowitz* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: January 14, 1983 Released: January 24, 1983)

1. This proceeding was designated for hearing on July 31, 1981 by the Chief, Broadcast Bureau.[2] The following issues are considered in this decision:

> 1. To determine with respect to Century Communications, Inc.:
>
> (a) the availability of additional funds over and above the $766,066 indicated; and
>
> (b) whether in light of the evidence adduced the applicant is financially qualified.[3]
>
> 2. To determine with respect to Urban Telecommunications Corporation:
>
> (a) whether it has $2,525,000 available for construction and operation of the proposed station;
>
> (b) whether in light of the evidence adduced pursuant to issue (a), applicant is financially qualified.
>
> 3. To determine which of the proposals would best provide a fair, efficient and equitable distribution of television service.
>
> 4. To determine the effect of *Velez v. Divine,* Civil Action No. 81–1225 D.D.C. upon Capital Communications of Washington, Inc.'s basic and/or comparative qualifications to become a licensee.
>
> 5. To determine the circumstances surrounding Capital's failure to disclose the involvement of A. Diane Graham in *Velez v. Divine* in answers to interrogatories, and to determine the effect, if any, upon Capital's comparative standing.

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[1] Alfred C. Cordon and Dennis J. Kelly withdrew as Urban's lawyers on May 24, 1982. During part of the hearing sessions held on June 2 and 3, 1982 an officer of Urban, Pat Silver, represented Urban. On August 2, 1982, Mark S. Allen began appearing on Urban's behalf. Mr. Allen participated in the filing of proposed findings and conclusions and then on September 9, 1982, before reply findings were filed, he withdrew as Urban's counsel. Urban's reply findings were filed by Urban's only stockholder, Theodore M. White.

[2] *Hearing Designation Order,* BC 002820, released August 19, 1981, 46 Fed. Reg. 43737 (August 31, 1981).

[3] Originally this issue included an inquiry into Century's land costs and its construction and operation costs. In a *Memorandum Opinion and Order,* FCC 81M-4113, released December 31, 1981, at ¶ 24, summary decision was granted on those aspects of the issue.

> 6. To determine whether Lawrence Brailsford and Grant Broadcasting engaged in misrepresentation by failing to report Mr. Brailsford's bankruptcy and, if that is the case, to determine the effect on Grant Broadcasting's basic and/or comparative qualifications.
>
> 7. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 8. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[4]

2. Preceding the hearing additional issues were designated against applicants who dismissed their applications before the hearing. See *Hearing Designation Order*, BC 002820, released August 19, 1981, at 15 (Issues 2, 3, 4); *Memorandum Opinion and Order*, FCC 81M-4113, released December 31, 1981, at 13 (Issues 9, 10, 11, 12). These issues have not been resolved because of the dismissals. See *Order*, FCC 82M-0600, released February 24, 1982 (dismissing applications of Community Service Broadcasters, Inc. and Metropolitan Television, Inc.) and *Order* FCC 82M-0955, released March 24, 1982 (dismissing applications of Focus Broadcasting, Inc., Kent of Washington, Inc., and Television Communications, Inc.).

3. Prehearing conferences were held on October 22, 1981 (Tr. 1–32), January 8 (Tr. 33–62) and May 5, 1982 (Tr. 2589–2626). Hearing sessions were held on March 22 - April 2, 1982 (Tr. 63–2588) and June 2–3, 1982 (Tr. 2627–2947). The record was closed on July 19, 1982. *Order*, FCC 82M-2186, released July 19, 1982.

4. On August 2, 1982, all the competing applicants but Grant Broadcasting filed proposed findings of fact and conclusions of law on their own proposals.[5] On September 9, 1982, the competing applicants submitted proposed findings of fact and conclusions of law about one another's proposals. Reply findings were filed on September 30, 1982 by all parties. The Broadcast Bureau withdrew from participation in the case on July 27, 1982 and consequently it submitted no proposed findings or conclusions of law.

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[4] The *Hearing Designation Order*, BC 002820, released August 19, 1982, at 15, designated an issue (No. 6) questioning the financial qualifications of Washington Television, Inc. Summary decision was granted on that issue. *Memorandum Opinion and Order*, FCC 81M-4113, released December 31, 1981, at 8, 12. In addition, an unresolved character issue in *Gemini Broadcasting Company*, Dkt. BC 81-381-387, against Grant Broadcasting Corporation's principal, Milton Grant, was considered pursuant to the Commission policy enunciated in *Allegan County Broadcasters*, 83 F.C.C. 2d 371, 373 (1980) and resolved in Grant's favor. *Memorandum Opinion and Order*, FCC 82M-2601, released August 26, 1982 (denying the Broadcast Bureau's request to enlarge the issues to consider the *Gemini* issue involving Grant.)

[5] Grant Broadcasting filed on August 3, 1982 and has requested leave to file out of time. Grant has submitted good cause for its request and no opposition has been received. Thus, its findings and conclusions will be accepted.

FINDINGS OF FACT

Qualifying Issues

5. *Century's Financial Proposal (Issue 1)*: The cost for Century to construct and operate for three months has been determined to be $1,692,017. The Broadcast Bureau found that Century had available $766,066, leaving an unestablished balance of $925,951. Century relies on bond subscriptions from three of its stockholders to provide these funds. Pauline Wechsler would provide $600,000, Dr. Everett J. Gordon, $300,000, and Dr. Herbert M. Wechsler, $300,000. Century Exh. 5, at 1.

6. Pauline Wechsler supports her commitment with a balance sheet showing net assets of $19,008,137 and net liquid assets of $1,351,507. Century Exh. 5, Attachment 4. Dr. Gordon supports his commitment with a loan for $300,000 from the United Bank and Trust Company of Maryland. Century Exh. 5, Attachment 5, 6. Herbert Wechsler has supported his commitment with a balance sheet showing net assets of $5,518,618.22 and net liquid assets of $871,914. Century Exh. 5, Attachment 7.

7. *Urban's Financial Qualifications (Issue 2)*: In August 1981, when these applications were designated for hearing, Urban Telecommunications Corporation estimated its costs at $2,525,000. Urban relied on a $4,000,000 loan from Sefel J. and Associates, Ltd. The Broadcast Bureau concluded that since the lender was not an equipment manufacturer or a financial institution, it was necessary for Urban to submit a balance sheet for its lender. *Designation Order*, at ¶ 26. The loan was also found by the Bureau to be faulty because it was conditioned on Urban's pending STV authorization and contained a 30 day backout clause. *Id.* The Bureau concluded that the loan from Sefel J. and Associates was indefinite, that it did not state its terms, and that it was unreasonable for Urban to rely on it. *Id.*

8. Urban did not amend its financial showing until March 15, 1982, nearly a week after the written case was due in this proceeding and two days before the parties designated the witnesses they wanted to cross-examine. In the proposed amendment, Urban reported that until the first week of March it had been unable to find financing. Then it found the Ideal Opportunities Corp., Miami Beach, Florida, "which expressed interest in Urban's objectives" and "expressed its willingness to loan Urban $1,250,000."[6] In addition, Urban stated in its petition that in the first week of March, it had obtained a letter from the National Bank of Commerce, Washington, D.C. "concerning a loan for $1,000,000."

9. With the hearing scheduled to begin on Monday, March 22,

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[6] Petition for Leave to Amend, filed March 15, 1982, by Urban Telecommunications Corporation, at 2.

1982, Washington Television, Inc. filed on Friday, March 19, 1982 an opposition to Urban's petition for leave to amend. Urban also sought a protective order to prevent the authors of its last minute filed financial documents from having to appear for cross-examination. Washington Television, Inc. also opposed Urban's request for a protective order. Washington Television, Inc. urged rejection of Urban's amendment because there was no showing that the Ideal Opportunities Corp. was either a financial institution or an equipment manufacturer and Urban had not supplied any financial statement or balance sheet. Washington Television pointed out that this was the second time that Urban had ignored this requirement. Washington Television also pointed out that the terms of the loan were so extraordinarily favorable that the agreement did not appear to have resulted from an arms length transaction. In addition, Washington Television urged that the letter from Ideal Opportunities was ambiguous about what security would be required.

10. Washington Television also urged that the letter from the National Bank of Commerce was deficient because it stated no more than the bank's confirmation that it had an "interest in providing a loan." Washington Television maintained that this letter too, like an earlier Urban bank letter, was indefinite about terms of repayment, covenants, and personal guarantees. And Washington Television noted that the National Bank of Commerce could not legally lend the amount stated in the letter.

11. In addition, Washington Television argued that questions were raised about whether the stock and assets of Urban could be pledged to two different lenders. This was particularly troublesome since Urban proposed to lease all items that might ordinarily be available as collateral.

12. On the first day of the hearing these matters were resolved. Urban was directed to produce the authors of its lending letters for cross-examination and the proffered financial showing amendment was accepted. Tr. 69–72; *Order*, FCC 82M-0953, released March 30, 1982. At that time, Urban pointed out that it additionally relied on a letter from Amvest Leasing and Capital Corp. promising to lease Urban its equipment. Urban was directed to give some assurance that Amvest was qualified as a financial institution or an equipment manufacturer, or if it did not, it would have to establish Amvest's ability to provide the equipment. Tr. 70–71. Urban stated it would provide such assurance. Tr. 70.

13. Later, Urban urged that Amvest was a "recognized lessor of broadcast equipment" and that official notice should be taken that Washington's Christian Television Outreach (WCTO) had relied on equipment from Amvest Leasing and that the Broadcast Bureau had not designated a financial issue against that applicant. Tr. 189–90. Urban claimed that the Bureau's action in the case of WCTO

demonstrated the validity of its claim that it need not establish the ability of Amvest to supply Urban with equipment.

14. It was pointed out to Urban that the application form made no exception to the financial showing requirement for equipment lessors and that the Bureau's designation order was silent about the reason for finding WCTO financially qualified. Tr. 190. Urban stated that it would provide a memorandum establishing that lessors were treated like financial institutions. On March 23, 1982, Urban submitted a memorandum which purported to demonstrate that leasing entities need not demonstrate their ability to supply the equipment being leased. The memorandum relied on the Commission's holding in the hearing designation order in *Merrimack Valley Broadcasting, Inc.*, FCC 80-50, released February 13, 1980. In that order the Commission held that equipment suppliers need no longer demonstrate that they had examined and approved the credit worthiness of an applicant. The issue in this case is quite different: It is not the credit worthiness of the applicant that is uncertain but the ability of the lender to lend. There has been no demonstration that Amvest is capable of providing the equipment and it has not been established that Amvest is an equipment manufacturer. Moreover, the only standard available to measure its ability is that provided in the instructions to Form 301.

15. The need for an Amvest witness was underscored by uncertainties which developed during the testimony of Urban's President, Theodore White, concerning the nature and terms of the Amvest proposal. Tr. 2306–17. In view of the lack of such a witness, that portion of Urban's Exhibit No. 3 concerning the proposed Amvest lease and Exhibit 9 were rejected. Tr. 2384–85. Nonetheless, it was indicated that Urban might be permitted to present a representative of Amvest as a witness upon request if there was not too great a delay in such presentation. Tr. 2387.

16. The hearing sessions during which Urban presented its case ended on April 2, 1982. Additional hearing sessions concerning issues added with respect to other applicants were held on June 2 and 3, 1982. On July 7, 1982, Urban filed a Petition to Reopen the Record proposing an examination by telephone of a representative of Amvest on July 8 or 9, 1982. Urban's proposal was denied because it was too late and so indefinite and incomplete that it did not justify the disruption which approval would cause. *Order*, FCC 82M-2186, released July 19, 1982.

17. While the hearing was going on Urban elected not to rely on the financing of the Ideal Opportunities Corp. It did, however, attempt to demonstrate that the National Bank of Commerce had given reasonable assurance that it would lend Urban $1,000,000. Urban Exh. 3, at 2.

18. Urban relies on the net proceeds of $922,916.67 from the National Bank of Commerce (NBC) loan. Jeffrey N. Cohen, Chair-

man of the Board of Directors of NBC, testified at the hearing concerning the proposed loan. Tr. 2120–83. Although the NBC letter is worded as if NBC will be the sole source of the loan, Mr. Cohen testified that NBC is limited by law to loans of no more than approximately \$490,000 to any one entity for one purpose. Tr. 2131. He stated that other entities would have to participate with NBC to make the proposed loan and that those other entities would probably be banks. Tr. 2131. He testified further that such other banks could be any one of, or a combination of, Equitable in Baltimore, Maryland, Old Stone Bank in Providence, Rhode Island, and the National Bank of North America in New York. Tr. 2131–32.

19. Mr. Cohen stated that another bank would make an independent evaluation as to whether to advance funds towards any proposed loan in which it is asked to participate (Tr. 2132, 2133), and that banks have varying standards with respect to evaluation of loan requests. Tr. 2130, 2133. The three banks named by Mr. Cohen have a regular correspondent relationship with NBC (Tr. 2131), but there is no requirement that correspondent banks accommodate each other with respect to particular proposed loan transactions. Tr. 2133–34. Mr. Cohen has not spoken to anyone at the Equitable Bank or at the National Bank of North America concerning their possible participation in a loan to Urban. Tr. 2135. He has spoken about the possibility, for approximately ten minutes during a telephone call involving other topics, to a senior loan officer at Old Stone Bank. None of the written information provided by Urban to NBC (Tr. 2176) was sent to Old Stone Bank. Tr. 2135, 2178. However, Mr. Cohen may have told Old Stone Bank that Urban would operate Channel 14 as an STV station, because he was under the impression that that was the case. Tr. 2136–37, 2164.

20. Mr. Cohen was also questioned concerning the terms and conditions of the proposed loan. He testified that there might well be a facility fee charged in connection with the loan, were it made. Such a fee would consist of "points" representing a charge which could range from 1% of the total amount of the loan (\$10,000) to 7% of the amount of the loan (\$70,000), with various possibilities as to amount and method of payment required. Tr. 2137–40. He testified that there might be a requirement that Urban maintain "compensating balances," but representatives of Urban did not ask for an explanation of what this requirement might entail and no such explanation was provided, inasmuch as information as to the likely implementation of that possible requirement is not now known. Tr. 2156–57.

21. *Applicability of Section 307(b) as to Fair, Efficient, and Equitable Distribution of Television Service (Issue 3)*: Urban submitted a proposed hearing exhibit (Urban Exh. 4) to establish the Section 307(b) merit of its proposal for Arlington, Virginia. That exhibit was rejected. Tr. 2243. The presiding officer (as well as the competing applicants) devoted considerable time at the hearing to a

testing of the evidentiary shortcomings of the exhibit, and the possibility of reforming the exhibit to overcome those shortcomings. Tr. 2193–2244. This discussion included an extended colloquy between counsel to Urban and the presiding officer concerning the details of how to reform the exhibit and to make it probative. Tr. 2224–42. The Judge offered Urban an opportunity to prepare a substitute Urban Exhibit No. 4 to cure the problems. Tr. 2371–72. Counsel to Urban stated in this regard that: "I think at this point, Your Honor, I can represent that we'll try to put another exhibit in." Tr. 2372. Nonetheless, despite the invitation and acceptance, Urban never tendered a substitute Exhibit 4.[7]

22. A document prepared by Urban and given to at least one of its proposed financial backers was entered into evidence. Tr. 2126, 2277; WTI Exh. 9. Mr. White, President of Urban, testified that he had prepared the document in conjunction with his law firm. Tr. 2276. The memo is titled "Memo re: UHF Commercial Television in the Arlington, Virginia/Washington, D.C. Area," and it states that:

> The Arlington, Virginia (Washington, D. C.) television market consists of the greater metropolitan Washington area, all of southern Maryland, all of western Maryland, (except for Garrett County), all of Virginia north of the Rappahannock River (plus Fredericksburg and Spotsylvania County), the five northeasternmost counties of West Virginia, and Franklin County, Pennsylvania (Chambersburg). This market, defined by the national television market research firms (here, Arbitron), is ranked number 8 in the United States, out of over 210 such markets. In relation to its size, this market probably has the fewest number of local television stations in the nation.

WTI Exh. 9, at 1. The memo further states "There is a need for an additional television station in the Washington market, and, if done successfully, this can well be a lucrative venture." WTI Exh. 9, at 3. Other portions of the memo include a map of the proposed contour of the station (WTI Exh. 9, at 6) and a page entitled "Future Value of an Independent UHF Station in Washington." WTI Exh. 9 at 8. Mr. White confirmed, when questioned, that the revenue projections contained in the memorandum he had prepared included anticipated revenues from the entire Washington, D. C. metropolitan area. Tr. 2284.

23. *Capital Communications' Diane Graham's Violation of Title VII of the Civil Rights Act (Issue 4)*: Diane Graham, who is proposed for a part-time management position in Capital Communications, and is its President and a 12.5 percent shareholder, was found by the U. S. District Court for the District of Columbia to have discriminated, on the basis of sex, in hiring the Director of the Hispanic

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[7] An exhibit in the nature of a rebuttal to Urban's 307(b) argument was prepared by the Washington, D. C. applicants for Channel 14, and the exhibit was identified at the hearing as WSCT Exhibit No. 25. Tr. 1630. Because of Urban's failure to meet the burden of going forward and establishing the issue, the Washington, D. C. applicants never offered the exhibit into evidence.

Employment Program, Office of Personnel Management. *Velez v. Devine*, No. 81–1225 (D.C. Feb. 9, 1982). WCTO Exh. 13. Ms. Graham is Assistant Director of the United States Office of Personnel Management for Affirmative Action Programs. CapCom Exh. 9, at 1; Tr. 847. It was Ms. Graham's function, as supervisor, to select one of the persons on a list of qualified applicants for the position of Director of the Hispanic Employment Program. Tr. 2805–06, 2810. Her failure to select Roceliz Velez for the position was found by the United States District Court for the District of Columbia to have violated Title VII of the Civil Rights Act of 1964. The Court held that Ms. Graham did not select Ms. Velez because she is a female. Ms. Graham testified at the trial held on the Velez complaint and the Court, in summarizing her testimony about the hiring of a male candidate over a female, stated that:

> . . . Ms. Graham's testimony therefore is not only insubstantial, it contains contradictions and inconsistencies with other evidence given at various times as to her reasons for not promoting Ms. Velez and, viewing it as a whole, the Court finds that it is not entitled to any weight. WCTO Exh. 13, Slip Op. at 5.

24. The Court continued:

> Finally, Ms. Velez was clearly better qualified than the male eventually selected for the Director's vacancy and at least as well qualified as the two other males to whom the job was offered. Thus, the Court must also reject as pretextual Ms. Graham's claim that Ms. Velez was not as well qualified as those offered the position. *Id.* Slip Op. at 6.

25. Ms. Velez was awarded back pay, ordered reinstated to the grade and step that she would have received had she occupied the position, and granted attorneys' fees and costs. *Id.*

26. While, as already pointed out, Ms. Graham testified in the trial of *Velez v. Devine* and sat through the trial as the government's representative, during the investigation she was not consulted "other than as a person answering questions." Tr. 2821. She made particular note in her testimony that she had no control over the government defense of her action.

27. She has participated in more than 40 hiring decisions during her years in government, and the *Velez* case is the only challenge that has been made to any of those decisions. Tr. 2799–2800. In her present position, which she has held since 1979, she has made approximately 30 promotions and 30–32 hires. Tr. 2802. During that time the staff she has supervised has increased from 63 percent women to 65–66 percent. Tr. 2800, 2803, 2844. These figures compare to only 37 percent employment of women in the government as a whole. The professional staff (Grades 12 and 13) is 66 percent women as compared to only 11 percent for the government as a whole. Tr. 2803. For managerial grades 14 and 15, the figure for the government as a whole is 5.7 percent while in Ms. Graham's office it is 50

percent. Tr. 2803. Promotions by Ms. Graham have followed a similar pattern. Tr. 2804.

28. Four witnesses testified that they knew Ms. Graham has a commitment to non-discrimination in employment: Ruth Bates Harris, Hedwig Oswald, Dolores de la Torre Bastning, and Francesca Farmer. Each of these women has a long standing record of working against discrimination in employment. They testified that Ms. Graham, in their view, does not discriminate against women and, to the contrary, that she has exhibited a professional interest in promoting women. Tr. 2768, 2778–81, 2786–91, 2853–67, 2880–85, 2891.

29. *Grant Broadcasting's Failure to Reveal Lawrence Brailsford's Bankruptcy (Issue 6)*: Lawrence Brailsford, who is a 25 percent stockholder/subscriber of Grant (one of only three), a Director, Vice President, and proposed part-time Public Affairs Director, in July 1981, filed for bankruptcy personally and for a corporation, Community Development, Inc., which he owns. There is also a pending suit against him regarding his bankruptcy. In September of 1981, Mr. Brailsford informed the bankruptcy court that his liabilities exceeded his assets. He did not report to the Commission his bankruptcy or the lawsuit against him when they occurred, nor did he reveal it when he was asked about such legal action in interrogatories in November 1981. Furthermore, on November 19, 1981, in response to a petition to enlarge about Grant's finances, Mr. Brailsford appeared to state that he was still able to meet the purchase price of $27,150 for his stock. See *Memorandum Opinion and Order*, 82M-1143, released April 9, 1982. The issue centers on whether Brailsford deliberately sought to conceal his bankruptcy because it would have raised questions about his ability to participate in Grant's application. His role is both quantitatively and qualitatively important. If he purchases his stock, he would own a significant share of the company and his role enhances Grant's application because he is black and lives in Washington, D. C.

30. In July 1980, when Mr. Brailsford submitted his first balance sheet to the Commission, he represented that he had $27,150 in cash on hand to meet his stock subscription. Century Exh. 37. Prior to this filing Mr. Brailsford met with Grant's two other stockholders, Milton Grant and Theodore R. Hagans, at Mr. Brailsford's home. He remembered that Mr. Grant stated that it was necessary that the reputation of participants in the application be impeccable. Tr. 2639–40. Mr. Grant testified that he also remembered the meeting and he recalled telling Mr. Brailsford that the application was already on file and that it was necessary to keep the Commission informed of significant changes. Tr. 2898, 2908. The necessity of keeping the Commission informed was also the primary topic at other meetings, Grant maintained. Tr. 2898.

31. Mr. Brailsford said there was no such discussion (Tr. 2639)

and that Grant had not told him the application was already on file. Tr. 2657. However, Mr. Brailsford agreed that at a third meeting held before he became a part of the application, Grant did tell him the importance of keeping the application current. Tr. 2642. Grant stated that it was also mentioned then and at all four meetings held. Tr. 2898, 2899, 2900. Brailsford said he did not remember the requirement from mid-1980 until mid-March 1982 when he was preparing for the hearing. Tr. 2652.

32. Mr. Brailsford said that he did not inform Mr. Grant or Grant Broadcasting's counsel of his bankruptcy because of preoccupation with other "pressing issues." Tr. 2649. However, he did tell Mr. Hagans, who is Grant's only other stockholder and a 25 percent owner. Tr. 2664, 2682.

33. When Grant Broadcasting submitted its November 18, 1982 responses to the interrogatories it did not supply information about the suit against Brailsford or his bankruptcy. Tr. 2911–14. Mr. Brailsford maintains that the interrogatories had not been discussed with him. Tr. 2688. Milton Grant testified that he had relied on his counsel's communication with Mr. Brailsford for the accuracy of Grant's responses involving Mr. Brailsford. Tr. 2915. He stated that when he went over the answers with his counsel, his counsel indicated that he had reviewed the responses with Mr. Brailsford. Tr. 2913–16.

34. At the same time Mr. Brailsford wrote Mr. Grant a letter which was included as part of a response to a petition to enlarge. Mr. Brailsford stated in the letter that he not only had the $27,150 reflected on his balance sheet already submitted to the Commission but that his net assets "above and beyond all long and short term liabilities" exceeded $15,000. Century Exh. 35. He also began the letter by noting that the commitment was both his and his wife's. *Id.* He included his wife, he stated, because, although she was not part of the application, he was financially incapable of meeting the obligation by himself. Tr. 2649–51. Mr. Brailsford claimed that he consulted Grant's counsel about his capability. Tr. 2668. The letter, which was originally drafted by counsel, was altered by Brailsford to include his wife in his commitment but he did not change the statement about his cash on hand, although he did not have the cash. Tr. 2678–79.

35. During the period Mr. Brailsford prepared the letter about his finances and the interrogatories were being answered, Mr. Brailsford spoke on the telephone with Mr. Grant at least twice. Tr. 2690–91, 2717. And, although he told Grant's former counsel about his bankruptcy in August or September 1981 (Tr. 2709), Mr. Brailsford initially maintained that he did not tell his current counsel about his bankruptcy when the letter about his finances was being prepared in November 1981. Tr. 2666. After a recess in the hearing he said that he had told his counsel in November and then

on redirect he maintained that he had not. Tr. 2681–82; 2720. Mr. Brailsford's testimony also reflects the same pattern of inconsistency when he was asked whether he had told Mr. Grant. Tr. 2667, 2681–82. Mr. Brailsford did say he was aware that the letter about his finances was intended for the Commission. Tr. 2687.

36. The inconsistency of Mr. Brailsford's testimony is highlighted by his detailed explanation of how he told Mr. Grant of his bankruptcy and financial problems in November 1981 and his total recant on redirect. Milton Grant's testimony is unequivocable that Brailsford did not tell him about the bankruptcy until March 1982. Mr. Grant also stated that his former counsel never told him that Mr. Brailsford had informed him of the bankruptcy. Tr. 2908–11, 2921–26.

Comparative Issues

Diversification of Ownership and Control of Mass Communications Media

37. Neither *Washington's Christian Television Outreach, Inc.*, nor any of its officers or directors, holds an ownership interest in or has any connection with any media of mass communications. WCTO Exh. 1, at 2. *Century Communications, Inc.* and its principals have no cognizable interest in any media of mass communications.[8] Century Exh. 2, at 1; Exh. 3, at 1–2; Exh. 4, at 2; Exh. 6, at 1; Exh. 7, at 2; Exh. 8, at 1; Exh. 11, at 2; and Exh. 13, at 2. Neither *Capital Communications of Washington, Inc.*, nor any of its stockholders, holds any interest in any media of mass communications.[9] Capital Exh. 2.

38. *Grant Broadcasting Corporation* does not hold any other mass media interest. Theodore R. Hagans, who is a director and 25 percent owner of Grant Broadcasting, is a 13 percent stockholder and a director of Washington Community Broadcasting Co., the licensee of WYCB(AM), Washington, D. C. He will divest this interest if a grant is made. Grant Exh. 2, at 1–2. Milton Grant, who is Chairman of the Board, Director and 50 percent owner of Grant Broadcasting, holds options to acquire 5 percent of Channel 21, Inc.,

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[8] Century stockholders and principals, Steven Wechsler, Pauline Wechsler, Peter Yeskel, and Diane Wechsler are stockholders and principals of Marquee Television Network, Inc. which operates a pay television service distributed by microwave in Washington, D. C. They propose to divest themselves of their shares if a grant is made to Century. Century Exh. 2, at 1–2; Exh. 3, at 3; Exh. 4, at 2; Exh. 6, at 1. Everett J. Gordon has 5 percent ownership interests as a limited partner in the following cable television companies: CATV Harrington Company (Harrington, Delaware); CATV Sussex Company (Sussex, Delaware); and CATV La Plata Company (La Plata, Maryland). He will divest these interests if a grant is made to Century. Century Exh. 9, at 3.

[9] Thelma J. Mullin's husband owns 5 percent of the stock of WJDY, a daytime-only AM station in Salisbury, Maryland and is a 1.26 percent stockholder of KSTS-TV, San Jose, California. Ms. Mullin is a capital stockholder and principal.

the licensee of KTXA-TV, Fort Worth, Texas. His option may be exercised after April 1, 1984, provided Grant is still employed at the station. Mr. Grant will also hold 21/2 percent of Channel 20 Enterprises, which is about to become the permittee of KTXH-TV, Houston, Texas. In addition, when the joint venture of Channel 20 Enterprises is executed, Grant will hold an option to acquire a 5 percent share. Grant Broadcasting has not indicated what conditions, if any, may apply to the 5 percent interest.[10]

39. Milton Grant is also a 50.9 percent shareholder in Grant Broadcasting of Little Rock which has the right to acquire within one year from June 28, 1982, a 25 percent limited partnership in LRTV Limited Partnership, which holds a construction permit for Channel 16, Little Rock, Arkansas. The option is conditioned on Grant Broadcasting of Little Rock obtaining favorable final Commission or Commission staff action on its qualifications.[11] Grant Exh. 2, at 2–3.

40. *Urban Telecommunications Corporation* holds no other mass media interests. Theodore White, who is Urban's sole stockholder, President and Treasurer, is the 75 percent stockholder, President and Director of Page Broadcasting Corporation. Urban Exh. 6. Page E. Silver, who is Urban's Vice President and Secretary, is Vice President, Director and 25 percent stockholder in Page Broadcasting. *Id.* Page Broadcasting is an applicant for a construction permit for a new television broadcast station which would operate on Channel 30, Nashville, Tennessee. *Id.* Page Broadcasting agreed to settle the Nashville proceeding in exchange for expenses and the right to purchase 5 percent of the permittee, Television Corporation of Tennessee. *Memorandum Opinion and Order*, FCC 82M-3943, released December 10, 1982 (per ALJ Joseph Stirmer), at ¶3. The stock was to be issued to Page after final FCC approval. See Docket No. 81–684, Hearing Session held November 17, 1982, at Tr. 184. Theodore White is also an applicant for a low power television station at Charlottesville, Virginia. Urban Exh. 6.

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[10] Grant's interest in Channel 20 Enterprises was only revealed after the Commission approved the assignment of the permit. See *Order*, FCC 82M-3669, released November 19, 1982, granting Motion for Leave to Amend, filed October 18, 1982 by Grant. Before the agreement is executed Grant continues to hold only an option to acquire a 21/2 percent interest in Channel 20, Inc. This option is subject to the same condition as the option to acquire an interest in Channel 21, Inc.

[11] Grant has not explained whether the condition has been satisfied or whether Grant Broadcasting of Little Rock intends to exercise the option. On August 26, 1982, in response to a Broadcast Bureau petition, the qualifying issues raised against Grant Broadcasting of Little Rock were considered in this proceeding and were found to be insufficient to affect Milton Grant's qualifications in this proceeding. *Memorandum Opinion and Order*, FCC 82M-2601, released August 26, 1982. Grant's subsequent pleadings do not state whether this satisfies the prohibition on Grant Broadcasting of Little Rock acquiring an interest in the Little Rock facility.

41. *Washington Television, Inc.*'s principal, Lonnie Murray, is the 13 percent owner of Radio Vanderbilt, Inc., licensee of WWIW(AM), New Orleans, Louisiana. WTI Exh. 1A, at 4. He participates in the operation of the station through a personal consulting and non-competition agreement with Radio Vanderbilt, which expires in June of 1984. *Id.* In recent years this agreement has required 5 hours or less of his time. Tr. 2425. John F. X. Browne holds less than 1 percent of the stock of Michigan Television Network, Inc., the licensee of WGTU(TV), Traverse City, Michigan and Satellite WGTO(TV), Sault Ste. Marie, Michigan. The other principals of Washington Television have no other interests in any media of mass communications.[12] WTI Exh. 1A, at 5; WTI Exh. 2, at 3; Tr. 2496.

42. *WSCT, Inc.* is wholly owned by Formula Telecommunications, Inc. Lewis A. Rivlin, a Formula stockholder, holds a 25 percent interest in Coaxial Systems, Inc. which has a 10% interest in Public Cable of Portland, Maine, the operator of Portland's cable television system. WSCT Exh. 2. Coaxial also has an 8.75 percent interest in cable television systems in Laurens and Clinton, South Carolina. *Id.* Portland is located 482 miles from Washington.[13] Armando B. Rendon, who is also a Formula principal, is a 10% stockholder in Los Cerezos Television Company, which is the licensee of an experimental television broadcast translator on Channel 56, Washington, D. C. WSCT Exh. 2, at 1. Tr. 1911. Mr. Rendon has stated he will divest if a construction permit is granted. WSCT Exh. 2.

Best Practicable Service to the Public—Integration of Ownership and Management.

43. *Washington's Christian Television Outreach, Inc.*: WCTO is a non-profit, non-stock D.C. corporation. WCTO is controlled by a board of directors which, in turn, elects the operating officers of the corporation. Corporate decisions are made in accordance with a majority vote of the Board of Directors. WCTO Exh. 1, at 1; Century Exh. 29, at 2. Its incorporators and original Board of Directors were A. Bert Carver, Dr. Wendell P. Witten and Dr. Lucas Blevins. Century Exh. 28, at 3. Seven additional members were added to the Board in 1980 to bring the total number of members to 10. WSCT Exh. 18, at 3. The directors of WCTO are elected to the Board of Directors for a two-year term and are eligible for reelection. The officers and directors of WCTO are:

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[12] Louis Schwartz and Robert A. Woods, whose law firm, Schwartz, Woods & Miller, is a Washington Television stockholder, each holds 25 percent of the stock of Multi-Video, Inc., a corporation which holds 50 percent of the stock of Term-Comm, the licensee of MDS microwave station WQR23, Terre Haute, Indiana. WTI Exh. 1A, at 5.

[13] Pursuant to WSCT-TV's request, official notice is taken of these distances.

August Bert Carver	President, Director
Dr. Wendell P. Witten	Vice-President, Director
Dr. Lucas H. Blevins	Secretary/Treasurer, Director
Julia F. Carver	Director
Elaine H. Witten	Director
Jean H. Blevins	Director
Charles R. Hayes	Director
Joe-Ann Hayes	Director
Raul Vasallo	Director
Emma Vasallo	Director

WCTO Exh. 1, at 1–2.

44. Although WCTO's corporate charter authorizes it to engage in the business of operating a television station, WCTO's purpose is primarily religious, i.e., "To bring greater glory to Almighty God by disseminating the Gospel of Jesus Christ and other truths of the Holy Bible by whatever means possible . . . ." Century Exh. 28, at 2. Each director of the corporation is required to make a written statement of faith "which the Board of Directors shall find not to be inconsistent with the purposes of this corporation." Century Exh. 29, at 1; Tr. 130. WCTO's bylaws provide that all prospective employees be informed of the purpose of the corporation, and "be qualified and willing to render service consistent therewith." Century Exh. 29, at 7; Tr. 148–50, 201.

45. WCTO's bylaws also require the directors to act to ensure that "no decision" in the selection or dismissal of employees be based on the person's age, sex, race, religious affiliation or nationality background (Century Exh. 29, at 7; Tr. 200) and a person's religious beliefs would not disqualify a person from working for WCTO's station. Tr. 173, 201. WCTO's president, Bert Carver, explained the intent of these provisions as: "We've clearly proposed a station with a Christian format, and I would assume if they [prospective employees] made application that they would be aware of that. However, to remove all doubt, they will so be advised as to our programming format and purposes. And if they are qualified to do the job, and want the job, they'll get the job." Tr. 201. WCTO's bylaws also provide that the selection of persons to benefit from WCTO's corporate, educational, or charitable programs shall not be affected by a person's age, sex, race, religious affiliation, skin color, nationality, or employment. Century Exh. 29, at 7.

46. Eight of WCTO's ten directors propose to play an active part on a day-to-day basis in station management and all eight directors propose to work full time (at least 40 hours per week) at WCTO's proposed station. WCTO Exh. 1, at 2–6. Those directors, and the positions they propose to occupy at the station are:

August Bert Carver	General Manager	WCTO Exh. 1, at 2
Dr. Wendell P. Witten	Program Production Manager	WCTO Exh. 1, at 4
Dr. Lucas H. Blevins	Counseling Manager	WCTO Exh. 1, at 3
Julia F. Carver	Marketing Director	WCTO Exh. 1, at 3

Elaine H. Witten	Program Manager	WCTO Exh. 1, at 5
Jean H. Blevins	Counseling Manager	WCTO Exh. 1, at 4
Rev. Charles R. Hayes	Public Relations Director	WCTO Exh. 1, at 5
Joe-Ann Hayes	News Director	WCTO Exh. 1, at 6.

47. Bert Carver, WCTO's President, proposes to work full time (40 hours per week) as General Manager of WCTO's proposed station. WCTO Exh. 1, at 2. As General Manager, Mr. Carver would be responsible for the overall operation of the TV station and its relation to the community. He will be responsible for the planning of the goals, objectives, and operating procedures of the station. Mr. Carver would also be responsible, generally, for evaluation of station facilities and equipment, ensuring WCTO's compliance with FCC rules and regulations, the development of variations needed in individual and overall program formats, development of changes in rate structure on selling methods and revision of office procedures. WCTO Exh. 1 at 2–3. The various departments which would report to Mr. Carver include news, marketing, local production, programming, operations and financial. Tr. 145. Mr. Carver may also make limited appearances on the air, if necessary. Tr. 145. As General Manager, Mr. Carver will, with the concurrence of the Board of Directors, hire and fire employees. Tr. 145–46. Mr. Carver expects to be a paid employee of WCTO (Tr. 157, 159) but the specific amount has not been discussed by WCTO's Board of Directors (Tr. 156, 159), no specific salary has been set. Tr. 140, 159.

48. Mr. Carver's heritage is part Cherokee Indian (Native American). WCTO Exh. 2, at 1. Mr. Carver's mother had both an Indian mother and father. Since 1954, he has been employed by the Johns Hopkins University Applied Physics Laboratory (APL) in Laurel, Maryland. WCTO Exh. 2, at 2. Mr. Carver will quit his present job to work full time for WCTO. WCTO Exh. 2, at 4. From 1955 to 1957 Mr. Carver lived in Chevy Chase, Maryland, and since late 1957 he has lived in Wheaton, Maryland. WCTO Exh. 2, at 3.

49. In addition to his full-time employment with APL, Mr. Carver is the joint owner, with his wife, of a broadcast tower in Wheaton, Maryland, doing business as the High Tower Company (WCTO Exh. 2, at 3), which leases tower space to approximately nine entities. Tr. 136–37. Mr. Carver devotes approximately seven or eight hours on a weekly basis to this business. Tr. 137. In addition, Mr. and Mrs. Carver own Action Radio, a company that provides UHF repeater coverage for business radio communications. WCTO Exh. 2, at 3. Action Radio does business with approximately 20 or 21 business radio customers and Mr. Carver devotes about seven to eight hours per week to that business. Tr. 137. Should WCTO be granted a construction permit, Mr. Carver anticipates continuing his interest in Action Radio and High Tower Company, which will consume no more than 15 hours per week of his time. WCTO Exh. 2, at 4; Tr. 136–37. Mr. Carver's other outside activities include

attending church at the Fourth Presbyterian Church, Bethesda, Maryland, and religious meetings, which consume no more than two to four hours per week. WCTO Exh. 2, at 4; Tr. 138. In addition, once or twice a year, Mr. Carver attends a special religious meeting for about two weeks which is normally incorporated into a family vacation. Tr. 138.

50. Beginning in 1971, Mr. Carver was asked to serve as TV coordinator for a local religious group (WCTO Exh. 7, at 3), and participated in the production of and hosted "God's Good News," a weekly religious television program broadcast on Channel 20, WDCA, Washington, D.C. until 1976. WCTO Exh. 2, at 3; Tr. 140–41. In 1976, Mr. Carver and WCTO took part in the production of "God's Great News," a weekly religious television program broadcast on Channel 20, WDCA, Washington, D.C., until the program ceased production in September 1979. WCTO Exh. 2, at 3; Tr. 141. Mr. Carver served as a coordinator of the program, which involved advising the studio director what the group desired to be done. Tr. 166. These programs were normally broadcast at 11:00 p.m. on Sunday and at various times on Saturday morning (Tr. 141), and Mr. Carver hosted the program approximately a dozen times a year. Tr. 143. Mr. Carver has never been employed by any radio or television station or by any media of mass communications. Tr. 140. His work on these programs was as a volunteer and he continued until it took up too much personal time. Tr. 141, 144.

51. Dr. Wendell P. Witten is Vice President of WCTO, and has been a Director of WCTO since its incorporation in 1976. WCTO Exh. 3, at 3. Dr. Witten has committed to work full time (40 hours per week) at WCTO's proposed station as it Program Production Manager. WCTO Exh. 1, at 4; WCTO Exh. 3, at 3. WCTO submitted a general exhibit which stated that the Program Production Manager would bear the primary responsibility for producing the local portions of the station's program schedule, for appearing as talent or as the host for local programs, where appropriate, and for coordinating and obtaining guests and talent to fill local programming needs. WCTO Exh. 1, at 4; Tr. 220. Dr. Witten would host at least one local program (Tr. 221), "Washington," for which he will be responsible as director (Tr. 197) and assist in setting up the studio for local productions. Tr. 241. As WCTO's Program Production Manager, he will assist in supervising the technicians necessary for the production of local programming, and WCTO anticipates that as the station's operations expand, assistants will be hired under Dr. Witten to help with local programming and production. Dr. Witten will have direct responsibility for supervising the assistants. WCTO Exh. 1, at 4; Tr. 234.

52. Dr. Witten is a black male. He lived in Washington until February 1972, moving first to Falls Church, Virginia and then (in 1975) to his present address in Alexandria, Virgina. WCTO Exh. 8, at

1–2. He began practicing optometry in the northeast section of Washington in 1952 and he still practices optometry in downtown Washington. He has been self-employed since 1954. Tr. 210.

53. Dr. Witten will continue practicing optometry should WCTO receive a construction permit, but he will reduce his involvement in his practice to no more than 15 hours a week to fulfill his commitment to work full time at the station. WCTO Exh. 3, at 3; Tr. 225. He estimates that decreasing his hours of practice to 15 hours a week will reduce his current gross income some $15,000 or $20,000, and projects that his income for 15 hours per week of optometry will be $50,000 per year (Tr. 226), a drop from his current gross of $65,000 to $75,000 from his 40 hour-a-week practice. Tr. 236–37. Although Dr. Witten expects to receive a salary for working at the station (Tr. 225), no specific figure has been agreed upon. Tr. 225. There is, however, an agreement that all of the board members of WCTO will receive some compensation. Tr. 225. Dr. Witten served as a member of the Board of Examiners in Optometry for the District of Columbia from 1963 until June 1969, and during four years of that term he served as Vice President of the Board. WCTO Exh. 3, at 2.

54. In 1967, Dr. Witten joined the Full Gospel Businessmen's Fellowship International (FGBMFI), and became the co-founder, a charter member, and President of the Downtown D.C. Chapter in 1975. WCTO Exh. 3, at 2. Dr. Witten devotes approximately three hours a week to the FGBMFI organization. Dr. Witten is also the director of the Wendell and Elaine Witten Christian Foundation, a nonprofit foundation which funds Christian service work, but which is now inactive. WCTO Exh. 3, at 2; Tr. 215–16. Dr. Witten also participated in sponsoring a series of television programs broadcast on WDCA, Channel 20, Washington, D.C., beginning in 1971 and known as "God's Good News," and after 1977 as "God's Great News." WCTO Exh. 3, at 2. Dr. Witten sometimes co-hosted the "God's Great News" programs for approximately two years in the middle 1970's. WCTO Exh. 3, at 3; Tr. 216. In addition, in December 1979 Dr. Witten produced, directed, and co-hosted (with his wife, Elaine) a special Christmas program aired on Christmas night on Channel 20. WCTO Exh. 3, at 3. He and Mrs. Witten related the Christmas story directly from the Bible. Tr. 221–23. Dr. Witten claimed the expense of that program as a business deduction. Tr. 239.

55. Dr. Lucas H. Blevins, WCTO's Secretary/Treasurer and a Director of WCTO since its incorporation in 1976 (Century Exh. 28, at 3; Tr. 479), would also work full time (40 hours per week) at the station as one of two counseling managers. WCTO Exh. 1, at 3; Tr. 484. WCTO stated that Dr. Blevins, as a counseling manager, would be responsible for the continuing recruitment, direction, training and supervision of volunteer counselors used in WCTO's call-in programs (WCTO Exh. 1, at 3), which would be broadcast two hours each evening. Tr. 196–97. Dr. Blevins stated that it "really hadn't

been decided" whether the telephone calls with which he and his volunteers would deal would be generated by a particular program broadcast over the station. Tr. 484–85. While the program, "Washington," would be broadcast while Dr. Blevins is at the station and counselors would be available during that program, the calls would not be presented as part of the on-the-air programming of "Washington." Tr. 501. Dr. Blevins would have no connection with programming except in regard to these counseling duties. Tr. 498.

56. The counseling that WCTO would provide was described variously as "listening to the needs and problems of people and trying to help them in every way that we possibly can" (Tr. 502); as "Christian counseling" (Cf. Tr. 414); or as having "a program geared toward community outreach in which they will be helping people through Christian counseling." Tr. 335. Christian counseling was described as "spiritual healing." Tr. 336. The counselors' continuing training would also include weekly sharing sessions at which the problems posed by particular callers would be shared, the counselors' responses analyzed, and the concerns of all counselors discussed. WCTO Exh. 1, at 3. The counseling managers would also coordinate activities with the leadership of churches in the greater Washington, D.C. area, including joint programs, choir, and youth group activities, ladies group activities, handicapped golf activities, school group activities, and related activities. WCTO Exh. 1, at 4. Initially, Dr. Blevins and his wife, the other counseling manager, would supervise at least 10 unpaid volunteer counselors. WCTO Exh. 1, at 4.

57. The counseling managers would also train counselors, an activity which Dr. Blevins anticipates would take from 5 to 6 hours per person. Tr. 489. He describes the training the volunteers would receive as training in dealing with people, and in choosing the right organizations to whom to refer people. Tr. 488–89. The counselors recruited would likely be Christian (Tr. 501) because of the station's Christian format. Tr. 200. Dr. Blevins believes that persons who would serve as volunteer counselors should be Christian "because they have a compassion for people that people who aren't Christian don't have. . .." Tr. 487. Dr. Blevins has received a certificate attesting to his work in alcohol rehabilitation from Lorton Reformatory. Tr. 491. He has done Christian counseling at his church, home, and office. Tr. 423. He receives constant calls at his house. Tr. 154.

58. Dr. Blevins testified that he would be at the station at least from 8:00–10:00 p.m., five days a week (Tr. 501), and expects to be paid for his work as counseling manager. Tr. 484. However, there has been no discussion concerning a specific salary figure (Tr. 484), and he does not know personally if money for salaries has been provided in WCTO's budget. Tr. 494–95. To fulfill his full-time commitment to WCTO, Dr. Blevins pledged to withdraw from the practice of dentistry once WCTO goes on the air. WCTO Exh. 4, at 3. He would continue his practice on a temporary basis were WCTO to receive a

construction permit, until someone could take over his practice. Tr. 483. At present, Dr. Blevins has identified a young man coming out of dental school who he believes would take over his practice gradually. Dr. Blevins believes that it would take six months to a year to end his practice (Tr. 483–84), but that it would "be tapering off . . . and wouldn't interfere with [his] work at the station." Tr. 484.

59. Dr. Blevins has lived and practiced dentistry in Arlington, Virginia since 1939. WCTO Exh. 4, at 1; WCTO Exh. 5, at 1. Dr. Blevins is a member of the Arlington Chamber of Commerce and the Kiwanis Club (1941 to the present); is an Elder in the Christian Assembly (from 1972 to the present); is presently serving as a board member of the Christian Service Corp., a philanthropic Christian organization; and has been the President of the Arlington Chapter of the FGBMFI since 1979. WCTO Exh. 4, at 2. Dr. Blevins anticipates continuing outside activities once WCTO begins operating the station, and estimates that he presently devotes time to these activities in the following amounts: Church—three hours per week (Tr. 479); FGBMFI—two evenings a month (Tr. 478); Director, First Virginia Bank—one to two hours per month (Tr. 476–77); Bhutan Mission—one meeting per year (Tr. 477); and Christian Service Corp.—one meeting per quarter. Tr. 477.

60. In addition, Dr. Blevins has been involved in numerous civic activities over the years. WCTO Exh. 4, at 2.

61. Dr. Blevins has known WCTO's President, Bert Carver, since the 1950's (Tr. 153), and was involved from 1971–1979 as a co-host and producer of the programs broadcast over WDCA, Channel 20, Washington, D. C., entitled "God's Good News" and "God's Great News." WCTO Exh. 5, at 2–3; Tr. 153.

62. Ms. Julia F. Carver, a Director of WCTO since 1980 (WCTO Exh. 1, at 1; Tr. 450), would work full time (40 hours per week) as the station's Marketing Director. WCTO Exh. 1, at 3; WCTO Exh. 7, at 4. Ms. Carver would be responsible for program sales, coordination of program suppliers, supervision of station salespersons (when hired), and the sale of station production program tapes from other programs once production has begun. WCTO Exh. 1, at 3. In addition, Ms. Carver would assist the Program Manager and General Manager in scheduling programming. Tr. 451–52. Initially, Ms. Carver would not supervise any sales personnel (WCTO Exh. 1, at 3; Tr. 452), but would supervise the sales staff as it is hired. WCTO Exh. 1, at 3. Ms. Carver believes that she would be selling advertising spots during WCTO's local programming, but no definite decision has been made concerning the sale of advertising spots. Tr. 470–72. Ms. Carver anticipates that she would be paid a commission on her sales (Tr. 460–62), but has not discussed a specific percentage (Tr. 461–62) and understands that most of the other WCTO staff positions would be paid a salary. Tr. 459–61.

63. Ms. Carver is female and was born in Washington, D. C.

WCTO Exh. 7, at 1. She has lived in the area all of her life. In 1961, Ms. Carver served as the first telephone chairwoman for the Christian Women's Club in the Washington, D. C. area, and later served as decorations chairwoman for two years. She has also been a Bible Study teacher. WCTO Exh. 7, at 3. Since the late 1960's, Ms. Carver has been associated with the Women's Committee for the National Symphony Orchestra, working first at the Decorator Showhouse, then as Chairwoman for Silver Spring, and finally as Chairwoman for all of Montgomery County for two years, 1977–1979. WCTO Exh. 7, at 3. From 1979 to 1981, Ms. Carver was the Chairwoman for the Women's Committee for the National Symphony Orchestra in Silver Spring. WCTO Exh. 7, at 3. From approximately 1973 to 1975, she was also a member of the Citizens' Advisory Committee for cable TV in Montgomery County, and served as chairwoman of the program committee, assisting in the production of the report on programming submitted to the Montgomery County Council. WCTO Exh. 7, at 3. Since 1977, Ms. Carver has worked with various real estate firms as a broker. WCTO Exh. 7, at 4. Presently Ms. Carver is an independent contractor working as a real estate broker with Wayne McDonald Realtors. Tr. 446. If WCTO is granted the construction permit, she will limit her present activities in the real estate business to fulfill her 40 hour week commitment to WCTO. WCTO Exh. 7, at 4.

64. Ms. Carver assisted her husband in his television work with "God's Good News," arranging trips to the studio, scheduling guests, and working with telethons. WCTO Exh. 7, at 3. Also, particularly with respect to WCTO's program, "God's Great News," Ms. Carver appeared as a hostess, arranged music for the program, lined up and helped select guests, and made sure that the stage was set up correctly. Tr. 464. At times, when Mr. Carver was traveling, Ms. Carver had to do all the work. Tr. 464.

65. Ms. Elaine H. Witten, a Director of WCTO since 1980 (WCTO Exh. 8, at 2) would work at the station full time (40 hours per week) as Program Manager. WCTO Exh. 1, at 4. As Program Manager, she would be responsible for all station programming, local and non-local, for reviewing incoming program matter to make sure that it meets the public's problems, needs and interests. WCTO Exh. 1, at 4; Tr. 272. The Program Manager, in conjunction with the General Manager and Marketing Director, would be responsible for deciding the program schedule and for scheduling special program presentations. WCTO Exh. 1, at 4–5; Tr. 273. In addition, the Program Manager would be responsible for scheduling programs for production. Tr. 273. Ms. Witten would be reviewing incoming non-local programming, as well as some local programming, including programming produced by the Riverdale Baptist Church and Hunter Ministries. Tr. 270–72. Ms. Witten would also review her husband's programs (Tr. 281), and would probably review the scripts and plans

for live programs prior to production, including her husband's local programming "to a certain extent." Tr. 281. During the initial phase of station operation, which WCTO anticipates would last approximately 12 months, Ms. Witten would not supervise any employees. WCTO Exh. 1, at 5; Tr. 269–75. After the initial phase of operation, WCTO anticipates that Ms. Witten would supervise a staff of from two to five employees. WCTO Exh. 1, at 5.

66. Ms. Witten participated as an occasional co-host in the "God's Great News" program broadcast on Channel 20, WDCA, Washington, D. C. for approximately two years, from 1975 through 1977 (WCTO Exh. 8, at 2), and as a telephone counselor during the "Good News Tonight" programs broadcast on Channel 20 in 1974. WCTO Exh. 8, at 2; Tr. 267–68, 280. Ms. Witten also participated as a co-host on a Christmas special program broadcast Christmas night, 1979. WCTO Exh. 8, at 2.

67. Ms. Witten is a black female. WCTO Exh. 8, at 1. She lived in Washington, D. C. from December 1954 through February 1972, when she moved to Falls Church, Virginia. WCTO Exh. 8, at 1–2. In June 1975, she moved to her present address in Alexandria, Virginia. WCTO Exh. 8, at 2.

68. Ms. Jean H. Blevins, a Director of WCTO since 1980 (WCTO Exh. 5, at 3) would work full time (40 hours per week) as one of two counseling managers, and her responsibility would be co-extensive with her husband's, Dr. Lucas Blevins. WCTO Exh. 1, at 4; WCTO Exh. 5, at 3. Ms. Blevins expects to get paid for her services as counseling manager once the station is operating (Tr. 414), but does not know the amount. Tr. 415. Volunteer counselors would be the only persons reporting to Ms. Blevins (Tr. 414), and she would do some counseling, but describes her role as "mostly supervising." Tr. 409–10. She describes the duties of the counseling manager as "to recruit volunteers, to teach them, instruct them, and also to supervise them in counsel[ing]." Tr. 409. Ms. Blevins described counseling as having reference to the "whole man, body, soul and spirit" (Tr. 413); it "not only looks at the problem of the individual in the physical sense and emotional sense, but also in the spiritual sense." Tr. 414.

69. Ms. Blevins, using the term "Christian counseling," stated that the principles laid down in the Bible, both the Old and New Testament, would provide guidelines for WCTO's counseling. Tr. 438–39. However, if someone were to call with respect to a health problem, she would refer that person to another agency (Tr. 432) and she would not give medical advice. Tr. 433. When asked how she would deal with the person who called in proposing to commit suicide, Ms. Blevins testified that she has received many such calls (Tr. 434), mostly from young people. Tr. 435. Ms. Blevins testified that in response to such a call, she would "listen to them. . . . We listen to hear what is causing them to feel this way." Tr. 435. If

necessary, the caller would be referred to a mental health agency (Tr. 435), or, if the person was young, the parents would be called. Tr. 435.

70. Dr. and Mrs. Blevins, as counseling managers, would train and supervise at least 10 volunteer unpaid counselors (Tr. 411), but since there would be a turnover, there would need to be many counselors trained. Tr. 432. Ms. Blevins noted that counselor training would likely require one to three hours per person. Tr. 412.

71. Ms. Blevins has counseled people before, in her home, her husband's office, and in her church. Tr. 423. In addition, she has been involved in some counseling over the air and over the phone. Tr. 425. She acted as a television counselor with the program, "God's Good News." Tr. 434. Ms. Blevins has also been a telephone counselor for the 700 Club, where she first used a referral book and saw a manual for Christian counseling. Tr. 437–38. Ms. Blevins, with her husband, Dr. Blevins, was involved as a co-host and producer of "God's Good News" and "God's Great News." WCTO Exh. 5, at 2–3.

72. One technique used by Ms. Blevins and her husband is laying of hands on people so that limbs can grow or bones can be settled or reset, and "we state that" the "legs grow out and so forth" and that the arms will straighten out. Tr. 424. Although she does not expect to provide this type of counseling over the phone, if requested by a caller to provide this service at their home or the caller's home, "I believe that my husband and I would do that if it didn't—if our bodies hold up that long." Tr. 426. Ms. Blevins was referring to her age which is 72. WCTO Exh. 5, at 1.

73. Since 1939, Ms. Blevins has lived in Arlington, Virginia. WCTO Exh. 5, at 1. Ms. Blevins is active in church work. She presently teaches Bible classes at her church and in various homes. WCTO Exh. 5, at 2. Ms. Blevins devotes approximately two to three hours per week to her church activities. Tr. 401.

74. The Reverend Charles R. Hayes, a Director of WCTO since January 1980 (WCTO Exh. 9, at 1) would work full time (40 hours per week) at the station as WCTO's Public Relations Director. WCTO Exh. 1, at 5; WCTO Exh. 9, at 1. As Public Relations Director, Rev. Hayes would be responsible for writing both internal and external communications, including weekly, daily, and monthly reports; and also for developing relations with the press, radio and television representatives, and with the public. WCTO Exh. 1, at 5. Rev. Hayes would be responsible for reviewing letters of inquiry, and for organizing open houses and lobby displays. WCTO Exh. 1, at 5; Tr. 307. Rev. Hayes also anticipates interviewing individuals and visiting churches. Tr. 309. Finally, the Public Relations Director would be responsible for developing and contacting sources of additional donations when income from advertising and other income is not adequate to maintain a sound financial base. WCTO Exh. 1, at 5; Tr. 329. During the initial phase of the station operation,

it is not anticipated that Rev. Hayes would supervise any station employees (WCTO Exh. 1, at 5), but following this initial phase of the station operation, it is anticipated that Rev. Hayes would supervise a public relations staff of from one to three employees. WCTO Exh. 1, at 5. Rev. Hayes believes he would receive a salary for working at the station, but does not know the amount of the salary. Tr. 304. When questioned whether he would work for no pay, Rev. Hayes answered, "Yes, I would. I would have to say 'yes' because I'm getting out entirely to serve the Lord, and I would try to do what I could to further the aims of Christian broadcasting, . . ." Tr. 327–28.

75. Rev. Charles R. Hayes is a black male. He moved to Washington in 1958. In 1967 he opened the Grace Temple Religious Goods Store, and was ordained for the ministry by the Mooth Fountain Home Baptist Church on 9th Street. Tr. 296. Rev. Hayes' status as a minister is recognized by the D.C. government. Tr. 297. Grace Temple Church was started in 1970 (Tr. 297), and Rev. Hayes has pastored Grace Temple since then. Tr. 298. He is supported by the contributions of the twelve families in the congregation (Tr. 298), receiving approximately $1,000 a month in contributions. Tr. 305. Rev. Hayes describes his present activities as including two to three hours on Sunday and approximately four hours a week counseling at various hospitals. Tr. 298–99. Rev. Hayes has told his congregation of his plans to work full time at WCTO. However, he would maintain the present level of his activity at Grace Temple while working full time for WCTO. Tr. 300–01. In 1973, he became the Vice Chairman of the 14th Street Project Area Committee of RLA. He has been a member of the 14th Street Ministerial Board since 1973. WCTO Ex. 9, at 1.

76. Ms. Joe-Ann Hayes, a Director of WCTO since January 1980 (WCTO Exh. 6, at 2), would work full time, 40 hours per week, as News Director of WCTO's proposed station. WCTO Exh. 1, at 6; WCTO Exh 6, at 2. As News Director Ms. Hayes would be responsible for editing and presenting the station's news (WCTO Exh. 1, at 6), producing news broadcasts (Tr. 199), and would supervise both the technicians and cameramen necessary for news remotes and the volunteers, which WCTO anticipates would assist in initial news gathering and production. WCTO Exh. 1, at 6. WCTO presently proposes three hours per week of news, at 30 minutes per day (Tr. 199; 366–67) and she would be the only person on the news staff when the station commences operation. Tr. 199. The station would rely primarily on local news and upon wire service copy. Tr. 367. Local news would be gathered by her and through volunteers. Tr. 367.

77. Ms. Hayes did not know if the WCTO budget had any allocation for news, or whether provision had been made for news programming equipment such as a camera and tape recorder. Tr. 368, 379. If equipment is available, she would operate them herself if

she does not have a volunteer. Tr. 379. She did not know who would be reading the news over the air or even if she would be doing that. Tr. 380. In response to a question about the need to prepare for over-the-air news broadcasts before the actual broadcast, Ms. Hayes admitted that "I know absolutely nothing about the news at the present time." Tr. 381. Ms. Hayes testified that the offices and studio for WCTO would be in Wheaton, Maryland (Tr. 369), though she changed her answer when shown the WCTO application that lists Washington, D. C. as the location. Tr. 369–70.

78. Ms. Hayes is a black female, and has lived her entire life in Washington, D. C. WCTO Exh. 6, at 1. In June of 1981, Ms. Hayes became a Supervisor of Central Vault at the First American Bank of Maryland, Columbia, Maryland, a management position in which she supervises two departments: Central Payments and the Central Vault. WCTO Exh. 6, at 1. In that capacity Ms. Hayes is responsible for processing all payments and deposits made by mail, including seeing that all cash orders and shipments are properly placed and accounted for. WCTO Exh. 6, at 1. Ms. Hayes is paid $13,400 annually for her work at First American National Bank, and she would reduce her work week to 20 hours a week or less to accommodate her full 40 hour week commitment at the station.[14] WCTO Exh. 6, at 2; Tr. 352. Ms. Hayes has discussed her plans concerning WCTO with her supervisors. Tr. 352–53. Based on these discussions, Ms. Hayes would be allowed to work four hours a day and still be considered full time (Tr. 352–53), and, despite a decrease in her working hours, there would be no decrease in her salary. Tr. 354. Her time working at the station would be broken down as eight hours, Monday through Friday, at the station and four hours at the bank. Tr. 369. Ms. Hayes expects to be paid for her work at the station but has never discussed a specific salary. Tr. 365–66.

79. Ms. Hayes is married to Reverend Charles R. Hayes. WCTO Exh. 6, at 1. She serves as Choir Director of Grace Temple, the church which her husband pastors, and is a member of the Church Mother Board and Senior Missionary. WCTO Exh. 6, at 1–2. Ms. Hayes is active in missionary work for the church. It is an activity which takes approximately two to three hours a week. WCTO Exh. 6, at 2.

80. *Century Communications, Inc.*: Century proposes to integrate the following eleven stockholders: Steven Wechsler, who is Century's Executive Vice President, a Director, and 15.57 percent stockholder, is proposed as the station's General Manager. Century Exh. 1, at 1; Century Exh. 2, at 2. He would work full time. Century Exh. 2, at 2. Mr. Wechsler lives in the Washington area where he is an owner and is in charge of the financial and business affairs of Marquee

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[14] She works each business day from 8:30 a.m. to 5 p.m. and has more than one hour commute, each way, by public transportation. Tr. 352–92.

Television Network, Inc., a pay television service distributed by an MDS operator. Century Exh. 2, at 1–2.

81. Pauline Wechsler, who is Century's President, a Director, and 19.80 percent stockholder, proposes to spend 20 hours a week performing her duties as President and Director of Century. Century Exh. 1, at 1; Tr. 783. She will determine and review the policies of Century in connection with the station and she will represent Century at meetings, functions and activities in the Washington, D. C. area. Century Exh. 3, at 3. Ms. Wechsler stated that she would not be managing the day-to-day operations of the station. Tr. 778. Ms. Wechsler lives in the Washington area and has long been active in a variety of civic and philanthropic activities. Century Exh. 3, at 2.

82. Peter Yeskel, who is Century's Secretary-Treasurer, a Director and 13.35 percent stockholder (Century Exh. 1, at 2), proposes to spend, on the average, 30 hours per week carrying out the duties of Secretary-Treasurer and Chief Financial Officer—comptroller of Century. Century Exh. 4, at 2. Mr. Yeskel stated that on a week-to-week basis he would not necessarily spend 30 hours at the station. Sometimes the time spent at the station might be as little as ten or fifteen hours. Tr. 611–612; 631. The number of hours would depend on whatever kinds of business problems he had in other areas. Tr. 632. His duties would include preparing budgets, financial projections and financial analyses, establishing bookkeeping procedures, supervising billings, collections and accounts payable. Century Exh. 4, at 1. He would also supervise all employees involved in Century's financial affairs and would review station performance. *Id.*, at 2. Mr. Yeskel lives in Bethesda, Maryland. *Id.*

83. Diane Wechsler, who is a 10.46 percent stockholder of Century, proposes to work full time as the station's Customer Service Manager. Century Exh. 6, at 1. She would be responsible for implementing Century's procedures for considering suggestions and complaints, ascertaining community needs, and she would review Century's performance. *Id.* Ms. Wechsler lives in a Washington, D. C. suburb. *Id.*

84. Charles Bennett Fisher, who is Century's Vice President, a Director, and a 2.70 percent stockholder, proposes to work full time as the Director of Community Relations and Special Affairs. Century Exh. 1, at 1; Century Exh. 7, at 2. In this position Mr. Fisher would implement all public affairs programming at the station, supervise employees responsible for the programming and administer and implement Century's equal employment opportunities program. *Id.*; Tr. 660–61. In the past Mr. Fisher has been active in party politics and in 1967 he hosted a radio show for one year called "The Right to Succeed." Century Exh. 7, at 1. Mr. Fisher has always lived in Washington, D.C. and he is black. *Id.*

85. Eugene Aikens, Jr., who holds 6.67 percent of Century's stock, proposed to work on a part-time (30 hours per week) basis as

the station's Personnel Director. Century Exh. 1, at 1; Century Exh. 8, at 1. He would, subject to the supervision of the General Manager, hire and fire all personnel. Mr. Aikens is black and lives in Washington, D. C. *Id.*

86. Dr. Everett J. Gordon, who is a Director of Century and 3.56 percent stockholder, proposes to work as Director of Special Projects on a part-time basis (20 hours per week). Century Exh. 1, at 1; Century Exh. 9, at 3. Dr. Gordon would act as the station's contact with community groups, would be "involved" in all aspects of non-entertainment programming, and assist other integrated principals. *Id.*; Tr. 680. He would supervise employees as required. Century Exh. 9, at 3; Tr. 681–82. Dr. Gordon lives in Washington, D. C. He is retired and he has been active in civic affairs. Century Exh. 9.

87. Claudia R. Rayford, who is a 1.78 percent owner of Century (Century Exh. 1, at 1), proposes to work 20 hours per week as the Director of Business Development. Century Exh. 10. In this position she would set station advertising policy and would serve as the link between the Director of Advertising and Marketing and the General Manager. Tr. 705. She would also develop "rapport" with advertising agencies. Tr. 706. Ms. Rayford has, to some extent, participated in community civic affairs. She has participated in auxiliaries of her husband's professional organizations, which appear to exhibit an interest in the community. Century Exh. 10, at 1–2. She is black and lives in Washington, D. C. Century Exh. 10.

88. Dr. Frances E. Rankin, who is an owner with her husband as a tenant by entirety of 2.67 percent of Century stock, proposes to work as Director of Women and Children's Programming for 20 hours per week. Century Exh. 1, at 2; Century Exh. 11, at 2. She has plans to implement two programs, one scheduled for weekdays and the other for Saturdays, and supervise employees as necessary. Century Exh. 11, at 2. Dr. Rankin is black, lives in Chevy Chase, Maryland and belongs to the NAACP and various professional organizations. Century Exh. 11, at 1.

89. Edna R. Jones, who with her husband as tenants by entirety, owns 1.78 percent of Century stock, proposes to work 20 hours per week as Director of Consumer Affairs. Century Exh. 1, at 2. Century Exh. 12, at 2. She would supervise the implementation of consumer programming. Century Exh. 12, at 2; Tr. 738. She is black, lives in Chevy Chase, Maryland, and has demonstrated an interest and participation in local civic affairs. Century Exh. 12.

90. Brenda Gladden, who with her husband as tenants by entirety, owns 4.45 percent of Century's stock and is a Director, proposes to work 20 hours per week as house counsel and Legal Affairs Director. Century Exh. 1, at 1; Century Exh. 13, at 1; Tr. 701–02. Her work would involve development of contracts and collections. Tr. 694. She claims this would also involve her in Century's non-entertainment programming. Century Exh. 13, at 1. Ms. Gladden is

black, lives in Washington, D. C., and has listed membership in various social clubs and auxiliaries of her husband's professional organizations. Century Exh. 13, at 1–2.

91. *Capital Communications, Inc.*: Each of the eight Capital Communications' stockholders holds 12.5 percent of the stock. However, at the cut-off date there was one more stockholder, Hortensia Alvirez, who withdrew, and if her interest is not counted as being redistributed, each of the stockholders would hold an 11.11 percent interest. CapCom Exh. 1A, at 1; Tr. 915, 1008.

92. Karen L. Braun, who is Secretary and a Director of Capital proposes to work full time as the Assistant General Manager. CapCom Exh. 4. Ms. Braun would participate in overseeing all aspects of station operation. Tr. 1062. She would assist the General Manager in formulating and implementing policies regarding station personnel and programming. She would have primary responsibility for the business management of the station and would have supervisory authority over all station personnel. CapCom Exh. 3A, at 4. While stockholder employees would be supervised by Ms. Braun and the General Manager, they would, as Directors, ultimately review the General Manager's performance. Tr. 1068. Ms. Braun lives in Rockville, Maryland and has been active in civic and community affairs. CapCom Exh. 4, at 1–3.

93. Yetta W. Galiber, who is a Vice President and a Director of Capital, proposes to work part time as Assistant Program Manager, staff producer and talent. CapCom Exh. 8, at 1. Ms. Galiber would be responsible for the production of some local programming which she would host. CapCom Exh. 3A, at 5. Ms. Galiber is black, lives in Washington, D. C. and has participated in numerous civic activities. Her concern has been with employment and education of the disabled, day care, civil rights, and the provision of community services. CapCom Exh. 8; Tr. 1126–27.

94. A Diane Graham, who is President and a Director of Capital, proposes to work part time as Assistant Program Manager and staff producer. She would have responsibility for producing some local programs and would appear in some. CapCom Exh. 3A, at 5; Tr. 863–64. Specifically, she would produce a program to be called "Maryland Forum" (Tr. 864) and a children's program using a magazine format. Ms. Graham lives in Potomac, Maryland, is black, and has appeared on numerous public affairs television programs about employment discrimination. CapCom Exh. 9, at 1; Tr. 852.

95. Margaret T. Johnson, who is the Assistant Secretary and a Director of Capital, proposes to work full time at the station as Assistant Station Manager and Director of Administration. CapCom Exh. 6, at 4. She would assist the Station Manager in coordinating and overseeing all day-to-day operations. She would be responsible for recordkeeping, bookkeeping, and paperwork. Tr. 1184; CapCom Exh. 6, at 4. Ms. Johnson lives in Vienna, Virginia and has

participated in numerous community activities over a long period of time. Her civic activities establish a strong record of community involvement. CapCom Exh. 6, at 1–4.

96. Nancy McCormick-Pickett, who is an Assistant Vice President and a Director of Capital, proposes to work full time as Station Manager. CapCom Exh. 5, at 4. She would be responsible for coordinating technical operation, program scheduling, regulation of work schedules, and facilities scheduling. CapCom Exh. 5, at 4; CapCom Exh. 3A, at 4; Tr. 1278–80. She proposes to produce a public affairs program to be called "Your Health." CapCom Exh. 5, at 4. Ms. McCormick-Pickett lives in Arlington, Virginia, is black, and has been active in civic affairs. CapCom Exh. 5, at 1, 3–4. While Ms. McCormick-Pickett has not worked at a broadcast station, she has had substantial media experience. She holds degrees in communications from Stanford University and American University. She has attended the Stanford Film and Broadcast Institute and a management training program sponsored by the National Association of Broadcasters at the Harvard School of Business. CapCom Exh. 5, at 1; Tr. 1274–75. She has been on the public affairs staff of the United States Information Agency, worked at the National Association of Broadcasters, where she directed the Employment Clearing House, has been a director of communications for the Cancer Coordinating Council of Metropolitan Washington and has acted as a consultant to the Consumer Assistance Division of this agency, the Federal Communications Commission. CapCom Exh. 5, at 2–3; Tr. 1275, 1276. She is an active member of American Women in Radio and Television. *Id.*

97. Thelma J. Mullin, who is Treasurer and a Director of Capital, proposes to work as the part-time Personnel Manager and on-air talent. CapCom Exh. 10, at 1. As Personnel Manager, she would be responsible for preparation and implementation of personnel policies and a personnel manual, hiring and firing, and personnel management. CapCom Exh. 10, at 1; CapCom Exh. 3A, at 6; Tr. 1203; 1217–18; 1220. She anticipates that the on-air appearances would be on programs that deal with handicapped children and the needs of inner-city blacks, areas that she has been much involved with over the past several years. Tr. 1209. She lives in Washington, D. C. and has an extensive record of participation in civic affairs. CapCom Exh. 10, at 1, 2; Tr. 1198.

98. Lili S. Packer, who is an Assistant Vice President and a Director of Capital, proposes to work part time as Co-Director of Public Affairs and Assistant Program Manager. CapCom Exh. 11, at 3. She would be responsible for publicity, promotion, and public relations. CapCom Exh. 11, at 3. Ms. Packer would supervise production of the proposed program, "Hispanic Highlights," and she would be engaged in the preparation and production of other programs directed to the Hispanic community. *Id.*; Tr. 894–95. In

addition, Ms. Packer would administer the station's planned internship program for communications students CapCom Ex. 3A, at 6; Tr. 899. She would also supervise the station's dual-language project, which is intended ultimately to provide simultaneous dual-language audio to the Spanish speaking audience. CapCom Exh. 3A, at 6, CapCom Exh. 11, at 3. She lives in Washington, D. C. Although she was born in Argentina, she is a naturalized citizen, and she has been active in local civic affairs. CapCom Exh. 11, at 1, 2, 3; Tr. 910.

99. David J. R. Pales, who is a Vice President and a Director of Capital, proposes to work part time at the station as Co-Director of Public Affairs and Comptroller. CapCom Exh. 7, at 2; Tr. 1230. Mr. Pales lives in Washington, D. C. and is Hispanic. CapCom Exh. 7, at 1.

100. Each of the foregoing Capital stockholders and directors would serve on four standing committees, which would meet on a monthly basis, or more frequently when the situation warrants. CapCom Exh. 3A, at 6; Tr. 874; 1060; 1073. These committees would consider station editorial policy, programming philosophy, complaints, and community relations. *Id.*

101. *Grant Broadcasting Corporation*: Two of the three principals of Grant Broadcasting Corporation would be integrated into the management of the station. Milton Grant, who is the President, a Director, Chairman of the Board, and 50 percent shareholder, proposes to work full time at the station as its General Manager. Grant Exh. 3, at 1. Mr. Grant lives in Texas but he commutes to Washington on a regular basis and he owns a house in Bethesda, Maryland. Grant Exh. 3, at 1; Grant Exh. 1, at 1; Tr. 1524. In Texas, he is the full-time President (Chief Executive Officer) and General Manager of Station KTXA-TV, Fort Worth, Texas. Grant Exh. 1, at 5. He has also agreed to supervise the construction of Station KTXH-TV, Houston, Texas. *Id.*

102. Milton Grant has worked as a broadcaster since 1947. Grant Exh. 1, at 3. From the time television station WDCA, Channel 20, Washington, D. C. began operation in 1966 until 1979, Mr. Grant was the station's General Manager. He also had the responsibility of putting the station on the air and until the station was sold in 1969 to Superior Tube Company, he controlled 50 percent of the station's stock. Grant Exh. 1, at 5; Tr. 1526–28. Even after the station was sold, he remained Vice President, Director and General Manager of the station and received 5 percent of the net profits. Tr. 1528–30. As a practical matter, he made the decisions about the station's programming, although Superior Tube could, but never did, overrule him. Tr. 1535–36.

103. An analysis of official program reports filed with the Commission by WDCA and other television stations licensed to Washington, D. C. for the years 1973–1979, disclose the following

news and public affairs program percentages for the complete broadcast day of each year's composite week:

	1973 *News*	*Public Affairs*
Average of all D. C. stations	**8.1**	**6.3**
WTTG (Ch. 5)	**6.8**	**6.7**
WDCA (Ch. 20)	**1.2**	**1.6**

	1974 *News*	*Public Affairs*
Average of all D. C. stations	7.7	**6.4**
WTTG	**5.6**	**5.4**
WDCA	1.1	2.0

	1975 *News*	*Public Affairs*
Average of all D. C. stations	8.5	6.6
WTTG	4.8	6.5
WDCA	1.2	1.1

	1976 *News*	*Public Affairs*
Average of all D. C. stations	8.6	5.9
WTTG	4.5	5.7
WDCA	1.1	.9

	1977 *News*	*Public Affairs*
Average of all D. C. stations	8.6	5.9
WTTG	4.4	4.9
WDCA	1.3	.8

	1978 *News*	*Public Affairs*
Average of all D. C. stations	7.4	5.1
WTTG	4.3	4.2
WDCA	1.2	.7

	1979 *News*	*Public Affairs*
Average of all D. C. stations	7.4	5.2
WTTG	3.9	4.1
WDCA	1.0	1.0

Century Exh. 26, at 37–38, 47–48, 56–57, 66–67, 76–77, 86–87, 96–97.

104. Washington, D. C. is ranked as the eighth television market.

A further analysis of the program performance for the period 1973–1979 for WDCA as compared with independent UHF television stations in markets ranked sixth (Boston, Mass.), seventh (Detroit, Mich.), ninth (Cleveland, Ohio), and tenth (Dallas-Forth Worth, Texas) disclosed the following overall station rankings, as contained in the stations' annual programming reports showing the percentages of news and public affairs aired during the complete broadcast day:

1973

Number of stations reporting: Nine.

	News
First Ranking, KXTX, Dallas-Ft. Worth	2.3
Ninth Ranking, WXON, Detroit	0
Eight Ranking, WDCA	1.2

	Public Affairs
First Ranking, WSBK, Boston	4.5
Eighth and Ninth Ranking WXON, Detroit and KXTX, Dallas-Ft. Worth	0
Seventh Ranking, WDCA	1.6

1974

Number of stations reporting: Nine

	News
First Ranking, KXTX, Dallas-Ft. Worth	2.3
Ninth Ranking, WXON, Detroit	0
Eighth Ranking, WDCA	1.1

	Public Affairs
First Ranking, KXTX, Dallas-Ft. Worth	12.1
Ninth Ranking, WXON, Detroit	1.3
Eighth Ranking, WDCA	2.0

1975

Number of stations reporting: Eight.

	News
First Ranking, KXTX, Dallas-Ft. Worth	2.3
Eighth Ranking, WXON, Detroit	0
Seventh Ranking, WDCA	1.2

	Public Affairs
First Ranking, WSBK, Boston	5.3
Eighth Ranking, WDCA	1.1

1976

Number of stations reporting: Nine.

	News
First Ranking, WGPR, Detroit	4.8
Ninth Ranking, WXON, Detroit	.4
Seventh Ranking, WDCA	1.1

	Public Affairs
First Ranking, WSBK, Boston	5.0
Ninth Ranking, WDCA	.9

1977

Number of stations reporting: Ten.

	News
First Ranking, WXNE, Boston	4.2
Tenth Ranking, WSBK, Boston	.7
Seventh Ranking, WDCA	1.3

	Public Affairs
First Ranking, WSBK, Boston	5.2
Tenth Ranking, WDCA	.8

1978

Number of stations reporting: Nine.

	News
First Ranking, WXNE, Boston	3.4
Ninth Ranking, WSBK, Boston	.7
Fifth Ranking, WDCA	1.2

	Public Affairs
First Ranking, WUAB, Cleveland	6.5
Ninth Ranking, WDCA	.7

1979

Number of stations reporting: Ten.

	News
First Ranking, WXNE, Boston	3.4
Tenth Ranking, WSBK, Boston	.7
Eighth Ranking, WDCA	1.0

Century Exh. 26, at 29–95.

105. The foregoing comparison of WDCA's programming performance with other stations in the Washington, D. C. market and with independent UHF stations in other comparable markets were made on the basis of the complete broadcast day of sign-on to sign-off. WDCA broadcast a substantial portion of its news programming between the hours of midnight and 6:00 a.m., as indicated by the following comparison of WDCA news program percentages, for this time slot and for the complete broadcast day:

				News			
	1973	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*
Complete Broadcast Day:	1.2	1.1	1.2	1.1	1.3	1.2	1.0
Midnight to 6:00 a.m.	.5	.5	.5	.5	.5	1.0	.6

Century Exh. 26, at 14–20, 38, 48, 56, 66, 77, 87, 96.[15]

106. Lawrence J. Brailsford, who is Vice President, a Director, and a 25 percent shareholder of Grant, proposes to work as the part-time (12 hours per week) Public Affairs Director. Grant Exh. 3, at 1. Mr. Brailsford is black and lives in the District of Columbia.

107. *Urban Telecommunications Corporation*: Theodore M. White, who is the President and sole shareholder of Urban Telecommunications Corporation, proposes to serve as the full-time General Manager of the facility. Urban Exh. 5, at 1. Mr. White is black, lives in the District of Columbia, and is not involved in any civic activities. *Id.*, Tr. 2261. He has no prior broadcast experience. Tr. 2249.

108. *Washington Television, Inc.*: Washington Television, Inc. proposes that two of its four shareholders would be integrated into management Dr. Joann Anderson, who is Treasurer, a Director, and holds a 53.6 percent interest in Washington Television, Inc., proposes to work full time as the station's General Manager. WTI Exh. 1A, at 3; WTI Exh. 2, at 2; Tr. 2448–49, 2573. She would be responsible for implementing station policy and guidelines and would be the primary station representative in community activities. WTI Exh. 2, at 2; Tr. 2558. Dr. Anderson holds graduate degrees in mass communications and works for the United States Department of Commerce, National Telecommunications and Information Administration, Public Telecommunications Facilities Program as a Program Officer. WTI Exh. 2, at 1, 2. The organization she works for finances the construction of nonprofit broadcast and non-broadcast telecommunications facilities. *Id.*

109. Dr. Anderson owned and worked part time as Assistant General Manager of WOWD(FM), Tallahassee, Florida. Tr. 2541–42, 2560–69, 2571. While Dr. Anderson told the Commission when she applied for WOWD in 1975 that she would be the general manager of the station, instead after a grant was made, she decided to go to graduate school. Century Exh. 34, Tr. 2564, 2571. This decision occurred after the competing applicant dropped out and the con-

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[15] Mr. Grant, in order to demonstrate that the above data are not an accurate picture of Channel 20's performance, submitted detailed analysis of 1977. Grant assessed Channel 20's news and public affairs programming for alternate months during 1977 to demonstrate that substantially more news and public affairs were televised than the composite weeks referred to by Century. This evidence is not comparable, however, since Grant did not undertake a similar study of the other stations and compare it to Channel 20's performance. There is no way of telling if Grant had assessed the programming of other stations in the same way whether Channel 20's performance would still be relatively the same. See Grant Exh. 4, Attach. A, at 27–28. Thus, the evidence submitted is not probative without making highly subjective determinations about the value of a specific program. The information submitted by Grant provided only its own view of the value of Milton Grant's record at WDCA.

struction permit was granted. After she finished her graduate studies, she became the general manager for a four month period in 1979. Tr. 2542–43, 2561. There is no evidence in the Commission's records that Dr. Anderson or the station ever notified the Commission of the change.

110. Dr. Anderson lives in Bethesda, Maryland, is black, and works (since September 1981) with the Cub Scouts in Bethesda two hours per month. WTI Exh. 2, at 1, 3.

111. Lonnie Murray, who is President, a Director, and a 16.5 percent owner of Washington Television, Inc., proposes to work full time as Program and Operations Manager. WTI Exh. 1A, at 3, 4; Tr. 2395. Mr. Murray would supervise programming, traffic, administrative, and engineering personnel at the station. He would also have responsibility for preparation and administration of the budgets in all departments. WTI Exh. 1A, at 4; Tr. 2398, 2415–17. Mr. Murray is an owner of WWIW, New Orleans and has been since March 1977. Beginning in September 1977 and ending in May 1979, he was the President and two-thirds owner of the corporation that held the license for WWIW. WTI Exh. 1A, at 4. During that period the station manager reported to Mr. Murray daily and he visited the station approximately once a month. WTI Exh. 1A, at 4.

112. *WSCT-TV, Inc.*: WSCT-TV, Inc. is wholly owned by Formula Telecommunications, Inc. WSCT Exh. 1, at 1. The officers and directors of WSCT-TV are also officers and directors of Formula. WSCT Exh. 1, at 1, 2. George C. Corbin, III is President and a Director of the applicant, WSCT-TV, Inc., and he is President and Chairman of the Board of Directors of Formula. WSCT Exh. 1, at 1, 2. Mr. Corbin is a 36.72 percent owner of Formula. He proposes to work full time as General Manager of the station. WSCT Exh. 3, at 1. He would be responsible for overseeing and coordinating all functions of the operation. Tr. 1670.

113. Mr. Corbin has television and radio broadcast experience. He has been a radio announcer, television floor director, assistant director/associate producer for station productions at a Washington, D.C. television station; a director and operations manager at a television station in Goldvein, Virginia; and studio coordinator for the ABC network in New York. WSCT Exh. 4, at 1, 2. Mr. Corbin lives in Washington, D.C. and is black. WSCT Exh. 4, at 1.

114. Thomas A. Farrand is a Vice President and Director of the applicant and Vice President - Creative Services Director of Formula, of which he is a 13.77 percent owner. WSCT Exh. 1, at 1, 2. Mr. Farrand proposes to work full time as the station's Program Director. WSCT Exh. 3, at 1. He would direct programming activities, including production scheduling, and program acquisition. *Id.* Mr. Farrand has worked at a radio station, several television stations and produced an independent television program, "International Assignment." WSCT Exh. 6, at 2. His television work has been

as an assistant director, assistant producer, and producer and director of local and children's programming. WSCT Exh. 6, at 1, 2.

115. Mr. Farrand lives in the Washington, D.C. area and is active as a priest in his religion, the Temple of Cosmic Religion. WSCT Exh. 6, at 1, 3. He is also director of religious education for the Christ Interfaith Community Church, which is located in Washington, D.C. WSCT Exh. 6, at 2.

116. Amy C. Gilbert is a Vice President and Director of WSCT and Vice President, Director, and Treasurer of Formula, of which she is a 13.77 percent owner. WSCT Exh. 1, at 1, 2. She proposes to work 20 hours per week, or part time, as the Business Manager or Comptroller of the station. WSCT Exh. 3, at 1. Ms. Gilbert lives in Washington, D.C. WSCT Exh. 5, at 1.

117. Armando B. Rendon is Corporate Secretary of WSCT and Formula and he owns 11.47 percent of Formula. WSCT Exh. 1, at 1, 2. He proposes to work full time as the Station Manager. WSCT Exh. 3, at 1. Mr. Rendon would be the primary person responsible for the day-to-day administration of the station. *Id.* Mr. Rendon is a Hispanic-American, lives in the District of Columbia, and is very active in local civic affairs. WSCT Exh. 7, at 1–3. He has been the host and producer of a radio public affairs program and he holds a 10 percent interest in Los Cerezos Television Company, the licensee of an experimental television broadcast translator station on Channel 56 in Washington, D.C. WSCT Exh. 7, at 1; WSCT Exh. 2. Mr. Rendon was President of the Board of Los Cerezos from 1980 to 1981. Tr. 1911; WSCT Exh. 7, at 1. In addition, Mr. Rendon works as a public information officer at the U.S. Bureau of the Census. WSCT Exh. 7, at 1.

118. Bill E. Tucker is Vice President - Sales of WSCT and a Vice President and Director of Formula, of which he holds a 4.61 percent interest. WSCT Exh. 1, at 1, 2. He proposes to work full time as the station's Sales Manager. WSCT Exh. 3, at 2. He would have responsibility for all sales and would supervise the station's traffic, promotion and sales functions. *Id.* Mr. Tucker has worked as an account executive and local sales manager at two major market television stations and as an account executive at ABC and NBC. WSCT Exh. 8, at 1–2. He also held a similar position at Blair Television from 1979 to 1981. *Id.*

119. Mr. Tucker is black, he lived in Washington from 1978 to 1980, but since 1980 he has lived in New York City. He would move to Washington to work at the station. WSCT Exh. 8, at 1.

120. Van F. Alexander is the Vice President - Corporate Relations of WSCT and a Vice President and Director of Formula, of which he is an 11.47 percent owner. WSCT Exh. 1, at 1. Mr. Alexander proposes to work full time as the station's Director of Public Affairs. WSCT Exh. 3, at 2. He has taken training in radio and television skills and he worked as a sound technician at two

Washington, D.C. television stations from 1967 to 1972. WSCT Exh. 9, at 1. Mr. Alexander also was President of and worked at New Image, Inc., a television production firm. *Id.*

121. He lives in New Carrollton, Maryland, is black and has been particularly active in Washington civic activities, such as D.C. Reading Is Fundamental and the Work Education Council of the Washington Metropolitan Council of Governments. WSCT Exh. 9, at 1, 2; Tr. 2021.

122. Two issues about WSCT's ownership—and therefore its integration, have been raised. WSCT's parent, Formula Telecommu-
nications, Inc. has received a $10,000 loan from Syncom Capital Corporation. WCTO Exh. 14, at 2. Formula has used the loan to finance its syndicated program production. Tr. 1924. Formula is obligated to repay the loan with interest. WCTO Exh. 14, at 2.

123. In addition, by letter dated December 17, 1980 Syncom has also promised to lend Formula $500,000. WCTO Exh. 14, at 1. Of that amount, $300,000 represents a ten-year subordinated note carrying interest at 14 percent. *Id.*, at 1–2. The $300,000 loan commitment is available to WSCT upon grant of the construction permit from the FCC to build and operate Channel 14 in Washington, D.C. *Id.*, at 3. The remainder, consisting of $200,000, would be available on demand by Formula during the first one and one-half years after closing on the first portion of the loan. *Id.*, at 2. If any of this money is borrowed, it would be incorporated into the subordinated note after passage of the year and one-half. *Id.*

124. If the loan is made, Syncom would receive warrants convertible into Formula stock. The value of warrants would depend on the equity raised by Formula. If more than $1 million in equity is raised by Formula, the warrants will be equal to 1,000 shares or 10 percent of Formula's stock. WCTO Exh. 14, at 2. If Formula fails to reach $1 million in equity, the warrants would be increased, pursuant to a schedule, up to a maximum of 2,000 shares or 26 percent of Formula's stock, depending on the dollar amount of the equity raised by Formula. *Id.* Further, if the $200,000 in demand funds is called upon, Syncom is entitled to warrants sufficient to maintain a 26 percent interest. *Ibid.*

125. Syncom's loan commitment to Formula also contains a put/call provision. From the fifth to tenth years after closing, Syncom has the right to sell, or put, its warrants to Formula, and Formula has the right to purchase, or call, the warrants held by Syncom. WCTO Exh. 14, at 3. The warrants are to be acquired by Formula at fair market value as determined by appraisers. *Id.* The possible maximum of $500,000 in loan funds from Syncom to Formula must in any event be paid back—totally aside from the warrants—pursuant to the subordinated note provided for in Syncom's commitment letter. WCTO Exh. 14, at 1–2.

126. Syncom's loan commitment letter makes reference to the

$10,000 loan, but does not tie it to any requirement that future funding also be obtained by Formula from Syncom. WCTO Exh. 14, at 2. In fact, the $10,000 loan is repayable on its own terms and at a 16 percent interest rate under a demand note maturing on December 21, 1982. *Id.*

127. In an "Agreement" dated January 14, 1981, appended to the loan commitment letter, Formula has agreed—as consideration for the $10,000 loan—"to provide Syncom with a right to purchase warrants and to participate in the financing for the start-up and construction of FTI's [Formula Telecommunications Incorporated's] station and other business operations as outlined in Syncom's commitment letter to FTI dated December 17, 1980." WCTO Exh. 14, attached Agreement.

128. Participation of Syncom is, in any event, not necessary to WSCT's financing of its proposed station. Speaking to this issue, the Commission said, in the *Hearing Designation Order* (46 Fed. Reg. 43737, 43742 (1981)):

> Since the loan from MNB (Maryland National Bank) is sufficient to cover the construction and operation of the proposed facility, further analysis of WSCT's financial sources is not necessary. Accordingly, a financial issue will not be specified.

129. The second issue raised has to do with whether Formula has established a voting trust that distorts ownership. George Corbin explained how the trust would work (WSCT Exh. 29, at 2):

> This block of 5,500 shares would consist of the shares held by myself, Thomas Farrand, Amy Gilbert, Armando Rendon, Bill Tucker, and Van Alexander, and of these individuals, Armando Rendon, Bill Tucker, Van Alexander, and myself are minority group members. Together we hold 70% of the shares in the 5,500 share block. Through this means, we could insure that even if all 10,000 authorized shares of Formula's stock were eventually sold, the majority of those shares (55%) would be voted in a block that was itself minority-controlled. Thus, such a voting trust agreement, if it were formalized, would have the effect of insuring control of Formula by minority group members even if the ownership of Formula's stock by minorities were to fall below 50%.

130. However, no formal agreement exists about the trust. WSCT Exh. 29, at 3.[16] While some of Formula's principals have discussed the use of the voting trust concept, there has never been a vote of the Formula shareholders applying a trust agreement. WSCT Exh. 29, at 2, 3.

Comparative Coverage (Issue 3)

131. While each applicant will serve areas and populations already receiving a minimum of five television signals, there is a divergence in the extent of their projected service areas. WSCT Exh.

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[16] D. C. Code § 29–330 provides that a true voting trust agreement must be in writing and deposited with the corporation at its registered office.

17, at 2. The varying service areas and populations to be served within the Grade B contours of the seven parties will be as follows (*Id.*, at 5):

Applicant	*Population*	*Area (Square Miles)*
Grant	5,144,312	6,298
WSCT	4,997,204	5,280
WCTO	4,729,296	4,185
Capital	4,686,961	5,027
Century	4,680,566	4,970
WTI	4,638,173	5,116
Urban	4,377,704	4,523

Capital Communications' Failure to Reveal In Interrogatories Velez v. Devine Involving Diane Graham (Issue 5):

132. During the pendency of *Velez v. Devine*, Capital Communications was served with interrogatories. Interrogatory 12(a) of Grant requested that Capital:

> State whether any principal of Capital Communications of Washington, Inc. is or has been an officer, director, or principal at any time during the last five (5) years of an entity involved in, or the subject of, any legal proceedings before any court or administrative agency, or is currently the subject of any investigation or outstanding judgments or orders arising from such proceedings.

CapCom did not disclose the pendency of *Velez v. Devine* in its Answer to this Interrogatory. WTI Exh. 11, at 2. Ms. Graham testified that she decided not to disclose the *Velez v. Devine* proceeding because she did not consider herself a "principal, director or officer" of the Office of Personnel Management. Tr. 2820. She decided that only political leaders could be considered officers, directors or principals and not members of the career civil service—even of a high rank—whom she determined to be mere employees. Tr. 2822. Ms. Graham is a member of the Senior Executive Service of the Federal Government, which is considered a managerial position. Tr. 2842–43. *Velez v. Devine* specifically concerned her actions as the selecting officer in failing to hire Ms. Velez. WCTO Exh. 13. She did not, in preparing answers to Interrogatories, tell either other Capital Communications stockholders or its counsel about the *Velez* proceeding. Tr. 2839.

133. Ms. Graham denied having deliberately concealed the pendency of the *Velez* case because of its possible impact on CapCom's application. Tr. 2842. This must be viewed in light of the immediately preceding testimony at Tr. 2841–42:

> Q: Did you view the pendency of the [Velez] case as helpful or adverse to CapCom's application?
>
> A: I didn't view it in relation to CapCom's application either way.
>
> Q: Well, if the [Velez] case turned out badly for you, and there was a finding of

> discrimination on your part, would that be helpful or adverse to CapCom's case?
>
> A: I'm not in a position to say because I'm not making judgments on CapCom's case.
>
> Q: All right, well, if there is a finding that you violated federal law, would you think that would be helpful to your application?
>
> A: I am not the person making the decision on what is helpful and what isn't helpful.

134. After Judge Gesell's decision, the Capital Communications application was amended to report it. Tr. 2823. The record shows, however, that Judge Gesell's decision was reported in the newspapers. Tr. 2877, 2891. There would have been little opportunity to conceal it, given the large number of local residents involved in competing applications in this case, at least some of whom would be likely to "read the newspaper like everybody," as Ms. Farmer put it. Tr. 2891.

Conclusions of Law

135. *The Financial Qualifications of Century and Urban*: The Broadcast Bureau found that Century Communications required an additional $925,951 in order to meet its estimated construction and operation costs. At the hearing Century demonstrated that three of its stockholders had subscribed to bonds totaling $1,200,000. Pauline Wechsler and Dr. Herbert M. Wechsler have provided financial statements which show sufficient net liquid assets to fulfill their subscriptions. Dr. Everett J. Gordon has demonstrated that he has an available bank loan to meet his. Thus, Century has more than enough money to construct and operate.

136. The Broadcast Bureau also found that Urban had not provided reasonable assurance that it had available the $2,525,000 it needed for construction and operation. Urban made no attempt to correct the inadequacies in its financial plan until a few days before the hearing. Then, instead of reforming its original showing, it presented an entirely new plan for review. This plan relied on $1,250,000 from a lender called Ideal Opportunities Corp. of Miami Beach, Florida. It was evident that Ideal Opportunities was not an equipment manufacturer, or a financial institution, and therefore Urban was asked to establish the ability of Ideal Opportunities to lend it over a million dollars. Urban, during the course of the hearing, chose not to make a showing with regard to Ideal Opportunities and withdrew the letter from it.

137. In Urban's new proposal it also relies on a loan of $1,000,000 from the National Bank of Commerce (NBC), Washington, D. C. The Chairman of the Board of Directors of NBC, Jeffrey N. Cohen, testified at the hearing that NBC would lend Urban the money but that it would need to rely on other banks to provide

$510,000 of the loan. Mr. Cohen stated that NBC frequently relied on three correspondent banks to supply such funds individually, or in combination. The correspondent banks, however, he pointed out, would independently assess the borrower. In fact, Mr. Cohen had not shown any of the material that Urban had submitted to NBC to secure the loan to the other banks. It cannot be said that there is any assurance at all that NBC's correspondent banks would participate in a loan to Urban.[17]

138. In addition, it is evident that even the $490,000 which NBC could legally lend to Urban might be reduced by "points" totalling $70,000, and restricted by a yet undetermined method of repayment. (For example, Mr. Cohen also said that Urban might need to maintain compensating balances.) Given these uncertainties about what conditions will be exacted, there is no way of determining Urban's ability to meet them. Overall the loan from the National Bank of Commerce is not reasonably assured.

139. Although Urban also relies on equipment to be leased from Amvest Leasing Corporation, it did not demonstrate that Amvest has the ability to lease that equipment. Urban refused to present either relevant written material establishing Amvest's ability or an appropriate representative of Amvest to discuss the leasing letter sent by Amvest.[18] Currently, there is a letter from Amvest in the record but it is unclear whether Amvest has the ability to lease the equipment and what conditions Urban would have to meet if it did.

140. Urban estimates that it needs $732,840.35 to pay Amvest and meet its additional expenses. Urban Exh. 3, at 1. Aside from the fact that these claimed expenses are unsupported (the designation order states an entirely different amount), it means that, even if the Amvest loan is credited, Urban must rely on the unestablished one million dollar loan from NBC. And this is a loan which cannot reasonably be considered available to Urban.[19] Finally, Urban's financial showing also fails because it did not comply with the order to produce witnesses. Urban is financially unqualified.

141. *The Character Issues Involving Grant Broadcasting and*

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[17] In the sole discussion Mr. Cohen did have with a correspondent bank, he led the correspondent to believe that Urban would rely on pay programs for its format and revenues. However, Urban had long since abandoned its pay television format when the discussion took place.

[18] It should be noted in this regard that Urban did attempt to make a late showing. While the comparative hearing ended on April 2, 1982, the request to present evidence was not made until July 7, 1982, over three months after Urban had been asked to make such a showing. In addition, Urban's proffer was subject to several conditions: the hearing had to be held the next day and the witness could only be interviewed by telephone. This request was denied because it would have been disruptive and it was unclear what showing Urban intended to undertake.

[19] Urban, as already noted, is now without counsel and its proposed findings, which were filed by counsel, are not clear on how even the most flattering review of the existing record gives Urban sufficient funds to meet its estimates.

Capital Communications: Grant Broadcasting has three stockholders, Milton Grant, who holds 50 percent of the stock, Lawrence Brailsford, who holds 25 percent, and Theodore Hagans, who holds 25 percent. Only Milton Grant and Lawrence Brailsford intend to work in the day-to-day operation of the station. Of these two integrated stockholders, Mr. Brailsford presents two qualitative attributes that Mr. Grant lacks: He is black and he lives in Washington, D. C.

142. However, Mr. Brailsford, in order to perfect his 25 percent interest and his integration credit, must have available $27,150. In July 1980, when he submitted his balance sheet, he stated he had cash on hand to pay the amount required. However, in July 1981, he declared bankruptcy and, in September 1981, he informed the bankruptcy court that his liabilities exceeded his assets.

143. When, in November 1981, Mr. Brailsford was asked in interrogatories in this case about his involvement in legal proceedings, the bankruptcy was not revealed. In November 1981, Mr. Brailsford also submitted a letter, as part of a response to a petition to enlarge, which indicated that he still had sufficient cash on hand to meet his commitment. His testimony indicates that that was not the case.

144. Mr. Brailsford attempted to excuse his apparent deception by explaining, at least initially, that he told the relevant members of Grant about his bankruptcy. But Mr. Brailsford's testimony at the hearing is inconsistent about his claim that he told Grant's counsel and its two other stockholders, Milton Grant and Theodore Hagans, about his bankruptcy. First he maintained he had not told them, then in some detail he explained how he had informed each of them, and finally he stated that he had not. Milton Grant, Grant Broadcasting's President, denies he was told when the November filings were made. In his testimony, Mr. Grant maintained that he had not known of Mr. Brailsford's bankruptcy until shortly before the hearing, in March 1982, when the matter was reported to the Commission. It is also evident from Mr. Grant's testimony, and Mr. Brailsford's, that Mr. Brailsford had been repeatedly told by Milton Grant how important it was to keep material information in the application accurate and to report any changes as soon as possible. While neither counsel for Grant nor Mr. Hagans testified, Milton Grant's testimony was consistent and creditable. In contrast, Mr. Brailsford's testimony was too inconsistent to be credited.

145. Mr. Brailsford appears to have deliberately withheld a fact, which he believed to be material to Grant's case, until another applicant in this proceeding called it to the Commission's attention. His deceptive actions are no better illustrated than by his attempt to alter a letter purportedly reaffirming his financial means to purchase his stock. He attempted to include his wife in the obligation, but he left the clear impression in the body of the letter

that the assets to be used were the same as those he promised before his bankruptcy. While it may have been a deception which was unnecessary, since Milton Grant stated that if he had known he would have lent Mr. Brailsford the money, the record demonstrates that Mr. Brailsford believed it was necessary.

146. The record also reflects that when Mr. Brailsford was informed that such information was called for in interrogatories, he did not reveal it. Moreover, Mr. Brailsford's deceptive testimony during the hearing lends credance to the conclusion that he intended to deceive the Commission. See *West Coast Media, Inc. v. F. C. C.*, No. 81–1548, D.C. CIR. decided December 7, 1982, at Slip Op. 5. Overall, his testimony on this issue is so contradictory and inconsistent that it is unbelievable and not entitled to any weight.

147. It has been stated often enough that the relationship between licensees and the Commission is one based on trust because of the necessity to rely on applicants and licensees to report relevant facts and to state events truthfully: Mr. Brailsford fails in both these respects.

148. His actions, moreover, are important in determining Grant Broadcasting's qualifications. He is a major owner of Grant Broadcasting; he is proposed for part-time integration in a position in which he is to represent the station before the public; and he is a director and officer. Grant Broadcasting has taken no steps to minimize his participation, and it is evident that as a principal of Grant Broadcasting his influence would be substantial. While there is no evidence that Milton Grant, the largest stockholder and the only stockholder to be integrated on a full-time basis, has not dealt truthfully with the Commission, he has taken no steps to insure that Brailsford's influence will not affect the public interest. Grant Broadcasting is, therefore, not qualified and will not be given comparative consideration.

149. The President of Capital Communications of Washington is Diane Graham. She is currently the Assistant Director of the United States Office of Personnel Management for Affirmative Action Programs. One of Ms. Graham's hiring decisions at OPM was found by the Federal District Court for the District of Columbia to have resulted in discrimination against one of the applicants, Roceliz Velez, because of her sex. Moreover, the reasons Ms. Graham gave to justify her actions were not given any weight by the court because her testimony was inconsistent and contradictory

150. However, this incident stands out in her professional record as an anomaly. Her overall hiring record at OPM demonstrates a superior devotion to equal employment opportunity. Her own office, for which she bears hiring responsibility, has had an improved level of hiring and promotion in all job categories. Moreover, the number of women employed in her office far exceeds the level of female employment in the federal government as a whole. At the manageri-

al level, employment of women in her office exceeds the government average by eight times. Thus, aside from the single incidence of discrimination cited in this case, there is no other evidence that establishes that Ms. Graham discriminates on the basis of sex. The contrary is true, she has enhanced equal employment opportunity. This incident should not disqualify Capital and it is of no comparative importance in light of the weight to be attributed to Ms. Graham's other hiring decisions.

151. *The 307(b) Issue: Arlington, Virginia vs. Washington, D. C.*: This proceeding began with thirteen applicants, twelve applied for Washington, D. C. and one, Urban Telecommunications, applied for the Washington suburb of Arlington, Virginia. Urban is not financially qualified and it never did make an acceptable showing that Arlington should receive a 307(b) preference. Nevertheless, its assertion warrants discussion. The claim that Arlington should have its own commercial television channel is similar to the claim recently considered in *Cleveland Television Corporation*, 52 Radio Reg. (P&F) 2d 581, 586–87 (Rev. Board 1982) that the Cleveland suburb, Shaker Heights, should prevail over Cleveland, and it requires the same resolution. Urban proposes to serve essentially the same area and population as the other applicants. The record reflects that Urban's transmitter would be located in Washington, D. C. and that Urban views the whole Washington area as being the audience and support for the station. Moreover, Arlington, like Shaker Heights, is a contiguous suburb that represents only a part of the Washington, D. C. community.

152. In this setting, to accept the claim that an applicant for Arlington would provide a more fair and equitable distribution of Channel 14 would raise form over substance. The reality is that Urban would use Section 307(b) as a procedural device to gain a preference and it would then use the allocation to provide service to the same community as the other applicants. The record reflects it has no ties to Arlington. Its only stockholder lives in Washington, D. C., its transmitter would be in Washington, D. C., and its financial proposal to its backers has been on the basis that it would serve the Washington, D. C. television market. Section 307(b) is not of decisional significance in this case. *Id.*

153. *Diversification of Control of the Media of Mass Communications*: Of the five qualified applicants none hold media interests. While some of the principals in various applications have media interests, these media interests are not large and present no ground for comparative consideration; they are *de minimis*. *Gainesville Media, Inc.*, 70 F.C.C. 2d 58, 64 (Rev. Board (1978)). WCTO has no media interests and its officers, directors and board members have none. Century has no media interests and its stockholders have stated they would divest themselves of any existing interests they

now hold. The principals of Capital Communications, like WCTO, have no media interests.

154. Washington Television has two stockholders that have broadcast interests. Lonnie Murray owns 13 percent of a radio station in New Orleans and John F. X. Browne holds 1 percent in a company that operates two television stations in Michigan.[20] Neither Mr. Browne nor Mr. Murray control the entities in which they have an interest and the stations are located a substantial distance from Washington, D. C. While Mr. Browne's television interest is of no consequence, Mr. Murray's radio station warrants a very slight demerit.

155. WSCT's Lewis Rivlin, who holds only a 4.59 percent interest in the applicant, also owns 25 percent of a company that holds a 10 percent interest in three cable systems that are 400 miles or more away from Washington. Mr. Rivlin's derivative interest is 2.5 percent in one system, located in Portland, Maine, and 2.19 percent in the two other systems, located in South Carolina. Mr. Rivlin lacks the possibility of any control over WSCT and his interest in the cable systems is very small. Moreover, the cable systems are some distance from the Washington, D. C. service area. As a practical matter his cable ownership is too small and remote to warrant any comparative demerit. See *New Continental Broadcasting Company*, 88 F.C.C. 2d 830, 851 (Rev. Board 1981). The cable television interests in *New Continental* were assigned a very minor demerit. However, it is apparent that Mr. Rivlin's holdings are significantly smaller and more remote than those held in *New Continental* and, therefore, no demerit is warranted.[21]

156. *Participation in Station Operation by Owners*: The deciding factor in this case is the preference to be granted when an applicant promises that owners will actively participate in the day-to-day operation of the station. There are differences between the applicants in the quantitative participation promised, and to a lesser extent, in the quality of the persons who will participate. The level of participation promised by WSCT-TV is the highest of all applicants.

157. The Commission is "primarily interested in full-time participation." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d, 393, 395 (1965). "[N]o credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." *Id.* Positions are

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[20] Mr. Browne's media ownership is attributable for comparative purposes although the stations have since been assigned. See *Order*, FCC 82M-3669, released November 19, 1982, granting Washington Television's amendment notifying the Commission of the assignment.

[21] If Grant and Urban were considered they might each receive a slight demerit for their media holdings. Mr. Grant because of his interest in a Texas television station and Urban because of Mr. White's new interest in a Nashville, Tennessee construction permit.

assessed in terms of the role they play in policy formation and station management. Other positions will be of diminished credit. *Id.* An owner's residence and relevant broadcast experience strengthens a proposal, but local residence is more important than broadcast experience.

158. George C. Corbin, Thomas A. Farrand, Armando B. Rendon, Bill E. Tucker, and Van F. Alexander are all officers of WSCT-TV and its parent corporation, Formula Communications, and their collective ownership interest is 77.64 percent. Each would play an important role in the management and operation of the station on a full-time, daily basis. George Corbin, who is a 36.72 percent owner, would be the General Manager; Thomas Farrand, who is a 13.77 percent owner, would direct programming activities; Armando Rendon, who is a 11.47 percent owner, would be the Station Manager; Bill Tucker, who is a 4.61 percent owner, would be the Sales Manager; and Van Alexander, who is a 11.47 percent owner, would be the Director of Public Affairs.

159. Their quantitative integration is enhanced by their qualitative attributes. All live in Washington, D. C., but Mr. Tucker, who would move to Washington. In addition, Messrs. Farrand, Rendon, and Alexander have exhibited participation in community affairs. Each of them have had relevant television experience, and some of that experience has been in the Washington, D. C. market. In addition, Messrs. Corbin, Tucker, and Alexander are black and Mr. Rendon is Hispanic. Overall, minority group members, who will work full time at the station in management, own 64.27 percent of the applicant.

160. WSCT-TV's proposal is further enhanced by the part-time (20 hours per week) integration of a woman, Amy Gilbert, who owns 13.77 percent of the applicant and would be the Business Manager, or Comptroller. She also lives in Washington, D. C. When her participation is considered, WSCT-TV proposes integration into management, on a full-time and part-time basis, persons who own 91.81 percent of the applicant. And, of this group, minorities and women hold a 78.04 percent interest in WSCT-TV. This becomes particularly important when it is remembered that the Washington, D. C. area has a large Hispanic and black population.

161. The competing applicants have argued that the total ownership by these principals would be reduced by the possibility of future stock holdings of the Syncom Capital Corporation. WSCT-TV has indicated that it might borrow from Syncom to finance its application. The agreement between WSCT-TV and Syncom provides that under certain circumstances Syncom could become one of the owners of Formula, WSCT-TV's parent. However, the potential Syncom interest is too uncertain to attribute an ownership interest to it.

162. WSCT-TV does not rely on the potential loan from Syncom

and it has not indicated whether it will borrow the money from Syncom. Moreover, even if it did, there is no reason to assume that Syncom would become a Formula stockholder. While, if Formula borrows from Syncom, Syncom would become the holder of warrants that could be converted to Formula stock, Formula retains the right to have Syncom return the warrants in exchange for their fair market value. And Syncom has the right to simply cash in the warrants. These rights apply from the fifth to the tenth year after the loan is made. Sycom's ownership is at this stage conjectural. There is no evidence that Formula will decide to borrow the money and, moreover, that if it does, the loan will result in Syncom owning Formula stock.[22]

163. In addition, the competing parties have argued that WSCT-TV's principals have formed a voting trust which essentially withdraws ownership power for the shares placed in the trust. While WSCT-TV principals have discussed a voting "trust," none has actually been formed and no voting through a trust has resulted. The trust, if ever formed, is intended to preserve the existing control of Formula, and therefore, WSCT-TV, by minorities. This is particularly reassuring since control of ownership by minorities is a factor in awarding WSCT-TV a substantial and decisional preference for its integration proposal. *Gilbert Broadcasting Corporation*, 52 Radio Reg. (P&F) 2d 429, 444 (1982).

164. The bona fides of Mr. Rendon's full-time and Ms. Gilbert's part-time proposed integration has also been challenged. The assertion is that Mr. Rendon, because he has stated he would practice law when he graduates from law school, and Ms. Gilbert, because she has an active career as a CPA, would not fulfill their proposed obligation. There is no evidence that Mr. Rendon would practice law if a grant is made to WSCT-TV, or that if he does that he would not be able to fulfill his commitment. Nor is there any evidence that Ms. Gilbert could not adjust her CPA practice to spend 20 hours per week with WSCT-TV.[23]

165. Finally, there is no merit to the claim that Mr. Rendon's position is at variance with the application. While the title of Station

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[22] WSCT-TV's parent, Formula, in a separate agreement has borrowed $10,000 from Syncom to finance the development of syndicated programming. That agreement, dated January 14, 1981, restates Syncom's right to purchase warrants and participate in the facility applied for here on the terms outlined in Syncom's original December 17, 1980 commitment letter to Formula. Contrary to the claims of the competing parties, this recent borrowing does not establish that Formula has decided to borrow the funds or that Syncom now has a right to the warrants.

[23] The further claim that she would not spend 20 hours a week because there would be insufficient work is an improper inference to reach from the fact that she stated the work would take more time in the beginning.

Manager, was later applied to his functions, Mr. Rendon's role has remained the same.[24]

166. Nor has there been a change in Mr. Alexander's title. Mr. Alexander's corporate title in WSCT-TV, Inc. is Vice President, Corporate Relations. WTI Exh. 4, at 2. In the staffing proposal, WSCT-TV provided for a Public Relations Manager. WTI Exh. 7, at 2. From this the parties construct their variance claim. Such an argument is without merit.

167. From the outset, Mr. Alexander has understood that his role would be in the public relations area. Tr. 2032. As a public relations official, Mr. Alexander's duties will involve the station's external relations. Tr. 2035. Thus, he will have a position that is differentiated from Armando Rendon's position which deals with internal station matters. Tr. 2035–36.

168. Washington's Christian Television Outreach also proposes a significant amount of participation in station operation by the board members of its non-profit, non-stock corporation. WCTO is controlled by its Board of Directors and corporate decisions are made by a majority vote of the Board. Eight of the ten Board members propose to work at the station and WCTO would attribute to each director a 20 percent share in the corporation. The President of WCTO, A. Bert Carver, proposes to work full time as the station's General Manager. The other seven integrated directors would also work full time. Dr. Wendell P. Witten is proposed as Program Production Manager, Elaine H. Witten as Program Manager, Dr. Lucas H. Blevins and Jean H. Blevins as Co-Managers of Counseling, Reverend Charles R. Hayes as Public Relations Director, Joe-Ann Hayes as News Director, and Julia F. Carver as Marketing Director. All live in the Washington area, Elaine and Wendell Witten and Joe-Ann and Charles Hayes are black, four of the eight are women, and Mr. Carver is part Cherokee Indian (his mother had both an Indian father and mother). Mr. Carver, Ms. Carver, Dr. Witten, Dr. Blevins, Ms. Blevins, Rev. Hayes and Ms. Hayes have participated in local civic activities.

169. All of the integrated directors of WCTO have participated in one or two religious television programs broadcast in Washington, D. C. on Channel 20, WDCA. None of them has been employed by a broadcast station in a managerial position. Their jobs with regard to

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[24] Mr. Rendon was originally listed as the Corporate Relations Director in WSCT-TV's staffing proposal in its application. Mr. Rendon testified that he foresaw his functions under that title as one where he would work with "all the other divisions or departments in the station." Tr. 1964. It is evident that while the title of his position now includes the traditional description of Station Manager, his function in the WSCT-TV proposal has remained the same. WSCT-TV had little incentive to vary Mr. Rendon's job by supplying a more common title to it since the *Comparative Policy Statement* is concerned with function not form and none of the competing parties have demonstrated that there has been a variance of function.

Channel 20's religious programs were on a volunteer basis and the work they performed ranged from "assisting production" to performing or participating as talent on the programs.

170. If all of WCTO's proposed integration is credited, it would have 80 percent full-time integration. Some of the parties have objected to crediting the Blevins with a management position since they are essentially going to assist each other in the same job of managing and training volunteers during an evening call-in program. These positions are undoubtedly significant to the production of the program they will be associated with, but it is clear that they will not play an important role in the station's management. In fact, there appears to be no policy function to their role and Dr. Blevin's testimony indicates that his daily time at the station will equal no more than two hours. *New Continental Broadcasting Company*, 88 F.C.C. 2d 830, 839 (Rev. Board 1981), *application for review to the Commission*, filed January 29, 1982. Moreover, their role is a shared function, essentially one job split in half, which means that any influence they exert on the station would not be as great as if they had responsibility for separate station operations. This does not mean that the Blevins should not be given credit for their participation, but it does mean that it is reduced in importance. In this regard WSCT offers a greater degree of full-time integration. And whether or not the Blevins are given full quantitative credit, WSCT-TV proposes, overall, a greater amount of integration.

171. Qualitatively, WCTO proposes the participation of more women than WSCT-TV (women represent 40 percent of WCTO and 13.77 percent of WSCT-TV) but WSCT-TV proposes more integration of minorities (integrated minorities represent 64.27 percent of WSCT-TV and 50 percent of WCTO). Aside from these percentages, however, there is a significant difference because WSCT-TV is controlled by minorities. This is not the case with WCTO's representation of women or minorities. WSCT-TV also proposes that the station will be operated by blacks with significant television experience which directly relates to the management of the proposed station. WCTO's directors have not had any broadcast experience that warrants similar credit. WSCT-TV is to be preferred over WCTO on both quantitative and qualitative grounds.

172. Washington Television proposes that two of its stockholders would operate the station. Dr. Joann Anderson would work full time as the General Manager and Lonnie Murray would work full time as Program and Operations Manager. They both live in the Washington, D. C. area, Dr. Anderson has participated in a civic activity, and Mr. Murray and Dr. Anderson have assisted in the management of radio stations. They are black and Dr. Anderson is a woman. However, they own only 70.1 percent of the applicant, which is not as great a percentage of ownership as that proposed by WSCT-TV or WCTO. Washington Television is qualitatively nearly the same as

WCTO, but it is not as strong on relevant experience and civic participation as WSCT-TV.

173. Capital Communications proposes significant integration, but most of it is part time. Karen Brown, Margaret Johnson, and Nancy McCormick-Pickett, each of whom can be credited with 11.11 percent ownership, represent proposed full-time management. Yetta W. Galiber, A. Diane Graham, Thelma Mullin, Lili Packer and David Pales would work twenty hours per week at management positions and their ownership interests total 55.55 percent. All but one stockholder are women, three are black, and the only male stockholder is Hispanic. The stockholders in this group have been very active in local civic affairs, and all have been long time local residents. In these respects they are qualitatively equal to those applicants that have promised more full-time integration. They do not, however, present the same quality of broadcast experience as WSCT-TV.

174. Century's integration proposal is also weaker than the other applicants' on quantitative grounds. Steven Wechsler, who is a 15.57 percent stockholder, is the proposed full-time General Manager. Diane Wechsler, who is a 10.46 percent stockholder, proposes to work full time as Customer Service Manager. And Charles Bennett Fisher, who is a 2.70 percent stockholder, proposes to work full time as Director of Community Relations and Special Affairs. All three live in the community. Mr. Fisher has been active in civic affairs and he is black, and Ms. Wechsler is a woman. Although they do not have broadcast experience, Mr. Wechsler operates a movie subscription service which is distributed by microwave.

175. Century proposes that two of its stockholders would work 30 hours per week and that six other stockholders would work 20 hours. Peter Yeskel, who is a 13.35 percent stockholder, proposes to spend an average of 30 hours on the duties of Secretary-Treasurer and Chief Financial Officer. Mr. Yeskel stated, however, that his commitment was not to the day-to-day operation and that the time he would spend would depend on other problems he might have with his other business interests. During some weeks, he believed, he might spend as little as ten hours. His day-to-day commitment is, therefore, uncertain and cannot be credited. On the other hand, the 30 hours proposed by Eugene Aikens, Jr., who holds 6.67 percent of Century's stock, is definite. He is proposed as the station's Personnel Director. Mr. Aikens is black and he lives in Washington, D.C.

176. Of the people who would spend twenty hours a week, only slight credit can be given for Pauline Wechsler, who owns 19.80 percent of Century's stock, because she stated she would not be involved in the day-to-day management of the station. Instead, she merely plans to represent the station at community functions. The remaining stockholders, who propose to work 20 hours per week, would only participate in a limited way in the development of day-to-

day station policy. Dr. Everett J. Gordon, who is a 3.56 percent stockholder, would act as the station's contact for community groups; Claudia R. Rayford, who is a 1.78 percent stockholder, would serve as a "link" between the Director of Advertising and Marketing and the General Manager; Dr. Frances Rankin, who is a 2.67 percent stockholder, plans to develop children's programming (two are planned); Edna R. Jones, who is a 1.78 percent stockholder, would supervise implementation of consumer programming; and Brenda Gladden, who is a 4.45 percent stockholder, would work as house counsel and be involved in non-entertainment programming. While all of these part-time participants have qualitative attributes, the quantity of ownership and the jobs they would perform does not raise Century's proposal to a level that is equal to the other applicants.[25]

177. *Auxiliary Power Source and Comparative Coverage*: WCTO and Century claim a preference for their proposal to install auxiliary power. The Commission has provided that auxiliary power equipment is "a factor of decisional significance in comparative AM and FM broadcast proceedings." *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 F.C.C. 2d 667, (1966). The Commission has made no provision for television proceedings and therefore, WCTO and Century's request for a preference must be denied.

178. The claim of WSCT-TV and Grant Broadcasting for preference based on coverage is also without merit. All proposed coverage areas now receive Grade B coverage from a minimum of five signals. While there are population differences in the areas covered by the applicants, the coverage evidence submitted does not identify the number of signals received by the population which is exclusive to WSCT-TV and Grant, which claim superior coverage. In part this is the case because only the minimum number of signals are identified and not the maximum. No preference can be accorded in light of the showing made.

179. *Capital Communications' Failure to Report Diane Graham's Involvement in VELEZ V. DEVINE*: While the sex discrimination case of *Velez v. Devine*, involving the hiring decision of Capital's principal, Diane Graham, was pending, Capital was asked if any of its stockholders were principals in an entity that was involved in, or the subject of, litigation. Capital did not report the sex discrimination case involving Ms. Graham. Ms. Graham testified that she did not view herself as a principal of the Office of Personnel Management. She believed that principals would be political appointees. She formed this conclusion despite the fact that she is a member of the Senior Executive Service of the Federal Government and holds the title of Assistant Director of the United States Office of Personnel Management for Affirmative Action Programs. In the common use of the word principal, there can be little doubt that the distinction she drew was unwarranted.

180. Once Ms. Graham decided on her own that she was not a principal she did not reveal the discrimination case involving her to other Capital stockholders or its counsel. However, once the case was publicly known Capital Communications did report the case because, of course, it did involve Ms. Graham, who is Capital's President. It is apparent that Ms. Graham was not fully candid about a matter that could have affected Capital's case. Her view that she was not a principal in the *Velez v. Devine* case is simply not creditable, particularly since Capital did report the case when it became publicly known. Because Capital did ultimately report the case and its impact has been considered, this issue does not rise to a level warranting disqualification. But Ms. Graham's withholding of information about the case greatly lengthened the time required for this hearing and demonstrated lack of candor and an unwillingness to reveal potentially harmful facts. A comparative demerit against Capital is required on this issue.

Summary Evaluation of the Applicants

181. Grant Broadcasting and Urban Communications are not entitled to comparative consideration because they have been unable to establish their qualifications. Grant Broadcasting is unqualified because of the deception its principal, Lawrence Brailsford, undertook to keep the Commission from learning of his bankruptcy. Urban Communications has not established its financial qualifications and it has refused to cooperate in the examination of its finances. The remaining five applicants are qualified and none have media interests that affect the outcome of the case. Only Lonnie Murray, a principal of Washington Television, has an interest that requires comparative recognition, and that interest requires only a very slight demerit.

182. The area of significant difference is in the promises the applicants have made to have owners operate the proposed facility. Of those promises, that made by WSCT-TV would best serve the public interest. Its proposed full-time and part-time integration is 91.81 percent. In addition, WSCT-TV is controlled by minority members who will work at the station in management positions. Those who will be integrated are, with one exception, already living in the community, most of the integrated stockholders have a high degree of relevant broadcast experience, and most of them have been active in area civic affairs.

183. In second place is WCTO. Its proposed integration is 80 percent. But two stockholders, Dr. Lucas H. Blevins and Jean H. Blevins, who represent 20 percent of the WCTO integration proposal, would not perform the same level of day-to-day management participation as the other integrated Board members. It is also evident that the Blevins would not occupy positions as responsible as those jobs that will be undertaken by WSCT-TV's principals. But

more importantly, WSCT-TV will be run and controlled by minorities and a woman, who represent nearly eighty percent of its ownership.

184. Because they have proposed lesser amounts of integration than WSCT-TV and WCTO, the remaining parties would be ranked as follows: Washington Television, Inc., Capital Communications and Century Communications. In addition, Capital Communications would receive a moderate demerit because it did not report, when it arose, the litigation involving its principal, Diane Graham.[25]

ACCORDINGLY, IT IS ORDERED that the petition for leave to file out of time, filed August 3, 1982 by Grant Broadcasting Corporation IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed November 18, 1982 by WSCT-TV, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend filed January 5, 1983 by Washington Television, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that Urban Telecommunications Corporation's motion for leave to amend filed January 10, 1983 IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion for leave to file supplemental pleading and supplemental conclusions of law of Washington Television, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the application of WSCT-TV, Inc. (File No. BPCT-800118KP) for authority to construct a new commercial television broadcast station on Channel 14, Washington, District of Columbia IS GRANTED and the applications of Washington's Christian Television Outreach, Inc., Century Communications, Inc., Capital Communications of Washington, Inc., Grant Broadcasting Corporation, Urban Telecommunications Corporation, and Washington Television, Inc. ARE DENIED.[26]

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[25] Although Grant Broadcasting's proposal has not been compared, if it had been it would not have prevailed since Grant's full-time integration is only 50 percent and its part-time is 25 percent. Moreover, this assessment assumes no comparative consideration would be given to Mr. Brailsford's failure to report his bankruptcy. If Urban Communications were qualified, it too would not prevail. While Urban Communications proposes the full-time integration of its sole stockholder, Theodore R. White, this would amount to only slightly more integration than the 91.81 percent that is proposed by WSCT-TV. This difference is *de minimis*, however, when compared to WSCT-TV's proposal which, unlike Urban, includes significant broadcast experience and participation in local civic affairs.

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN, *Administrative Law Judge*

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[26] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Coverage, Issue, See Also Comparative Coverage Issue
Diversification, of Control of Mass Media, See Also Control
Site Availability

In hearing matter of mutually exclusive CP applications for new FM station, Review Board affirms ALJ's grant. Winning applicant found to be financially qualified and entitled to diversification, coverage, and auxiliary power preferences. Petition for a site availability issue denied.
–White Mountain FM, Inc.
BC Docket No. 82–629

FCC 83R–58

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WHITE MOUNTAIN FM, INC. Littleton, New Hampshire	BC Docket No. 82–629 File No. BPH-810408AC
PROFILE BROADCASTING COMPANY, INC. Littleton, New Hampshire	BC Docket No. 82–630 File No. BPH-811027AL
For Construction Permit for a New FM Station	

Appearances

Julian P. Freret and *Christopher D. Imlay* for White Mountain FM, Inc.; *David Tillotson* and *Mania K. Baghdadi* for Profile Broadcasting Company, Inc.; and *Robert A. Zauner* for the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: August 22, 1983; Released: August 26, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. In this comparative case involving a new FM broadcast station in Littleton, New Hampshire, Administrative Law Judge Edward J. Kuhlmann awarded the construction permit to White Mountain FM, Inc. *See Initial Decision* (FCC 83D-17) (*I.D.*), released March 11, 1983. White Mountain was awarded a substantial preference on the

diversification criterion because its opponent, Profile Broadcasting Company, Inc., is the licensee of Littleton's only commercial radio station, WLTN(AM), whereas White Mountain owns no other media interests. White Mountain was also given credit for auxiliary power, and received a slight preference for providing a second aural service both during the day and at night. Profile has filed exceptions in which it argues that the ALJ erred in failing to add a financial issue against White Mountain, and that he should have awarded Profile a moderate preference for comparative coverage and a substantial preference for integration. After review of the record and briefs, we affirm the *I.D.* in all major respects.

2. *White Mountain's Financial Qualifications*. The *Hearing Designation Order* stated that White Mountain's application did not demonstrate its financial qualifications; that the Commission's new Form 301 required only a certification as to financial qualifications; and that White Mountain would be given 30 days to review its proposal, make any necessary changes, and, if appropriate, submit a certification to the ALJ. If it could not make the certification, the ALJ was authorized to specify an appropriate issue. This procedure was modeled on the Chief, Broadcast Bureau's (now Mass Media Bureau) designation Order in *Minority Broadcasters of East St. Louis, Inc.*, Mimeo No. BC5092, released July 15, 1982.

3. In its exceptions, Profile states that on October 4, 1982, White Mountain certified to its financial qualifications but failed to indicate what changes, if any, it had made in its financial proposal which permitted it to so certify. Believing that White Mountain's certification should not be credited in the absence of such information, Profile requested the ALJ to add a financial issue against White Mountain. The ALJ declined to do so, Tr. 3, and Profile excepted to this ruling. Oral argument on May 26, 1983 was focused exclusively on this matter. Subsequently, however, on June 2, 1983, the Commission released a Memorandum Opinion and Order in *South Florida Broadcasting Co., Inc.* (FCC 83-255) which overturned the Bureau's *East St. Louis* policy because it applied the certification procedure in a manner inconsistent with its intent. The Commission thereupon ordered all applicants in hearing status who initially filed under the old Form 301 but subsequently established their financial qualifications by certification to make the full documentary showing required by the old form within 30 days and authorized the specification of an appropriate issue if an applicant could not so demonstrate its financial qualifications. *Id.*

4. In accordance with *South Florida,* White Mountain, on June 22 1983, submitted a detailed financial amendment intended to establish its qualifications. According to the information furnished, White Mountain will need $138,959 to meet its costs of construction and first three months of operation. For funding, it relies on the net proceeds of a loan from The Saver's Bank, in Littleton, of $123,200, a

net deferred equipment credit of $43,124, cash on hand of $169, and a $10,000 contribution from its principals, Thomas M. and Kathleen G. Pancoast. While the Pancoast's balance sheet of June 1, 1983 shows sufficient net liquid assets from which they could advance $10,000, the applicant has not complied with the requirement that it furnish the agreement obligating them to do so and showing the terms of the commitment. *See* Form 301, Section III, Page 3, Item 4a. While this may have been simply an oversight, it appears that the applicant is financially well qualified even without reliance on these funds since it has a "cushion" of other funds over costs of almost $28,000. Profile has not challenged White Mountain's documentation and it appears that no financial issue is warranted, no material questions of fact being evident. Profile's financial exceptions are therefore denied.

5. *Comparative Issue: Coverage.* White Mountain was given a preference based on findings that it would provide a second aural service during the day to 1,258 persons, as compared to 218 by Profile, and a second aural service at night to 3,150 persons compared to 397 by Profile. While Profile would serve more persons overall in a slightly larger area, the ALJ noted that this population already has at least three services. *I.D.*, para. 14. Profile argues that it should receive a moderate coverage preference because its service area is 6.4% larger and contains 29.5% more people than the area that would receive primary service from White Mountain. *Br.* at 8.

6. The ALJ's award of a modest preference to White Mountain was a correct resolution of the coverage factors in this case. The Commission has traditionally placed greater emphasis on the provision of a first or second broadcast service than on superior overall coverage to areas and populations that cannot reasonably be said to be underserved. *Compare, e.g., Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976), *rev. denied*, FCC 76–597, released June 24, 1977 (decisive preference to applicant proposing first and second primary services, *with Wolverine Radio Co.*, 49 FCC 2d 1038 (Rev. Bd. 1974), *rev. denied*, FCC 75–985, released September 12, 1975 (slight preference to applicant for provision of new service to 21,000 more persons than its opponent); *see also Barnes Enterprises, Inc.*, 69 FCC 2d 1957 (Rev. Bd. 1978), *rev. denied*, FCC 79–451, released July 19, 1979, and cases cited therein. Profile has cited no supporting precedent at all, let alone a case involving comparable facts, where a preference was awarded to the applicant in its relative position. On the contrary, the law is clear that provision of a second primary aural service is a "factor of considerable importance" and should result in a preference. *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982) (moderate preference awarded), *rev. denied*, FCC 83–320, released July 7, 1983; *see also Town and Country Radio, Inc.,*, 70 FCC 2d 572, 575 (Rev. Bd. 1978) (moderate preference awarded). Thus, White Mountain receives a preference for providing this additional service both during the day and at night. Its

preference is a modest one, however, because the absolute numbers of additional persons it will serve are not as large as in the cited cases, and the additional overall population coverage by Profile is not inconsiderable. In view of these factors, we believe the ALJ prudently avoided overstating White Mountain's advantage but that the preference it received should be adjusted somewhat and be labeled as slight to moderate.

7. *Participation of Ownership in Management*. Kathleen G. and Thomas M. Pancoast each own 50% of the stock of White Mountain and each intends to work 40 hours a week at the proposed station in various management positions. Likewise, Profile's shares are jointly held by Peter C. and Judith F. Aydelott and each of them proposes to work full-time in management roles at the station. The applicants differ somewhat in terms of their qualitative enhancements but in view of their 100% full-time quantitative integration proposals, the ALJ found them to be nearly equal and did not award either one a preference. *I.D.*, paras. 12, 13, 15. Profile excepts to the award of full-time credit to Mr. Pancoast on the ground that his plan to continue working part-time as an attorney will conflict with his proposed role at the station. It urges award of only part-time credit for his role and a resulting substantial preference to Profile because of the difference between its 100% full-time proposal and White Mountain's reduced 50% full-time and 50% part-time proposal.

8. We affirm the ALJ's award of full credit for Mr. Pancoast's proposal. Mr. Pancoast testified that if the White Mountain application is granted he would reduce the 25 hours per week he now spends in his law practice to 10 to 15 hours per week and would also resign his position as a Master of the New Hampshire Superior Court where he now works two days a week. *I.D.*, para. 6; White Mountain Exh. 5. Mr. Pancoast's testimony is uncontradicted and unrebutted. Where, as here, a principal's integration proposal is set forth in some detail and he has specifically allocated his time so as to accommodate his outside interests in order to effectuate his proposal, we may conclude that the applicant has demonstrated the necessary assurance that its proposal will be carried out. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982); *Bradley, Hand and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969). Profile's exception does not cite to any record evidence or case law for support but relies instead on bare speculation. This, of course, is an insufficient basis for over-turning the ALJ's conclusion. We affirm the ALJ's conclusion that Mr. Pancoast should be fully credited and that the applicants are virtually equal because of their comparable 100% integration proposals.

9. *Petition to Reopen*. On June 15, 1983, Profile requested reopening of the record and remand on new issues to determine whether the transmitter site specified in White Mountain's applica-

tion is available to it; if the site is unavailable, whether White Mountain lacked candor or misrepresented in claiming the site was available; and the impact on White Mountain's qualifications. Profile contends that White Mountain cannot obtain access to its proposed transmitter site on Mann Hill because only one road provides access to that site. The road traverses private property owned by Roy and Barbara Hendrickson, and is subject to a restrictive easement which allegedly precludes White Mountain's use. Specifically, the easement allows access to use the road to the University of New Hampshire in order to maintain and operate educational television station WLED-TV from the site on Mann Hill. The easement is intended for this purpose only, Profile asserts, and the Hendricksons will not permit the road to be used by White Mountain or anyone else for any other purposes. Thus, Profile argues, a substantial question exists as to the site's availability.

10. In support of a candor issue, Profile asserts that White Mountain failed to ask the Hendricksons about using their road for access to the transmitter site, and that this is "tantamount to a failure by White Mountain to make any inquiry as to the availability of its proposed transmitter site." *Petition* at 7. Accordingly, since White Mountain never had reasonable assurance of the availability of its transmitter site, Profile argues that a misrepresentation or lack of candor issue is also warranted.

11. In opposition, White Mountain contends that it has both reasonable assurance of, and access to, its proposed transmitter site on Mann Hill, and that allegations of misrepresentation and lack of candor made by Profile are without merit. In support, White Mountain attaches the statement of William Ingalls, the transmitter supervisor for the WLED-TV site, who states "I know Thomas M. Pancoast of Littleton, New Hampshire. I met him as a result of his seeking and obtaining our reasonable assurance to allow White Mountain FM, Inc. to utilize the television tower of our WLED-TV on Mann's Hill in Littleton for the purpose of transmitting the signal of its proposed FM station." White Mountain also responds that it is not dependent upon the Hendrickson property for access to the transmitter site because another property owner, Daniel Edgar, will allow White Mountain access to the site over his land, or if that fails, a helicopter can be used to scale the mountain. In an attachment, Mr. Edgar states: "Existing logging roads on our property furnish access to the common boundary between our property and that of the State of New Hampshire" and that White Mountain is "welcome to cross our property to and from the property of the State of New Hampshire for the purpose of installing and maintaining an FM radio transmitter and antenna on the property of the State of New Hampshire, and to improve and maintain any roads on our property necessary for this purpose. . . ." Finally, as to the issue of

misrepresentation or lack of candor, White Mountain denies any knowledge of the existence of the Hendrickson easement.

12. The Board will not reopen the record to add site availability and misrepresentation or lack of candor issues against White Mountain. It is evident from the statements supporting its opposition pleading that White Mountain has had, and continues to have, reasonable assurance of its proposed transmitter site and of likely access to it. Although Profile replies that access is still in question and submits a supporting statement from John Keller, a forester, who conducted an aerial survey of Mann Hill to show that no truck-traversable road exists on the Edgar property that would allow access to the proposed site, this is an insufficient basis for addition of an issue. First, we have previously held that the mere fact that there are no present roads to a proposed site does not preclude the future construction of a road or the possibility of access to the site over existing barren land. *Charles Vanda*, 4 RR 2d 543 (Rev. Bd. 1965) (site issue denied). Secondly, the property owner who is affording White Mountain access to its proposed site, Mr. Edgar, has expressly given his permission for White Mountain to develop whatever roads are necessary for access to the site. And finally the applicant has even considered the possibility of airlifting its transmitter and associated equipment to its site if all other means of access fail. We also find that Profile's allegations of misrepresentation or lack of candor against White Mountain are baseless. White Mountain's claimed lack of knowledge of the Hendrickson easement at the time it specified the Mann site is not disputed by Profile, nor is its reasonable assurance of use of the Mann site itself challenged. The only question is that of access to the site and we find no factual questions relating thereto that warrant further evidentiary proceeding. One way or another, it appears, White Mountain will gain access to its site.

13. *Summation*. White Mountain has been found financially qualified and no basis for reopening the record to examine new issues has been shown by Profile. Comparatively, White Mountain is clearly superior, having an undisputed substantial diversification preference, a slight to moderate coverage preference, and an auxiliary power preference. A grant of White Mountain's application will serve the public interest, convenience and necessity.

14. ACCORDINGLY, IT IS ORDERED, That the petition to reopen the record and enlarge issues, filed June 15, 1983, by Profile Broadcasting Company, Inc., IS DENIED; and

15. IT IS FURTHER ORDERED, That the application of White Mountain FM, Inc. (File No. BPH-810408AC) for a construction permit for a new FM station on Channel 292A at Littleton, New

Hampshire, IS GRANTED, and that the application of Profile Broadcasting Company, Inc. (File No. BPH-811027AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WHITE MOUNTAIN FM, INC. Littleton, New Hampshire	BC Docket No. 82-629 File No. BPH-810408AC
PROFILE BROADCASTING COMPANY, INC. Littleton, New Hampshire	BC Docket No. 82-630 File No. BPH-811027AL
For Construction Permit for a New FM Station on Channel 292A Littleton, New Hampshire	

Appearances

Julian P. Freret and *Christopher D. Imlay* for White Mountain FM, Inc.; *David Tillotson* and *Richard Narvaiz* for Profile Broadcasting Company, Inc.; and *Robert A. Zauner* for the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: March 7, 1983; Released: March 11, 1983)

1. By *Hearing Designation Order*, 47 Fed. Reg. 41630, published September 21, 1982, the Commission, by the Chief, Broadcast Bureau, designated the mutually exclusive applications of White Mountain FM, Inc. and Profile Broadcasting Company, Inc., to construct a new FM station at Littleton, New Hampshire, for hearing on the following issues:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications, if either, should be granted.

2. In specifying the above issues, the Broadcast Bureau Chief noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Therefore, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other

primary aural services in such areas, will be considered under the standard comparative issue.

3. A prehearing conference was held on November 19, 1982. The evidence in this case was presented in written form on January 5, 1983 and subjected to objections at an oral hearing session held with counsel on January 19, 1983. The applicants did not request cross-examination of the written testimony and the record was closed on January 19, 1983. Proposed findings of fact and conclusions of law were filed by all parties on February 4, 1983 and replies were filed by the applicants on February 14, 1983 and the Mass Media Bureau on February 15, 1983.

FINDINGS OF FACT

4. *Diversification of control of the media of mass communications*: Profile is the licensee of station WLTN(AM) located in Littleton, New Hampshire. WLTN(AM) operates on 1400 kHz, 1000 watts daytime, although a construction permit has been granted for 2.5 kW daytime. The station is licensed to operate with 250 watts nighttime. Littleton has no other commercial broadcast facility and only one non-commercial facility, a television station, WLED-TV, Channel 49, operated by the University of New Hampshire. White Mountain Exh. 2. The only other media outlet in the community is a weekly newspaper, the *Courier*. *Id.* Profile and its principals have no other media interest. Profile Exhs. 1, 2, 3. Neither White Mountain nor its principals has any media interests. White Mountain Exh. 2, at 2.

5. *Full-time participation in station operation by owners*: White Mountain is owned by Kathleen G. and Thomas M. Pancoast; they each hold 50 percent of the 100 shares issued. Ms. Pancoast would work 40 hours per week at the station as the General Manager, Sales Manager, News Director and Director of Public Service Programming. White Mountain Exh. 1. Ms. Pancoast lives in Littleton, she has no recent broadcast experience, and for over ten years she has participated in the civic affairs of Littleton. She is also the President and a Director of White Mountain. *Id.*

6. Mr. Pancoast would work 40 hours per week at the station as Program Director, Promotion Manager, Assistant Sales Manager, Assistant News Director, and Chief Financial Officer. White Mountain Exh. 2. Mr. Pancoast lives in Littleton, he has no recent broadcast experience, and for over ten years he has been active in the civic affairs of the community. *Id.* Mr. Pancoast currently practices law 25 hours per week, acts as the trustee of a savings bank, and two days a week works as a Master for the New Hampshire Superior Court. *Id.* If a grant is made, he would resign his position with the Superior Court and reduce his law practice to 10–15 hours per week. *Id.*

7. Profile's shares are held jointly by Peter C. Aydelott, who is its

President and a Director, and Judith F. Aydelott, who is its Vice President, Treasurer, and a Director. Profile Exh. 1(P). Mr. Aydelott would work full time as Station Manager and Ms. Aydelott would work full time as Business Manager. *Id.*

8. Mr. Aydelott currently works at WLTN(AM), Littleton, New Hampshire and, therefore, has broadcast experience. He has, since 1975, been active in the civic affairs of Littleton. Profile Exh. 2(P). He lives in Sugar Hill, New Hampshire, which is eight miles from Littleton. *Id.* Ms. Aydelott has been active in Littleton civic affairs, she is the Business Manager for WLTN, and she lives in Sugar Hill. Profile Exh. 3(J).

9. *Auxiliary power*: White Mountain proposes auxiliary power. White Mountain Exh. 2, at 7.

10. *Comparative coverage*:

*Tabulation of Populations**
and Areas

	White Mountain		*Profile*	
	Population	*Area (Sq. Miles)*	*Population*	*Area (Sq. Miles)*
Total within 1.0 mV/m (60 dbu contour)	19,124	537	24,766	574
Total within Common area	14,348	376	14,348	376
Total within Uncommon area	4,776	161	10,418	198
Service provided to Uncommon area:				
DAYTIME				
Second	1,258	58	218	19
Third	3,218	85	161	8
Fourth	286	17	5,370	3
Fifth	14	1	3,545	127
Service provided to Uncommon area:				
NIGHTTIME				
Second	3,150	98	397	33
Third	1,626	63	8,374	159
Fourth	0	0	1,657	6
Fifth	0	0	0	0

*Joint Exh. 1
Profile Exh. 4(G), at 13.

CONCLUSIONS OF LAW

11. White Mountain and its owners have no media interests, while Profile Broadcasting is already the licensee of Littleton, New Hampshire's only radio station, WLTN(AM). WLTN operates both daytime and nighttime. Therefore, White Mountain is entitled to a substantial preference over Profile Broadcasting on the diversification criterion.

12. Kathleen G. Pancoast and Thomas M. Pancoast are equal owners of White Mountain. They both would work full time at the station in management positions, they are long-time residents of the community and are active in the civic affairs of Littleton. Ms. Pancoast, who is White Mountain's President, would be the Station Manager. She would hold significant programming policy positions at the station and because she is a woman in these positions, she receives additional preference.

13. Peter C. Aydelott and Judith F. Aydelott jointly own the shares of Profile. Like the Pancoasts, they would work full time at the station in management positions. They live eight miles from Littleton in Sugar Hill, New Hampshire, but they are active in Littleton's civic affairs and they operate an AM radio station in Littleton. They both have broadcast experience. Ms. Aydelott, like Ms. Pancoast, receives an additional preference because she is an integrated woman, albeit not in a position as important as the one to be held by Ms. Pancoast.[1]

14. White Mountain is entitled to a preference for its proposal to provide auxiliary power. It is also entitled to a slight preference for its superior second service aural coverage during the day to 1,258 persons (compared to Profile's 218) and to 3,150 at night (compared to Profile's 397). Overall, Profile would actually provide service to more people within a slightly greater area than White Mountain, but the gain in service would be to a population that already has at least three, four or five services daytime and nighttime.

15. White Mountain's application is comparatively better than Profile Broadcasting's because it would enhance diversification in the community. White Mountain, in addition, receives credit for its auxiliary power and slight credit for its provision of a second aural service. On the basis of integration the applicants stand nearly equal.

ACCORDINGLY, IT IS ORDERED that the application of White Mountain FM, Inc. (File No. BPH-810408AC) for FM Channel 292A at Littleton, New Hampshire IS GRANTED and the application of

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[1] Each of the parties has argued that the other would not perform its promised integration. White Mountain argues that the Aydelotts could not work full time at the station because they already work at WLTN(AM). Profile argues that Mr. Pancoast could not work at the station and still practice law, since both jobs require the same daily hours. Neither of these arguments are supported by record facts. There is no record evidence about what the Aydelotts plan to do about their jobs at WLTN; in fact, there is no record evidence about how much time the Aydelotts now spend at WLTN. On the other hand, Mr. Pancoast has explained how he will accommodate his law practice and his position at the station; his explanation, which is reasonable, is unquestioned on the record and must, therefore, be assumed to be true.

Profile Broadcasting Company, Inc. (File No. BPH-811027AL) IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN, *Administrative Law Judge*

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[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

SUMMARIES FOR

94 FCC 2d

FEBRUARY–APRIL, 1984

The following are summaries of Commission actions that have not been printed in full.

COMMON CARRIER MATTERS

By Direction Letter adopted responding to Robert Axelrod, General Counsel, Comsat General Corp. re filing of monthly reports of negotiations with foreign entities. January 30, 1984 (FCC 84-31)

Memordandum Opinion and Order adopted re assignment of orbital locations to space stations in Domestic Fixed-Satellite Service. January 31, 1984 (FCC 84-32)

Order adopted amending Sections 0.4, 0.215, and 0.291 to delegate authority to Chief, Common Carrier Bureau to act on radio and Section 214 applications without dollar limitations, and to eliminate Telecommunications and Subscription Television Committees. February 3, 1984 (FCC 84-34)

Application for review filed by AT&T of October 4, 1983 Bureau ruling granting in part FOIA request of Ms. Denise Bonn denied. February 22, 1984 (FCC 84-52)

Report and Order adopted eliminating annual report and miscellaneous common carriers (Form P) as an unnecessary regulatory burden. March 5, 1984, Docket 83-1291, *49* FR *10121* (FCC 84-74)

Application for review of complaint filed by Peter F. Cohalan and County of Suffolk, New York against New York Telephone Co. and Petition to Institute Forfeiture Proceedings filed by Congressman Thomas J. Bliley, Jr. against Drake Publishers, Inc. for offering a "dial-it" service commonly know as "dial-a-porn" denied and dismissed respectively. March 5, 1984 (FCC 85-76)

Application for review filed by Georgia Power Co. of Bureau Order denying its complaint under Section 224 of Communications Act and granted cross-complaint by Tele-Communications, Inc. and its subsidiaries granted but relief requested is denied and excepted by modifying maximum just and reasonable rate. March 15, 1984 (FCC 84-100)

Order adopted deferring effective date for changes in jurisdictional separations procedures. March 29, 1984, Docket 80-286, *49* FR *14111* (FCC 84-121)

Application for review filed by Western Union International, Inc. and RCA Global Communications, Inc. to reverse Bureau Order which resolved dispute among WUI, RCA and Comsat relating to financing of U.S. earth stations that operate with INTELSAT global system denied. March 30, 1984 (FCC 84-123)

Petition for Emergency Relief Requiring Nondiscriminatory CPE Interconnection During Six-Month Transition Period prior to BOC's compliance with Computer II Rules filed by North American Telecommunications Assn. denied. Motion for Partial Stay of Dial Tone Referral Modification granted pending submission and Disposition of Petitions for Reconsideration. March 30, 1984, Docket 83-115 (FCC 84-132)

Further NPRM adopted re MTS and WATS Market Structure and amendment of Part 67 of rules and establishment of Joint Board. March 30, 1984, Docket 78-72, and Docket 80-286, *49* FR *18318* (FCC 84-133)

Order adopted inviting comments re amendment of Part 67 and establishment of Joint Board. April 10, 1984, Docket 80-286, *49* FR *18746* (FCC 84-139)

NOI adopted re revision of Part 42, Preservation of Records of Communication Common Carriers. April 11, 1984, Docket 84-283, *49* FR *18138* (FCC 84-143)

Order on Reconsideration adopted re Access to Telecommunications Equipment by Hearing Impaired and Other Disabled Persons. April 11, 1984, Docket 83-427, *49* FR *19666* (FCC 84-144)

Petition for reconsideration filed by Bell System Operating Companies of Commission decision, Interconnection Order, 94 FCC 2d 5 (1983), denied. April 11, 1984, Docket 81-216 (FCC 84-145)

Applications for review filed by MCI Telecommunications Corp. of Bureau's Order which denied petitions to reject or suspend and investigate revisions of Bell System Operating Companies Exchange Network Facilities for Interstate Access tariff proposed in Transmittal No. 74 denied. AT&T seeks review of Bureau Order which rejected revisions to ENFIA tariff proposed in Transmittlal No. 77 denied. April 13, 1984, Docket 78-371 (FCC 84-162)

Application for review filed by Public Service Co. of New Hampshire of Bureau Order which granted complaint by Teleprompter Corp. under Section 224 of Communications Act granted to an extent and otherwise denied. April 17, 1984 (FCC 84-164)

Application for review of *Memorandum Opinion, Order, Authorization and Certificate* adopted in General Communications, Inc. proceeding released May 27, 1981 filed by Alascom, Inc. denied. April 20, 1984 (FCC 84-168)

NPRM adopted seeking comments regarding revision of Uniform System of Accounts for Telephone Cos. to accommodate generally accepted accounting principles (Parts 31, 33, 42 and 43 of FCC Rules). May 10, 1984, CC Docket 84-469, *49* FR *21377* (FCC 84-200)

Memorandum Opinion and Order adopted re Investigation of Access and Divestiture Related Tariffs. April 27, 1984, Docket 83-1145, *49* FR *19821* (FCC 84-188)

General Matters

Report and Order adopted re amendment of Parts 2 and 74 to permit use of frequencies 161.7 and 161.75 MHz by U.S. Coast Guard. February 15, 1984, Docket 83-425, *49* FR *06950* (FCC 84-49)

NPRM adopted re amendment of Parts 2, 73, and 76 to authorize offering of data transmission services on vertical blanking interval by TV stations. February 15, 1984, Docket 84-168 *49* FR *10556* (FCC 84-50)

Order adopted re amendment of Parts 2 and 97 to remove restrictions on Amateur Service use of 1900-2000 kHz band due to LORAN-A operations. March 22, 1984, (FCC 84-103)

Notice adopted re FCC's list of rules to be reviewed pursuant to section 610 of Regulatory Flexibility Act during 1983-1984. April 4, 1984, Docket 84-361, *49* FR *17045* (FCC 84-135)

Hearing Matters

Petition for reconsideration filed by Heart O'Texas B/cing, Inc. of Commission Order FCC 83-415, which denied review of Review Board Decision, *Central Texas B/cing Co., Ltd.*, 90 FCC 2d 583, denied. March 1, 1984, Docket 79-286 (FCC 84-73)

Applications for review filed by Las Misiones De Bejar TV Co. and Christian Tele-Communications, Inc. of Review Board Decision, FCC 83R-10, released February 11, 1983, granting application of Alamo B/cing Corp. for UHF TV station in San Antonio, Texas denied. February 3, 1984, Docket 81-647, (FCC 84-97)

Petition for reconsideration filed by Western Virginia TV Co. of Commission Order denying its application for review in Roanoke, Virginia comparative UHF proceeding denied. February 3, 1984, Docket 81-46 (FCC 84-98)

Petition for reconsideration filed by Wm. Shearer and Arike Logan-Shearer of Commission Decision released October 13, 1983, reversing Review Board's Decision, granting application of Absolutely Great Radio, Inc. for CP and denying competing applications denied. March 30, 1984, Docket 80-366 (FCC 84-120)

Application for review filed by James U. Steele of Review Board Decision, *Cannon's Point B/cing Co.*, FCC 83R-22, released March 29, 1983, *recon. denied*, FCC 83R-88, released May 13, 1983 denied. April 11, 1984, Docket 81-306 (FCC 84-161)

Mass Media Bureau Matters

Application for review filed by Arlington Telecommunications Corp. of Bureau decision in *Arlington Telecommunications Corp.*, Cable TV Action Report No. 2803, Mimeo No. 417, released October 25, 1983; stay denied, Cable TV Action Report No. 2807, Mimeo No. 570, released November 2, 1983 denied. February 3, 1984 (FCC 84-37)

NPRM adopted re amendment of Part 73 concerning remote control operation of AM, FM, and TV b/c transmitters. February 3, 1984, Docket 84-110, *49* FR *08268* (FCC 84-39)

Report and Order adopted re amendment of Subparts E and F of Part 74 to provide for operation of Microwave Boosters. February 3, 1984, Docket 82-20, *49* FR *07127* (FCC 84-40)

Application for review filed by Faith Center, Inc. of Review Board's Order affirming dismissal of Faith's application for renewal of license to operate station KVOF-TV, San Francisco, Ca. denied. February 3, 1984, Docket 82-339 (FCC 84-41)

Order adopted modifying *Memorandum Opinion and Order* granting 82 applications filed by PBS for Instructional TV Fixed Service. February 7, 1984 (FCC 84-43)

Application for review filed by Ninety-Two Point Seven of a letter dated Nov. 10, 1983, issued by Daniel Armstrong, Associate General Counsel, addressing issue of authority of Virginia court system vs. FCC licensing authority under Title III of Communications Act. February 7, 1984 (FCC 84-44)

Petition for partial reconsideration filed on behalf of State of Alaska of freeze on low power TV/TV translator applications denied. February 24, 1984 (FCC 84-59)

Application for review of Bureau action returning application of Sara Diaz Warren for CP for TV station on channel 9, Secaucus, New Jersey, as unacceptable for filing denied. March 1, 1984 (FCC 84-64)

NPRM adopted re implementation of BC Docket 80-90 to increase availability of FM b/c assignments. March 1, 1984, Docket 84-231, *49* FR *11214* (FCC 84-66)

License renewal applications of WKNT/WNIR (FM), Kent, WJW Cleveland, and WEBN-FM, Medina, Ohio; and WWWW (FM), Detroit, Michigan granted. Petition to deny filed by National Black Media Coalition and other petitions denied/dismissed. March 1, 1984 (FCC 84-70)

NPRM adopted re amendment of frequency assignment procedures in b/c Remote Pickup Service to facilitate more efficient use of availeble spectrum. March 23, 1984, Docket 84- 820 *49* FR *14986* (FCC 84-81)

Application for review filed by Inter American B/cers, Inc. of Bureau's action denying waiver of AM minimum power requirement and returning of application as unacceptable for filing denied. March 15, 1985 (FCC 84-83)

Petition for reconsideration filed by Clear-View Cable TV, Inc. of Commission's decision in *Liability of Clear-View Cable TV, Inc.* which denied review of Bureau decision in *Liability of Clear-View Cable TV, Inc.*, Mimeo No. 3748 (1983) denied. March 15, 1984 (FCC 84-86)

Report and Order adopted re amendment of Part 73 concerning nighttime power limitations for Class IV AM b/c stations. March 15, 1984, Docket 79-265, *49* FR *14742* (FCC 84-88)

NPRM adopted re nighttime operations on Canadian, Mexican, and Bahamian AM clear channels. March 15, 1984, Docket 84-281 *49* FR *18567* (FCC 84-89)

By Direction Letter adopted admonishing licensee of Stations KADE and KBCO-FM, Boulder, Colo. for not fully implementing EEO programs and imposing appropriate sanctions, including submission of periodic progress reports. March 15, 1984 (FCC 84-91)

By Direction Letter adopted admonishing licensee of Station KAUV-TV, Victoria, Texas for not fully implementing EEO programs and imposing appropriate sanctions, including submission of periodic progress reports. March 15, 1984 (FCC 84-92)

By Direction Letter adopted admonishing licensee of Stations KDHL and KDHL-FM, Fairbault, Minn. for not fully implementing EEO programs and imposing appropriate sanctions, including submission of periodic progress reports. March 15, 1984 (FCC 84-93)

By Direction Letter adopted admonishing licensee of Station KLBK-TV, Lubbock, Texas for not fully implementing EEO programs and imposing appropriate sanctions, including submission of periodic progress reports. March 15, 1984 (FCC 84-94)

By Direction Letter adopted admonishing licensee of Station WKYV-FM, Vicksburg, Mississippi for not fully implementing EEO programs and imposing appropriate sanctions, including submission of periodic progress reports. March 15, 1984 (FCC 84-95)

By Direction Letter adopted admonishing licensee of Station WLVS-FM, Germantown, Tenn. for not fully implementing EEO programs and imposing appropriate sanctions, including submission of periodic progress reports. March 15, 1984 (FCC 84-96)

By Direction Letter adopted informing E. Kaye Johnson that her 807 applications for commercial FM translator stations are unacceptable for filing. March 29, 1984 (FCC 84-109)

Application for review filed by Anthony R. Martin-Trigona and New Haven Radio, Inc. of Bureau's July 8, 1983, denial of Oct. 6, 1981 petition for reconsideration of staff grant of application of Daniel Meister, Esq., Trustee in Bankruptcy, for involuntary assignment of license for WNHL (AM) New Haven, Conn. denied. March 29, 1984 (FCC 84-110)

Application for review filed by Stone Communications, Inc. of *Report and Order*, *47* FR *40433* (9/14/82), to the extent the Bureau denied modification of Stone's existing license for WGUY-FM, Brewer, Maine, to specify Channel 293 denied. March 30, 1984 (FCC 84-111)

Second Report and Order adopted re use of subcarrier frequencies in aural baseband of TV transmitters. March 29, 1984, Docket 21323, *49* FR *18100* (FCC 84-116)

Application for review filed by Royce International B/cing Co. of rulings dismissing an application and approving settlement agreements in Yucca Valley, Ca. comparative FM proceeding denied. March 29, 1984, Docket 84-135 (FCC 84-119)

Applications of Metromedia, Inc. for consent to transfer of corporate control from John W. Kluge (De Facto Control) to John W. Kluge (De Jure Control) granted. April 10, 1984 (FCC 84-138)

Application for review filed by Big River B/cing Corp. directed against staff action of Aug. 17, 1983 which dismissed its request for the relinquished WEZI call letters due to noncompliance with Section 73.3550(q) of rules denied. April 11, 1984 (FCC 84-152)

By Direction Letter adopted granting request of 1984 Political Conventions Frequency Coordinating Committee to act as auxiliary b/c frequency coordinator for 1984 Democratic/Republican National Conventions; and to suspend Section 74.24. April 11, 1984 (FCC 84-153)

Application for review filed by Santee-Cooper B/cing Co. of Bureau's action allotting FM channels to North Charleston, Eastover, Ravenel, Mt. Pleasant and Parris Island, South Carolina denied. April 11, 1984, Docket 80-201 (FCC 84-154)

License renewal application of KDEN, Denver, Colo. granted subject to reporting conditions. Petition to deny filed by National Black Media Coalition and Urban League of Metropolitan Denver denied. April 11, 1984 (FCC 84-159)

License renewal application of Alainde, Inc. for Station WYDE, Birmingham, Alabama granted subject to EEO reporting conditions. Informal objection filed by National Black Media Coalition denied. April 11, 1984 (FCC 84-160)

Report and Order adopted re amendment of Part 73 to permit stations in TV b/c service to operate with aural power of less than 10% of visual power. April 19, 1984, Docket 83-117, *49* FR *22089* (FCC 84-165)

Memorandum Opinion and Order adopted reducing the forfeiture to the sum of ten thousand dollars ($10,000) for willful or repeated violation of Section 76.610(b) to be paid by Cablevision of Chicago. February 23, 1984 (FCC 84-55)

Private Radio Matters

NPRM adopted re amendment of Part 90 to reserve frequencies for emergency electrical alarm protection. January 19, 1984, Docket 84-30, *49* FR *05639* (FCC 84-23)

NPRM adopted re amendment of Part 90 to eliminate permissible communications restrictions in Private Land Mobile Radio Services. February 3, 1984, Docket 84-109, *49* FR *10560* (FCC 84-33)

NOI adopted re items before International Maritime Organization concerning future amendments to Safety of Life at Sea Convention, 1974. February 7, 1984, Docket 84-141, *49* FR *06994* (FCC 84-45)

NPRM adopted re amendment of Part 83 to allow radiotelegraph officers to perform maintenance and repair duties while keeping mandatory watch on 500 kHz. February 7, 1984, Docket 84-139, *49* FR *06114* (FCC 84-46)

By Direction Letter adopted declaring that Section 605 of Communications Act does not proscribe the manufacture, sale or lease of Dataspeed's SCA receiver to authorized subscribers. February 15, 1984 (FCC 84-48)

Petitions for reconsideration of *Report and Order*, FCC 83-333, *48* FR *33903*, regarding amendment of Part 83 governing spare parts, tools, test equipment, etc. denied. February 23, 1984, Docket 82-677, *9* FR *08257* (FCC 84-54)

NPRM adopted re amendment of Parts 2 and 87 regarding aeronautical flight test telemetry. February 24, 1984, Docket 84-186, *49* FR *08455* (FCC 84-57)

Application for review filed by Guardian Alarm Co. of Michigan of Bureau's decision not to reinstate its application in the 800 MHz Specialized Mobile Radio System denied. February 24, 1984 (FCC 84-58)

NOI adopted re Future Public Safety Telecommunications Requirements. March 1, 1984, Docket 84-232, *49* FR *09754* (FCC 84-63)

NPRM adopted re reimbursement of out-of-pocket costs for volunteer administered amateur radio examinations. March 6, 1984, Docket 84-265, *49* FR *10316* (FCC 84-75)

NPRM adopted re amendment of Part 90 to authorize narrowband technologies for base and mobile communications in Private Land Mobile Radio Services. March 15, 1984, Docket 84-279, *49* FR *13074* (FCC 84-80)

Order adopted terminating proceeding in amendment of rules governing land mobile radio stations to provide for additional technologies which can improve efficiency of radio spectrum use. March 15, 1984, Docket 84-440, *49* FR *14771* (FCC 84-101)

Report and Order adopted amending Part 90 to replace fixed mileage standard with table indicating permissible co-channel assignments between specific antenna sites located in Northern California. March 22, 1984, Docket 82-593, *49* FR *17505* (FCC 84-102)

Report and Order adopted re amendment of Part 87 concerning aeronautical advisory stations. March 29, 1984, Docket 83-990, *49* FR *15083* (FCC 84-107)

Petition for reconsideration filed by Texas Two-Way Inc. of Commission order, FCC 83-472, which denied its application of review and affirmed Bureau's determination that Texas Two-Way could not change its elected method of constructing its Specialized Mobile Radio System. March 30, 1984 (FCC 84-108)

NPRM adopted re amendment of Part 90 concerning sharing of two Police Radio Service frequency pairs with eligibles in Fire and Special Emergency Radio Services. April 11, 1984, Docket 84-370, *49* FR *18571* (FCC 84-141)

Report and Order adopted re maritime search and rescue operations by governmental entities. April 13, 1984, Docket 83-665, *49* FR *17503* (FCC 84-163)

Application for review filed by AirCall of California seeking the setting aside of Bureau Order denying its Petition for Reconsideration and reinstatement of its original 20 channel authorizations. April 26, 1984 (FCC 84-174)

ADMINISTRATIVE LAW JUDGE, DISCRETION OF

COMPETING APPLICANTS MADE PARTIES TO REMANDED PROCEEDING INVOLVING SAME LICENSEE. PARTIES TO SELECT REPRESENTATIVE COUNSEL AND ALJ TO EXERCISE BROAD DISCRETION IN EXPEDITING CASE. COMMISSION WILL INVOKE COLLATERAL ESTOPPEL TO PRECLUDE RELITIGATION OF COMMON ISSUES. DURING PENDENCY OF INQUIRY INTO LICENSEE'S QUALIFICATIONS, RULES AUTHORIZING AMENDMENTS TO APPLICATIONS ARE SUSPENDED. 94FCC2D0890
RKO GENERAL, INC.

ADVERTISING

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670 94FCC2D0678
COMMERCIAL TV STATIONS

AGREEMENT, BETWEEN APPLICANTS

REVIEW BOARD GRANTED JOINT REQUEST FOR APPROVAL OF AGREEMENT CALLING FOR GRANT OF ONE APPLICATION AND DISMISSAL OF COMPETING APPLICATIONS. UNAUTHORIZED PLEADING SEEKING CONDITION ON GRANT DISMISSED. BOARD ON ITS OWN MOTION, HOWEVER, ADDED CONDITION TO THE AWARD OF CP.
BC DOCKET 81-733 94FCC2D1000
WHITCO B/CERS, INC.

APPLICANT, FINANCIAL QUALIFICATION, SEE FINANCIAL QUALIF

COMMISSION OVERTURNED BUREAU POLICY WHICH ALLOWED APPLICANTS FILING 1977 VERSION OF FORM 301 TO CERTIFY THEIR FINANICAL QUALIFICATIONS AFTER BEING DESIGNATED FOR HEARING, IF THEY HAD NOT DEMONSTRATED THOSE QUALIFICATIONS UNDER OLD FORM. HEARING APPLICANTS WHICH TOOK ADVANTAGE OF THIS POLICY MUST SHOW THEIR COMPLIANCE WITH STANDARDS.
BC DOCKET 82-731 94FCC2D0452
SOUTH FLORIDA B/CING CO.

APPLICATION, ACCEPTANCE OF

APPLICATION FOR REVIEW DENIED. SINCE APPLICANT'S PROPOSED SERVICE AREA RECEIVES SIGNALS FROM THREE FULL-SERVICE STATIONS AND LOCATED LESS THAN 55 MILES FROM 142ND LARGEST TV MARKET, APPLICANT'S STATUS AS AN EXISTING LICENSEE OF FULL-SERVICE UHF TV STATION DOES NOT WARRANT A WAIVER OF COMMISSION'S FREEZE ON ACCEPTANCE OF TV TRANSLATOR APPLICATIONS. APPLICATION DISMISSED. 94FCC2D1164
FAMILY TELEVISION, INC.

PETITION FOR REVIEW OF BUREAU'S ACTION RETURNING APPLICATION DENIED. SINCE APPLICANT'S PROPOSED SERVICE AREA ALREADY RECEIVES SIGNALS FROM TWO FULL-SERVICE STATIONS, APPLICANT'S PROVISION OF FIRST LOCAL SERVICE DOES NOT MEET COMMISSION'S FREEZE EXEMPTION CRITERIA FOR PROPOSALS AND APPLICATION DISMISSED.
P.M. B/CING CO., INC. 94FCC2D1335

APPLICATION, AMENDMENT OF, AFTER DESIGNATION,

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775
BEAUFORT COUNTY B/CING CO. 94FCC2D0572

APPLICATION, AMENDMENT OF, CURRENT INFORMATION,

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679
RKO GENERAL, INC. (KHJ-TV) 94FCC2D0879

APPLICATION, AMENDMENT OF, NEED FOR

COMPETING APPLICANTS MADE PARTIES TO REMANDED PROCEEDING INVOLVING SAME LICENSEE. PARTIES TO SELECT REPRESENTATIVE COUNSEL AND ALJ TO EXERCISE BROAD DISCRETION IN EXPEDITING CASE. COMMISSION WILL INVOKE COLLATERAL ESTOPPEL TO PRECLUDE RELITIGATION OF COMMON ISSUES. DURING PENDENCY OF INQUIRY INTO LICENSEE'S QUALIFICATIONS, RULES AUTHORIZING AMENDMENTS TO APPLICATIONS ARE SUSPENDED.
RKO GENERAL, INC. 94FCC2D0890

APPLICATION, DISMISSAL OF, SEE ALSO DISMISSAL

REVIEW BOARD AFFIRMS ALJ'S DISMISSAL OF APPLICATION WHERE APPLICANT PROPOSED MAJOR CHANGE TO ITS APPLICATION WITHIN MEANING OF SECTION 73.3572(A)(1).
MM DOCKET 83-61
TREFOIL B/CING CO., INC. 94FCC2D0928

APPLICATION, FILING, SEE ALSO FILING

WHERE AN APPLICATION FILED LATE BECAUSE AIR CARRIER COULD NOT PROVIDE NEXT DAY DELIVERY DUE TO GROUNDING AT AN INTERMEDIATE STOP, UNUSUAL AND COMPELLING CIRCUMSTANCES ARE DEMONSTRATED TO WARRANT WAIVER OF SECTIONS 73.3572(C) AND 1.227(B) OF RULES. 94FCC2D0069
CALDWELL TV ASSOCIATES, LTD.

APPLICATION, FOR REVIEW, SEE ALSO REVIEW

APPLICATION FOR REVIEW DENIED. COMPLAINANT MUST IDENTIFY A PARTICULAR WELL-DEFINED CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE. IN ADDRESSING OVERALL PROGRAMMING AIRED PRIOR TO SUBJECT B/C. 94FCC2D0728
CONSERVATIVE CAUCUS, INC.

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST ABC TV NETWORK DENIED. COMPLAINANT FAILED TO ESTABLISH THAT TREATMENT OF ALLERGY SUFFERERS IS CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE. 94FCC2D0734
COUNCIL OF ALLERGY/IMMUNOLOGY

APPLICATION FOR REVIEW OF DENIAL OF COMPLAINT AGAINST RAHALL B/CING OF INDIANA, INC. (WFBQ-FM) DENIED. COMMISSION FOUND NO ERROR IN BUREAU'S ACTIONS. 94FCC2D1162
DECENCY IN B/CING, INC.

APPLICATION, FOR REVIEW, TIME FOR FILING

PETITION FOR RECONSIDERATION MUST BE TIMELY FILED. FOLLOW-UP COMPLAINT MUST BE FILED WITHIN REASONABLE TIME (NORMALLY WITHIN 30 DAYS) AFTER COMMISSION DENIAL OF INITIAL COMPLAINT. 94FCC2D0501
ACCURACY IN MEDIA

BANKRUPTCY

WHILE COMMISSION HAS GENERAL POLICY OF NOT QUESTIONING APPOINTMENT OF RECEIVER OR TRUSTEE IN BANKRUPTCY BY STATE AND FEDERAL COURTS, WHERE SUCH AN APPOINTMENT INVOLVES ENFORCEMENT OF REVERSIONARY INTEREST IN B/C LICENSE AND RECOGNITION OF SECURITY INTEREST IN LICENSE BY CREDITORS, APPLICATION SEEKING CONSENT TO ASSIGN B/C LICENSE TO RECEIVER OR TRUSTEE IS UNACCEPTABLE FOR FILING. 94FCC2D0829
KIRK MERKLEY

BROADCAST EXPERIENCE, SEE ALSO COMPARATIVE CRITERIA

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531
GLOBAL B/CING GROUP, INC 94FCC2D0809

BROADCASTING, RE-REGULATION

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670
COMMERCIAL TV STATIONS 94FCC2D0678

CANDOR, SEE ALSO CHARACTER OR MISREPRESENTATION

APPLICANT FOUND FINANCIALLY UNQUALIFIED BECAUSE OF LACK OF GOOD CAUSE FOR LATE-FILED FINANCIAL AMENDMENT AND FAILURE TO DEMONSTRATE REASONABLE ASSURANCE, ON THE MERITS, THAT SUFFICIENT FINANCIAL RESOURCES WOULD BE AVAILABLE. SUBSTANTIAL COMPARATIVE DEMERIT ASSESSED FOR LACK OF CANDOR IN SETTING FORTH PROPOSED FINANCIAL RESOURCES, AND PRIMA FACIE BASIS FOR REMAND NOTED. BC DOCKET 80-460
COASTAL BEND FAMILY TV, INC. 94FCC2D0648

REVIEW BOARD AFFIRMS I.D. AND GRANTS APPLICATION WITH SUBSTANTIAL DIVERSIFICATION AND INTEGRATION PREFERENCES AND SLIGHT-TO-MODERATE COMPARATIVE DEMERIT FOR CARELESS LACK OF CANDOR IN REPORTING PRINCIPAL'S VOTING INTEREST IN ANOTHER LICENSEE AS NONVOTING AND FAILING TO REPORT OTHER LICENSEE'S APPLICATION FOR, AND SUBSEQUENT GRANT OF, TV STATION IN REGION. BC DOCKET 80-734
SUPERIOR B/CING OF CALIFORNIA 94FCC2D0904

CATV CARRIAGE, SIGNIFICANT VIEWING TEST

GRANTED IN PART REQUEST OF TV B/C STATION TO BE DECLARED SIGNIFICANTLY VIEWED. STATION MET TEST LEVELS IN SEVEN COUNTIES IN 1976, BUT NO LONGER MEETS LEVELS IN ONE COUNTY TODAY.
OCTAGON B/CING CO. 94FCC2D0561

CATV CROSS OWNERSHIP

PETITION FOR TAX CERTIFICATE GRANTED FOR SALE OF MULTIPOINT DISTRIBUTION SYSTEM BASED UPON FINDING THAT ITS OPERATIONS WERE TECHNICALLY AS WELL AS FUNCTIONALLY INTEGRATED IN LARGE PART WITH CABLE SYSTEM THAT WAS SOLD TO PROMOTE COMMISSION'S POLICY AGAINST OWNERSHIP OF CO-LOCATED TV STATION AND CABLE SYSTEM. 94FCC2D0207
GEORGIA CABLEVISION CORP.

CELLULAR COMMUNICATIONS SYSTEMS

APPLICATIONS FOR REVIEW OF STAFF ACTIONS RETURNING AMENDMENTS TO CELLULAR APPLICATIONS AS MAJOR GRANTED. APPLICATIONS GRANTED IN PART CONCERNING AMENDMENTS REMANDED TO COMMON CARRIER BUREAU AND DENIED IN ALL OTHER RESPECTS. 94FCC2D0074
CELLULAR COMMUNICATIONS SYSTEMS

CHANNEL, ASSIGNMENT, SEE ALSO FREQUENCY ASSIGNMENT

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90 94FCC2D0152
FM B/C STATIONS

CHARACTER QUALIFICATIONS, LACK OF CANDOR, SEE ALSO CANDOR

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679 94FCC2D0879
RKO GENERAL, INC. (KHJ-TV)

COMMON CARRIER

NPRM ADOPTED PROPOSING A PLAN FOR COMMISSION TO MONITOR THE EFFECTS OF INTERSTATE ACCESS CHARGES AND VARIOUS RATE CHANGES ON AVAILABILITY OF LOCAL SERVICE.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE (PHASE IV) 94FCC2D0396

PETITION FOR DECLARATORY RULING SEEKING CLARIFICATION OF
DETERMINATION WHICH PRECLUDES STATES FROM IMPOSING ALTERNATIVE REGULATORY SCHEMES UPON CARRIERS TO ASSURE CONTINUED
AVAILABILITY OF CPE TO ALL SUBSCRIBERS GRANTED TO AN EXTENT
AND OTHERWISE DENIED. ADOPTION OF SECOND COMPUTER INQUIRY,
77 FCC 2D 384, PREEMPTS APPLICATION OF PETITIONER'S PROPOSAL
TO ANY CARRIER SUBJECT TO STRUCTURAL SEPARTION RULES.
NARUC 94FCC2D0409

NOI ADOPTED RE INTEGRATED DIGITAL SERVICE NETWORKS (ISDN),
ITS EVOLUTION, CURRENT STANDARDIZATION EFFORTS AND POSSIBLE
U.S. IMPLEMENTATIONS.
GEN. DOCKET 83-841
INTEGRATED SERVICES DIGITAL NETWORKS 94FCC2D1289

COMMON CARRIER, AUTHORIZATION, SEE ALSO CERTIFICATE

MEMORANUDM OPINION, ORDER AND CERTIFICATE ADOPTED AUTHORIZING WESTERN UNION FACILITIES TO PROVIDE TELETEX SERVICE
WITHIN U.S. AND BETWEEN U.S. AND GERMANY.
WESTERN UNION TELEGRAPH CO. 94FCC2D0472

COMMON CARRIER, COMPLAINT AGAINST

AT&T'S REFUSAL TO HONOR MCI'S ORDER FOR TELPAK CIRCUITS IN
1975 ON BASIS OF CUSTOMER PREMISES TARIFF RESTRICTIONS WAS
UNJUST, UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF
SECTION 201(B) AND 202(A) OF COMMUNICATIONS ACT AND RESULTED
IN INJURY TO MCI. DAMAGES ASSESSED. PREJUDGEMENT INTEREST
AWARDED ON CONTINGENCY BASIS.
CC DOCKET 81-217
MCI V. AT&T 94FCC2D0332

COMMON CARRIER, COST ACCOUNTING METHODOLOGY

ITEM REVISES INTERIM COST ALLOCATION MANUAL USED BY AT&T TO
ALLOCATE COSTS AMONG ITS INTERSTATE SERVICES.
CC DOCKET 79-245
AT&T CO. 94FCC2D1118

COMMON CARRIER, COSTS, ALLOCATION OF

ITEM REVISES INTERIM COST ALLOCATION MANUAL USED BY AT&T TO ALLOCATE COSTS AMONG ITS INTERSTATE SERVICES.
CC DOCKET 79-245
AT&T CO. 94FCC2D1118

COMMON CARRIER, INTERCONNECTION

NPRM ADOPTED SEEKING COMMENT ON PROPOSED RULES AND REQUIREMENTS TO COMPLEMENT ADOPTION OF ACCESS CHARGES IN PHASE I, AND REVISED INDUSTRY STRUCTURE WHICH WILL RESULT FROM IMPLEMENTATION OF MODIFICATION OF FINAL JUDGEMENT IN U.S. V. AT&T CO., 552 F. SUPP. 131 (D.C. 1982).
CC DOCKET 78-72
MARKET STRUCTURE (PHASE III) 94FCC2D0292

AT&T'S APPLICATION FOR SECTION 214 AUTHORITY TO OFFER BASIC PACKET SWITCHING SEVICE GRANTED, WITH CONDITIONS ATTACHED TO AUTHORIZATION.
BASIC PACKET SWITCHING SERVICE 94FCC2D0048

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

COMMON CARRIER, INTERCONNECTION, CARRIER TO CARRIER

NPRM ADOPTED SEEKING COMMENT ON PROPOSED RULES AND REQUIREMENTS TO COMPLEMENT ADOPTION OF ACCESS CHARGES IN PHASE I, AND REVISED INDUSTRY STRUCTURE WHICH WILL RESULT FROM IMPLEMENTATION OF MODIFICATION OF FINAL JUDGEMENT IN U.S. V. AT&T CO., 552 F. SUPP. 131 (D.C. 1982).
CC DOCKET 78-72
MARKET STRUCTURE (PHASE III) 94FCC2D0292

MEMORANUDM OPINION, ORDER AND CERTIFICATE ADOPTED AUTHORIZING WESTERN UNION FACILITIES TO PROVIDE TELETEX SERVICE WITHIN U.S. AND BETWEEN U.S. AND GERMANY.
WESTERN UNION TELEGRAPH CO. 94FCC2D0472

COMMON CARRIER, INTERCONNECTION, CUSTOMER-PROVIDED EQUIPMENT

COMMISSION ADOPTED NPRM PROPOSING PROCEDURES FOR DETARIFFING OF EMBEDDED CPE OWNED BY BELL SYSTEM, INDEPENDENT TELEPHONE COMPANIES, AND RECORD CARRIERS.
COMPUTER II IMPLEMENTATION 94FCC2D0076

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

COMMON CARRIER, INTERNATIONAL

NOI ADOPTED RE INTEGRATED DIGITAL SERVICE NETWORKS (ISDN), ITS EVOLUTION, CURRENT STANDARDIZATION EFFORTS AND POSSIBLE U.S. IMPLEMENTATIONS.
GEN. DOCKET 83-841
INTEGRATED SERVICES DIGITAL NETWORKS 94FCC2D1289

COMMON CARRIER, INTERSTATE

ITEM REVISES INTERIM COST ALLOCATION MANUAL USED BY AT&T TO ALLOCATE COSTS AMONG ITS INTERSTATE SERVICES.
CC DOCKET 79-245
AT&T CO. 94FCC2D1118

COMMON CARRIER, JOINT USE OF FACILITIES

NPRM ADOPTED SEEKING COMMENT ON PROPOSED RULES AND REQUIREMENTS TO COMPLEMENT ADOPTION OF ACCESS CHARGES IN PHASE I, AND REVISED INDUSTRY STRUCTURE WHICH WILL RESULT FROM IMPLEMENTATION OF MODIFICATION OF FINAL JUDGEMENT IN U.S. V. AT&T CO., 552 F. SUPP. 131 (D.C. 1982).
CC DOCKET 78-72
MARKET STRUCTURE (PHASE III) 94FCC2D0292

COMMON CARRIER, LEASE CHANNEL SERVICE

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

COMMON CARRIER, MAXIMUM SEPARATION RULES

ORDER ADOPTED GRANTING TRANSFER OF CONTROL OF SOUTHERN PACIFIC COMMUNICATIONS CO. AND SOUTHERN PACIFIC SATELLITE CO.'S LICENSES AND AUTHORIZATION TO GTE CORP.
GTE CORP. AND SOUTHERN PACIFIC CO. 94FCC2D0235

COMMON CARRIER, RATE OR TARIFF, UNLAWFUL

ON REMAND FROM COURT OF APPEALS FOR D.C. CIRCUIT, COMMISSION EXPLAINS FURTHER ITS DECISION THAT RCA'S TARIFF REVISIONS FOR DOMESTIC SATELLITE SERVICES, ARE UNJUST AND UNREASONABLE UNDER SECTION 201(B) OF ACT.
CC DOCKET 80-766
RCA AMERICAN COMUNICATIONS, INC. 94FCC2D1338

COMMON CARRIER, RATE REVISION, AUTHORITY TO MAKE

MEMORANDUM OPINION AND ORDER ADOPTED DENYING PETITIONS TO REJECT OR SUSPEND AND INVESTIGATE AND PERMITTING AT&T TO CONDUCT AND EXPERIMENT WITH ITS MTS RATES IN TRIAL STATE OF NEW YORK, CALIFORNIA, AND IOWA TO EXPIRE ON DEC. 31, 1983.
AT&T CO. 94FCC2D0551

COMMON CARRIER, RATE STRUCTURE, INQUIRY

PART TIME/FULL TIME RATE STRUCTURE BASED ON 60/40 PERCENT DIVISION OF PRESENT AND FUTURE REVENUE REQUIREMENTS ADOPTED AS REASONABLE FOR AT&T'S SERIES 7000 TERRESTRIAL TV TRANSMISSION SERVICES. FURTHER ACTION INVESTIGATING UNJUST DISCRIMINATION DEFERRED UNTIL FURTHER NOTICE.
AT&T CO. 94FCC2D0566

COMMON CARRIER, RATES, CHARGES, SEE ALSO TARIFF

NPRM ADOPTED SEEKING COMMENT ON PROPOSED RULES AND REQUIREMENTS TO COMPLEMENT ADOPTION OF ACCESS CHARGES IN PHASE I, AND REVISED INDUSTRY STRUCTURE WHICH WILL RESULT FROM IMPLEMENTATION OF MODIFICATION OF FINAL JUDGEMENT IN U.S. V. AT&T CO., 552 F. SUPP. 131 (D.C. 1982).
CC DOCKET 78-72
MARKET STRUCTURE (PHASE III) 94FCC2D0292

NPRM ADOPTED PROPOSING A PLAN FOR COMMISSION TO MONITOR THE EFFECTS OF INTERSTATE ACCESS CHARGES AND VARIOUS RATE CHANGES ON AVAILABILITY OF LOCAL SERVICE.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE (PHASE IV) 94FCC2D0396

COMMON CARRIER, RATES, JUST AND REASONABLE CHARGES

AT&T'S REFUSAL TO HONOR MCI'S ORDER FOR TELPAK CIRCUITS IN 1975 ON BASIS OF CUSTOMER PREMISES TARIFF RESTRICTIONS WAS UNJUST, UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF SECTION 201(B) AND 202(A) OF COMMUNICATIONS ACT AND RESULTED IN INJURY TO MCI. DAMAGES ASSESSED. PREJUDGEMENT INTEREST AWARDED ON CONTINGENCY BASIS.
CC DOCKET 81-217
MCI V. AT&T 94FCC2D0332

COMMON CARRIER, SERVICE, RESALE AND SHARED USE OF

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. RESALE OR SHARED USE RESTRICTIONS MAY NOT BE LAWFULLY APPLIED TO PHYSICALLY INTRASTATE WATS USED IN INTERSTATE COMMUNICATIONS. COMMISSION DECLINED TO ORDER BSOCS TO OFFER SERVICE AT PARTICULAR RATES OR TERMS.
AT&T CO. 94FCC2D1110

COMMON CARRIER, SPECIALIZED SERVICES

RULES ADOPTED FOR COMPUTATION AND ASSESSMENT OF END USER AND CARRIER'S CARRIER ACCESS CHARGES AND CREATION OF AN EXCHANGE CARRIER ASSOCIATION TO PREPARE ACCESS CHARGE TARIFFS AND DISTRIBUTE POOLED ACCESS CHARGE REVENUES.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE 94FCC2D0852

PETITION FOR WAIVER OF RULES PRESCRIBING RATE STRUCTURE FOR USE OF LOCAL TRANSPORT FACILITIES TO ORIGINATE OR TERMINATE INTERSTATE OR FOREIGN TELECOMMUNICATIONS GRANTED. RULES HAD ASSUMED EQUAL INTERCONNECTION OPPORTUNITY FOR ALL INTEREXCHANGE CARRIERS.
AT&T CO. 94FCC2D0545

COMPARATIVE HEARING, SEE ALSO HEARING OR APPLICATION, MUTUAL

REVIEW BOARD AFFIRMS ALJ'S GRANT TO FM B/C APPLICANT WHO HAS
MODERATE COMPARATIVE COVERAGE PREFERENCE FOR SERVING NIGHT-
TIME WHITE AREA. WINNING APPLICANT'S SMALL ATTRIBUTABLE
OWNERSHIP INTEREST IN LOCAL B/C PRODUCTION COMPANY IS DE
MINIMIS, AND ITS 50% INTEGRATION CREDIT WITH MINORITY OWNER-
SHIP ENHANCEMENT DEEMED EQUAL TO ANOTHER'S 52% CREDIT.
BC DOCKET 79-56 94FCC2D0212
GOLDEN STATE B/CING CORP.

REVIEW BOARD AFFIRMS I.D., FINANCIALLY DISQUALIFIES ONE COM-
MERICAL VHF TV APPLICANT, AND GRANTS COMPETING APPLICATION.
DISQUALIFIED APPLICANT RELIED HEAVILY ON EQUIPMENT ON HAND
WHICH WAS IN POOR CONDITION AND WAS NOT SHOWN TO BE FUNC-
TIONAL IN QUALITY AND ADEQUATE IN AMOUNT, AND SUBSTANTIALLY
UNDERESTIMATED ITS PROGRAMMING COSTS.
BC DOCKET 80-484 94FCC2D0761
GACO COMMUNICATIONS CORP.

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT
PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO
SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING
APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE
PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF
JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775 94FCC2D0572
BEAUFORT COUNTY B/CING CO.

REVIEW BOARD AFFIRMS I.D. AND GRANTS APPLICATION WITH SUB-
STANTIAL DIVERSIFICATION AND INTEGRATION PREFERENCES AND
SLIGHT-TO-MODERATE COMPARATIVE DEMERIT FOR CARELESS LACK OF
CANDOR IN REPORTING PRINCIPAL'S VOTING INTEREST IN ANOTHER
LICENSEE AS NONVOTING AND FAILING TO REPORT OTHER LICENSEE'S
APPLICATION FOR, AND SUBSEQUENT GRANT OF, TV STATION IN
REGION. BC DOCKET 80-734 94FCC2D0904
SUPERIOR B/CING OF CALIFORNIA

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT AFTER FINDING IT
WILL NOT IMPEDE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION
OF TV SERVICE AS REQUIRED BY SEC. 307(B) OF COMMUNICATIONS
ACT. SINCE COMPETING APPLICATIONS WERE FOR DIFFERENT SUBURBS
OF A LARGE CITY AND SINCE TV CHANNELS MUST SERVE BROADER
AREAS THAN RADIO STATIONS, NO SEC. 307(B) PREFERENCE COULD
HAVE BEEN AWARDED TO EITHER APPLICANT. BC DOCKET 81-310
BUENA VISTA TELECASTERS - TEXAS, INC. 94FCC2D0625

REVIEW BOARD AFFIRMS I.D., GRANTS TV APPLICATION WHERE ONLY PREFERENCE AWARDED WINNING APPLICANT WAS FOR SUPERIOR INTEGRATION. NO DIVERSIFICATION PREFERENCE AWARDED FOR INSIGNIFICANT CROSS INTERESTS, AND BOARD WILL NOT CREATE NOVEL COMPARATIVE PREFERENCE FOR COMMUNITY ORGANIZATIONS.
BC DOCKET 82-420
PITTSFIELD COMMUNITY TV ASSOCIATION 94FCC2D1320

COMPETITION, COMMON CARRIERS

COMMISSION ADOPTED NPRM PROPOSING PROCEDURES FOR DETARIFFING OF EMBEDDED CPE OWNED BY BELL SYSTEM, INDEPENDENT TELEPHONE COMPANIES, AND RECORD CARRIERS. 94FCC2D0076
COMPUTER II IMPLEMENTATION

MEMORANUDM OPINION, ORDER AND CERTIFICATE ADOPTED AUTHORIZING WESTERN UNION FACILITIES TO PROVIDE TELETEX SERVICE WITHIN U.S. AND BETWEEN U.S. AND GERMANY.
WESTERN UNION TELEGRAPH CO. 94FCC2D0472

COMPLAINT, FORMAL

APPLICATION FOR REVIEW OF DENIAL OF COMPLAINT AGAINST RAHALL B/CING OF INDIANA, INC. (WFBQ-FM) DENIED. COMMISSION FOUND NO ERROR IN BUREAU'S ACTIONS. 94FCC2D1162
DECENCY IN B/CING, INC.

COMPUTING DEVICE

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15, APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PROCEDURE MP-4. 94FCC2D0508
CORDLESS TELEPHONES

COMSAT, FINANCING

MEMORANDUM OPINION AND ORDER ADOPTED CONCERNING CONSOLIDATED CAPITALIZATION PLAN FOR 1983 OF COMSAT. 94FCC2D1149
COMSAT

CONSOLIDATION OF CASE FOR HEARING, SEE HEARING, CONSOLIDAT

WHERE AN APPLICATION FILED LATE BECAUSE AIR CARRIER COULD NOT PROVIDE NEXT DAY DELIVERY DUE TO GROUNDING AT AN INTERMED'ATE STOP, UNUSUAL AND COMPELLING CIRCUMSTANCES ARE DEMONSTRATED TO WARRANT WAIVER OF SECTIONS 73.3572(C) AND 1.227(B) OF RULES.
94FCC2D0069
CALDWELL TV ASSOCIATES, LTD.

CONTOUR, OVERLAP

PROCEEDING REMANDED BECAUSE FACTUAL BASIS UPON WHICH ALJ RELIED IN GRANTING APPLICATIONS AND TERMINATING PROCEEDING WAS INCORRECT.
BC DOCKET 82-701
94FCC2D0934
TRIO B/CERS, INC.

REVIEW BOARD GRANTS SUMMARY DECISION ON PROHIBITED CONTOUR OVERLAP ISSUE, INVOLVING SECTION 73.37(A), AND DENIES APPLCATION FOR AM STATION. JOINT FIELD INTENSITY MEASUREMENTS DEMONSTRATED OVERLAP, WHICH WAS CONFIRMED BY DATA AVERAGING METHODOLOGY USED TO EVALUATE ALL AVAILABLE SETS OF DATA EXCEPT CERTAIN HIGHLY SUSPECT DATA.
BC DOCKET 81-606
94FCC2D1168
GSM MEDIA CORP.

CONTROL, TRANSFER OF, PROCEDURES

APPLICATION FOR ASSIGNMENT OF LICENSE GRANTED. VIOLATION OF SEC. 310(D) OF COMMUNICATIONS ACT OF 1934, AS AMENDED, REQUIRING PRIOR COMMISSION CONSENT TO TRANSFER OF CONTROL OR ASSIGNMENT OF LICENSE, WAS NOT DISQUALIFYING WHERE APPLICATION WAS PROMPTLY FILED.
94FCC2D0117
D.H. OVERMYER TELECASTING CO. INC.

WHILE COMMISSION HAS GENERAL POLICY OF NOT QUESTIONING APPOINTMENT OF RECEIVER OR TRUSTEE IN BANKRUPTCY BY STATE AND FEDERAL COURTS, WHERE SUCH AN APPOINTMENT INVOLVES ENFORCEMENT OF REVERSIONARY INTEREST IN B/C LICENSE AND RECOGNITION OF SECURITY INTEREST IN LICENSE BY CREDITORS, APPLICATION SEEKING CONSENT TO ASSIGN B/C LICENSE TO RECEIVER OR TRUSTEE IS UNACCEPTABLE FOR FILING.
94FCC2D0829
KIRK MERKLEY

CONTROL, TRANSFER OF, UNAUTHORIZED

MUTUALLY EXCLUSIVE APPLICATIONS DESIGNATED FOR HEARING. FAILURE TO FILE AN APPLICATION FOR TRANSFER OF CONTROL BASED ON GRADUAL CHANGE OF MAJORITY OF BOARD MEMBERS OF LICENSEE'S PARENT, NONPROFIT, NON-STOCK ENTITY WILL NOT REFLECT ADVERSELY ON LICENSEE WHERE REQUIREMENT FOR SUCH APPLICATION IS UNCLEAR AND LICENSEE HAS OTHERWISE NOTIFIED COMMISSION OF CHANGES. MM DOCKET 83-667
SEVEN LOCKS B/CING CO. 94FCC2D0899

CORDLESS TELEPHONES

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED COMMISSION'S OPIGINAL DECISION. 94FCC2D0531

COSTS ALLOCATION OF

ITEM REVISES INTERIM COST ALLOCATION MANUAL USED BY AT&T TO ALLOCATE COSTS AMONG ITS INTERSTATE SERVICES.
CC DOCKET 79-245
AT&T CO. 94FCC2D1118

COVERAGE, ISSUE, SEE ALSO COMPARATIVE COVERAGE ISSUE

IN HEARING MATTER OF MUTUALLY EXCLUSIVE CP APPLICATIONS FOR FM STATION, REVIEW BOARD AFFIRMED ALJ'S GRANT. WINNING APPLICANT FOUND TO BE FINANCIALLY QUALIFIED AND ENTITLED TO DIVERSIFICATION, COVERAGE, AND AUXILIARY POWER PREFERENCES. PETITION FOR SITE AVAILABILITY ISSUE DENIED.
BC DOCKET 82-629
WHITE MOUNTAIN FM, INC. 94FCC2D1423

COVERAGE, MISREPRESENTATION

COMMISSION WILL NO LONGER MAINTAIN POLICIES AGAINST MISUSE OF AUDIENCE RATINGS DATA OR USE OF INACCURATE OR EXAGGERATED COVERAGE MAPS OR COVERAGE CLAIMS BY B/C LICENSEES.
B/C REGULATION 94FCC2D0619

CROSS INTEREST SEE ALSO CONTROL, COMPETITION, OR OWNERSHIP

REVIEW BOARD AFFIRMS I.D. AND GRANTS APPLICATION WITH SUBSTANTIAL DIVERSIFICATION AND INTEGRATION PREFERENCES AND SLIGHT-TO-MODERATE COMPARATIVE DEMERIT FOR CARELESS LACK OF CANDOR IN REPORTING PRINCIPAL'S VOTING INTEREST IN ANOTHER LICENSEE AS NONVOTING AND FAILING TO REPORT OTHER LICENSEE'S APPLICATION FOR, AND SUBSEQUENT GRANT OF, TV STATION IN REGION. BC DOCKET 80-734
SUPERIOR B/CING OF CALIFORNIA 94FCC2D0904

REVIEW BOARD AFFIRMS I.D., GRANTS TV APPLICATION WHERE ONLY PREFERENCE AWARDED WINNING APPLICANT WAS FOR SUPERIOR INTEGRATION. NO DIVERSIFICATION PREFERENCE AWARDED FOR INSIGNIFICANT CROSS INTERESTS, AND BOARD WILL NOT CREATE NOVEL COMPARATIVE PREFERENCE FOR COMMUNITY ORGANIZATIONS.
BC DOCKET 82-420
PITTSFIELD COMMUNITY TV ASSOCIATION 94FCC2D1320

CUT-OFF RULES

WHERE AN APPLICATION FILED LATE BECAUSE AIR CARRIER COULD NOT PROVIDE NEXT DAY DELIVERY DUE TO GROUNDING AT AN INTERMEDIATE STOP, UNUSUAL AND COMPELLING CIRCUMSTANCES ARE DEMONSTRATED TO WARRANT WAIVER OF SECTIONS 73.3572(C) AND 1.227(B) OF RULES.
CALDWELL TV ASSOCIATES, LTD. 94FCC2D0069

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679
RKO GENERAL, INC. (KHJ-TV) 94FCC2D0879

DATAPHONE DIGITAL SERVICE, INTERSTATE

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216 94FCC2D0005
AMENDMENT OF PART 68

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DECLARATORY RULING

PETITION FOR DECLARATORY RULING SEEKING CLARIFICATION OF
DETERMINATION WHICH PRECLUDES STATES FROM IMPOSING ALTERNATIVE REGULATORY SCHEMES UPON CARRIERS TO ASSURE CONTINUED
AVAILABILITY OF CPE TO ALL SUBSCRIBERS GRANTED TO AN EXTENT
AND OTHERWISE DENIED. ADOPTION OF SECOND COMPUTER INQUIRY,
77 FCC 2D 384, PREEMPTS APPLICATION OF PETITIONER'S PROPOSAL
TO ANY CARRIER SUBJECT TO STRUCTURAL SEPARTION RULES.
94FCC2D0409
NARUC

GRANTED IN PART REQUEST OF TV B/C STATION TO BE DECLARED
SIGNIFICANTLY VIEWED. STATION MET TEST LEVELS IN SEVEN
COUNTIES IN 1976, BUT NO LONGER MEETS LEVELS IN ONE COUNTY
TODAY. 94FCC2D0861
OCTAGON B/CING CO.

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND
OTHERWISE DENIED. RESALE OR SHARED USE RESTRICTIONS MAY NOT
BE LAWFULLY APPLIED TO PHYSICALLY INTRASTATE WATS USED IN
INTERSTATE COMMUNICATIONS. COMMISSION DECLINED TO ORDER
BSOCS TO OFFER SERVICE AT PARTICULAR RATES OR TERMS.
94FCC2D1110
AT&T CO.

DEREGULATION

COMMISSION ADOPTED NPRM PROPOSING PROCEDURES FOR DETARIFFING
OF EMBEDDED CPE OWNED BY BELL SYSTEM, INDEPENDENT TELEPHONE
COMPANIES, AND RECORD CARRIERS. 94FCC2D0076
COMPUTER II IMPLEMENTATION

DISCLOSURE, CANDID, SEE ALSO CANDOR

REVIEW BOARD AFFIRMS GRANT OF CHALLENGER'S APPLICATION IN
COMPARATIVE FM RENEWAL PROCEEDING. INCUMBENT IS NOT AWARDED
RENEWAL EXPECTANCY AND RECEIVES SUBSTANTIAL COMPARATIVE
DEMERIT ON PAST MISCONDUCT. LOSING COMPETING APPLICANT
ACHIEVES SLIGHT SPECIALIZED PROGRAM FORMAT PREFERENCE FOR
FIRST NIGHTTIME SPANISH PROGRAMMING AND SLIGHT REPORTING
DEMERIT. BC DOCKET 80-479 94FCC2D0938
UNITED B/CING CO., INC.

DISCOVERY SEE ALSO DEPOSITION, INSPECTION OR INFORMATION

REVIEW BOARD DENIED APPEAL OF DISMISSAL OF TV RENEWAL APPLICATION BECAUSE LICENSEE FAILED TO COMPLY WITH VALID DISCOVERY REQUESTS AND ORDERS. ASSERTED GROUNDS FOR NON-COMPLIANCE WERE PREVIOUSLY REJECTED BY BOARD, COMMISSION, AND COURTS. ALSO, APPEAL FROM DISMISSAL OF LATE-FILED PETITION TO INTERVENE IS DENIED BECAUSE RULE 1.223 REQUIREMENTS NOT MET.
BC DOCKET 82-339
94FCC2D0756
FAITH CENTER, INC.

DISCOVERY, PROCEEDINGS, SCOPE OF

DISCOVERY GRANTED IN PART AND CLAIM OF ATTORNEY-CLIENT PRIVILEGE DISALLOWED ON FINDING THAT APPLICANTS WAIVED RIGHT TO ASSERT PRIVILEGE. DISCOVERY DENIED WITH RESPECT TO DOCUMENTS PROTECTED BY ATTORNEY-WORK-PRODUCT DOCTRINE.
CC DOCKET 82-587 94FCC2D0539
A.S.D. ANSWER SERVICE, INC.

DIVERSIFICATION, OF CONTROL OF MASS MEDIA, SEE ALSO CONTROL

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531 94FCC2D0809
GLOBAL B/CING GROUP, INC

REVIEW BOARD AFFIRMS I.D., GRANTS TV APPLICATION WHERE ONLY PREFERENCE AWARDED WINNING APPLICANT WAS FOR SUPERIOR INTEGRATION. NO DIVERSIFICATION PREFERENCE AWARDED FOR INSIGNIFICANT CROSS INTERESTS, AND BOARD WILL NOT CREATE NOVEL COMPARATIVE PREFERENCE FOR COMMUNITY ORGANIZATIONS.
BC DOCKET 82-420
PITTSFIELD COMMUNITY TV ASSOCIATION 94FCC2D1320

IN HEARING MATTER OF MUTUALLY EXCLUSIVE CP APPLICATIONS FOR FM STATION, REVIEW BOARD AFFIRMED ALJ'S GRANT. WINNING APPLICANT FOUND TO BE FINANCIALLY QUALIFIED AND ENTITLED TO DIVERSIFICATION, COVERAGE, AND AUXILIARY POWER PREFERENCES. PETITION FOR SITE AVAILABILITY ISSUE DENIED.
BC DOCKET 82-629 94FCC2D1423
WHITE MOUNTAIN FM, INC.

DIVESTITURE, SEE ALSO CROSS-OWNERSHIP OR OWNERSHIP

PETITION FOR TAX CERTIFICATE GRANTED FOR SALE OF MULTIPOINT
DISTRIBUTION SYSTEM BASED UPON FINDING THAT ITS OPERATIONS
WERE TECHNICALLY AS WELL AS FUNCTIONALLY INTEGRATED IN LARGE
PART WITH CABLE SYSTEM THAT WAS SOLD TO PROMOTE COMMISSION'S
POLICY AGAINST OWNERSHIP OF CO-LOCATED TV STATION AND CABLE
SYSTEM. 94FCC2D0207
GEORGIA CABLEVISION CORP.

DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE SEE ALSO MOBILE

APPLICATIONS FOR REVIEW OF STAFF ACTIONS RETURNING AMEND-
MENTS TO CELLULAR APPLICATIONS AS MAJOR GRANTED. APPLI-
CATIONS GRANTED IN PART CONCERNING AMENDMENTS REMANDED TO
COMMON CARRIER BUREAU AND DENIED IN ALL OTHER RESPECTS.
CELLULAR COMMUNICATIONS SYSTEMS 94FCC2D0074

EMPLOYMENT, EQUAL EMPLOYMENT OPP. RULE, COMPLIANCE ORDERED

PETITION TO DENY CERTAIN LICENSE RENEWAL APPLICATIONS DIS-
MISSED AND/OR DENIED. WHERE MINORITIES OR WOMEN ARE NOT PRE-
SENT ON LICENSEE'S STATE IN PERCERTAGE BEARING A REASONABLE
RELATIONSHIP TO THEIR PRESENCE IN LOCAL LABOR FORCE AND
LICENSEE HAS NOT MADE REASONABLE EFFORT TO RECRUIT AND HIRE
MINORITIES AND WOMEN, APPROPRIATE REMEDIAL SANCTIONS WILL BE
ORDERED.
LOUISIANA/MISSISSIPPI B/C STATIONS 94FCC2D0275

EQUIPMENT AUTHORIZATION PROGRAM

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF
RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR
COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR
CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN
ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15,
APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PRO-
CEDURE MP-4. 94FCC2D0508
CORDLESS TELEPHONES

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF
RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO
PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED
COMMISSION'S ORIGINAL DECISION. 94FCC2D0531

EQUIPMENT INSPECTION OF

REVIEW BOARD AFFIRMS I.D., FINANCIALLY DISQUALIFIES ONE COMMERICAL VHF TV APPLICANT, AND GRANTS COMPETING APPLICATION. DISQUALIFIED APPLICANT RELIED HEAVILY ON EQUIPMENT ON HAND WHICH WAS IN POOR CONDITION AND WAS NOT SHOWN TO BE FUNCTIONAL IN QUALITY AND ADEQUATE IN AMOUNT, AND SUBSTANTIALLY UNDERESTIMATED ITS PROGRAMMING COSTS.
BC DOCKET 80-484 94FCC2D0761
GACO COMMUNICATIONS CORP.

ESTOPPEL

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775 94FCC2D0572
BEAUFORT COUNTY B/CING CO.

COMPETING APPLICANTS MADE PARTIES TO REMANDED PROCEEDING INVOLVING SAME LICENSEE. PARTIES TO SELECT REPRESENTATIVE COUNSEL AND ALJ TO EXERCISE BROAD DISCRETION IN EXPEDITING CASE. COMMISSION WILL INVOKE COLLATERAL ESTOPPEL TO PRECLUDE RELITIGATION OF COMMON ISSUES. DURING PENDENCY OF INQUIRY INTO LICENSEE'S QUALIFICATIONS, RULES AUTHORIZING AMENDMENTS TO APPLICATIONS ARE SUSPENDED. 94FCC2D0890
RKO GENERAL, INC.

EXPEDITED ACTION, SEE ACTION, EXPEDITED

COMPETING APPLICANTS MADE PARTIES TO REMANDED PROCEEDING INVOLVING SAME LICENSEE. PARTIES TO SELECT REPRESENTATIVE COUNSEL AND ALJ TO EXERCISE BROAD DISCRETION IN EXPEDITING CASE. COMMISSION WILL INVOKE COLLATERAL ESTOPPEL TO PRECLUDE RELITIGATION OF COMMON ISSUES. DURING PENDENCY OF INQUIRY INTO LICENSEE'S QUALIFICATIONS, RULES AUTHORIZING AMENDMENTS TO APPLICATIONS ARE SUSPENDED. 94FCC2D0890
RKO GENERAL, INC.

FAIRNESS DOCTRINE

PETITION FOR RECONSIDERATION MUST BE TIMELY FILED. FOLLOW-UP COMPLAINT MUST BE FILED WITHIN REASONABLE TIME (NORMALLY WITHIN 30 DAYS) AFTER COMMISSION DENIAL OF INITIAL COMPLAINT.
ACCURACY IN MEDIA 94FCC2D0501

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST CBS TV NETWORK DENIED. COMPLAINANT HAS FAILED TO ESTABLISH THAT CBS DID NOT PRESENT CONTRASTING VIEWPOINTS IN ITS OVERALL PROGRAMMING ON ISSUE OF "NATIONAL DEFENSE."
AMERICAN SECURITY COUNCIL 94FCC2D0521

APPLICATION FOR REVIEW DENIED. COMPLAINANT MUST IDENTIFY A PARTICULAR WELL-DEFINED CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE. IN ADDRESSING OVERALL PROGRAMMING AIRED PRIOR TO SUBJECT B/C.
CONSERVATIVE CAUCUS, INC. 94FCC2D0728

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST ABC TV NETWORK DENIED. COMPLAINANT FAILED TO ESTABLISH THAT TREATMENT OF ALLERGY SUFFERERS IS CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE.
COUNCIL OF ALLERGY/IMMUNOLOGY 94FCC2D0734

FAIRNESS DOCTRINE, COMPLAINT, SUFFICIENCY IN OVERALL PROG

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST CBS TV NETWORK DENIED. COMPLAINANT HAS FAILED TO ESTABLISH THAT CBS DID NOT PRESENT CONTRASTING VIEWPOINTS IN ITS OVERALL PROGRAMMING ON ISSUE OF "NATIONAL DEFENSE."
AMERICAN SECURITY COUNCIL 94FCC2D0521

APPLICATION FOR REVIEW DENIED. COMPLAINANT MUST IDENTIFY A PARTICULAR WELL-DEFINED CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE. IN ADDRESSING OVERALL PROGRAMMING AIRED PRIOR TO SUBJECT B/C.
CONSERVATIVE CAUCUS, INC. 94FCC2D0728

FAIRNESS DOCTRINE, CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE

UNDER COMMISSION'S PERSONAL ATTACK RULE, B/CER INCURS OBLIGATIONS ONLY WHEN AN ATTACK IS MADE UPON HONESTY, CHARACTER, INTEGRITY OR LIKE PERSONAL QUALITIES OF AN IDENTIFIED PERSON OR GROUP, DURING DISCUSSION OF CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE.
EULOGIO CARDONA Y BELTRAN 94FCC2D0146

APPLICATION FOR REVIEW DENIED. COMPLAINANT MUST IDENTIFY A PARTICULAR WELL-DEFINED CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE. IN ADDRESSING OVERALL PROGRAMMING AIRED PRIOR TO SUBJECT B/C.
CONSERVATIVE CAUCUS, INC. 94FCC2D0728

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST ABC TV NETWORK DENIED. COMPLAINANT FAILED TO ESTABLISH THAT TREATMENT OF ALLERGY SUFFERERS IS CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE.
COUNCIL OF ALLERGY/IMMUNOLOGY 94FCC2D0734

FAIRNESS DOCTRINE, CONTROVERSIAL ISSUE, WITHIN OVERALL PROG.

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST CBS TV NETWORK DENIED. COMPLAINANT HAS FAILED TO ESTABLISH THAT CBS DID NOT PRESENT CONTRASTING VIEWPOINTS IN ITS OVERALL PROGRAMMING ON ISSUE OF "NATIONAL DEFENSE."
AMERICAN SECURITY COUNCIL 94FCC2D0521

FAIRNESS DOCTRINE, PERSONAL ATTACK, SEE PERSONAL ATTACK

UNDER COMMISSION'S PERSONAL ATTACK RULE, B/CER INCURS OBLIGATIONS ONLY WHEN AN ATTACK IS MADE UPON HONESTY, CHARACTER, INTEGRITY OR LIKE PERSONAL QUALITIES OF AN IDENTIFIED PERSON OR GROUP, DURING DISCUSSION OF CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE.
EULOGIO CARDONA Y BELTRAN 94FCC2D0146

FCC FORMS, SEE ALSO FORMS

COMMISSION OVERTURNED BUREAU POLICY WHICH ALLOWED APPLICANTS FILING 1977 VERSION OF FORM 301 TO CERTIFY THEIR FINANICAL QUALIFICATIONS AFTER BEING DESIGNATED FOR HEARING, IF THEY HAD NOT DEMONSTRATED THOSE QUALIFICATIONS UNDER OLD FORM. HEARING APPLICANTS WHICH TOOK ADVANTAGE OF THIS POLICY MUST SHOW THEIR COMPLIANCE WITH STANDARDS.
BC DOCKET 82-731
SOUTH FLORIDA B/CING CO. 94FCC2D0452

FEMALE OWNERSHIP-PARTICIPATION, COMPARATIVE CREDIT FOR

REVIEW BOARD AFFIRMS I.D., 91 FCC 2D 1198, GRANT OF FM
STATION CP TO ONE OF TWO COMPETING 100% INTEGRATED APPLI-
CANTS. WINNER HAS SUBSTANTIAL ENHANCEMENT CREDIT FOR 100%
FEMALE OWNERSHIP PARTICIPATION IN MANAGEMENT; LOSER'S CREDIT
IS INSIGNIFICANT BECAUSE ITS INTEGRATED MINORITY OWNERSHIP
IS ONLY 15%.
BC DOCKET 81-551 94FCC2D0815
HORNE INDUSTRIES, INC.

FIELD INTENSITY, CONTOUR MEASUREMENT, SEE ALSO CONTOUR

REVIEW BOARD GRANTS SUMMARY DECISION ON PROHIBITED CONTOUR
OVERLAP ISSUE, INVOLVING SECTION 73.37(A), AND DENIES APPL-
CATION FOR AM STATION. JOINT FIELD INTENSITY MEASUREMENTS
DEMONSTRATED OVERLAP, WHICH WAS CONFIRMED BY DATA AVERAGING
METHODOLOGY USED TO EVALUATE ALL AVAILABLE SETS OF DATA EX-
CEPT CERTAIN HIGHLY SUSPECT DATA.
BC DOCKET 81-606 94FCC2D1168
GSN MEDIA CORP.

FINANCIAL QUALIFICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON
DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL
CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0001
ADVANCED BUSINESS COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DE-
MONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CON-
SISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0437
RAINBOW SATELLITE, INC.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DE-
MONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CON-
SISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0462
U.S. SATELLITE SYSTEMS, INC.

COMMISSION OVERTURNED BUREAU POLICY WHICH ALLOWED APPLICANTS FILING 1977 VERSION OF FORM 301 TO CERTIFY THEIR FINANICAL QUALIFICATIONS AFTER BEING DESIGNATED FOR HEARING, IF THEY HAD NOT DEMONSTRATED THOSE QUALIFICATIONS UNDER OLD FORM. HEARING APPLICANTS WHICH TOOK ADVANTAGE OF THIS POLICY MUST SHOW THEIR COMPLIANCE WITH STANDARDS.
BC DOCKET 82-731 94FCC2D0452
SOUTH FLORIDA B/CING CO.

PROCEEDING REMANDED ON FINANCIAL ISSUE AND ON COMPARATIVE ISSUE TO EXPLORE INTEGRATION PROPOSAL.
BC DOCKET 81-528 94FCC2D1360
WASHINGTON'S CHRISTIAN TV OUTREACH

FINANCIAL QUALIFICATIONS, ESTIMATED COSTS

REVIEW BOARD AFFIRMS I.D., FINANCIALLY DISQUALIFIES ONE COMMERICAL VHF TV APPLICANT, AND GRANTS COMPETING APPLICATION. DISQUALIFIED APPLICANT RELIED HEAVILY ON EQUIPMENT ON HAND WHICH WAS IN POOR CONDITION AND WAS NOT SHOWN TO BE FUNCTIONAL IN QUALITY AND ADEQUATE IN AMOUNT, AND SUBSTANTIALLY UNDERESTIMATED ITS PROGRAMMING COSTS.
BC DOCKET 80-484 94FCC2D0761
GACO COMMUNICATIONS CORP.

FINANCIAL QUALIFICATIONS, LOAN COMMITMENT,ABILITY TO MEET

APPLICANT FOUND FINANCIALLY UNQUALIFIED BECAUSE OF LACK OF GOOD CAUSE FOR LATE-FILED FINANCIAL AMENDMENT AND FAILURE TO DEMONSTRATE REASONABLE ASSURANCE, ON THE MERITS, THAT SUFFICIENT FINANCIAL RESOURCES WOULD BE AVAILABLE. SUBSTANTIAL COMPARATIVE DEMERIT ASSESSED FOR LACK OF CANDOR IN SETTING FORTH PROPOSED FINANCIAL RESOURCES, AND PRIMA FACIE BASIS FOR REMAND NOTED. BC DOCKET 80-460
94FCC2D0648
COASTAL BEND FAMILY TV, INC.

FM STATION

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90 94FCC2D0152
FM B/C STATIONS

FM STATION, APPLICATION, SEE ALSO APPLICATION,

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT
PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO
SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING
APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE
PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF
JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775 94FCC2D0572
BEAUFORT COUNTY B/CING CO.

FM STATION, AUTHORIZATION

REVIEW BOARD AFFIRMS ALJ'S GRANT TO FM B/C APPLICANT WHO HAS
MODERATE COMPARATIVE COVERAGE PREFERENCE FOR SERVING NIGHT-
TIME WHITE AREA. WINNING APPLICANT'S SMALL ATTRIBUTABLE
OWNERSHIP INTEREST IN LOCAL B/C PRODUCTION COMPANY IS DE
MINIMIS, AND ITS 50% INTEGRATION CREDIT WITH MINORITY OWNER-
SHIP ENHANCEMENT DEEMED EQUAL TO ANOTHER'S 52% CREDIT.
BC DOCKET 79-56 94FCC2D0212
GOLDEN STATE B/CING CORP.

REVIEW BOARD AFFIRMS I.D., 91 FCC 2D 1198, GRANT OF FM
STATION CP TO ONE OF TWO COMPETING 100% INTEGRATED APPLI-
CANTS. WINNER HAS SUBSTANTIAL ENHANCEMENT CREDIT FOR 100%
FEMALE OWNERSHIP PARTICIPATION IN MANAGEMENT; LOSER'S CREDIT
IS INSIGNIFICANT BECAUSE ITS INTEGRATED MINORITY OWNERSHIP
IS ONLY 15%.
BC DOCKET 81-551 94FCC2D0815
HORNE INDUSTRIES, INC.

FREQUENCY ALLOCATION

REALLOCATION OF SPECTRUM TO ENABLE ESTABLISHMENT OF NEW
DIRECT B/C SATELLITE SERVICE AFFIRMED ON RECONSIDERATION,
GIVEN POLICIES AND PROCEDURES ADOPTED TO PROTECT LEGITIMATE
INTERESTS OF EXISTING USERS OF FREQUENCY BAND.
DIRECT B/C SATELLITE SERVICE 94FCC2D0741

FREQUENCY ALLOCATION, AM, SEE ALSO AM STATION

COMMISSION REAFFIRMED GRANT OF CP FOR AM STATION. SECTION
73.37(B)(2) OF RULES WAIVED AND INTERNATIONAL TREATIES NOT
CONSIDERED A BAR TO GRANT OF CP.
DOCKET 20969 94FCC2D0841
LARES B/CING CORP.

FREQUENCY ASSIGNMENT SEE ALSO CHANNEL ASST. OR SHORT-SPACING

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90 94FCC2D0152
FM B/C STATIONS

GRANT, CONDITIONAL

REVIEW BOARD GRANTED JOINT REQUEST FOR APPROVAL OF AGREEMENT CALLING FOR GRANT OF ONE APPLICATION AND DISMISSAL OF COMPETING APPLICATIONS. UNAUTHORIZED PLEADING SEEKING CONDITION ON GRANT DISMISSED. BOARD ON ITS OWN MOTION, HOWEVER, ADDED CONDITION TO THE AWARD OF CP.
BC DOCKET 81-733 94FCC2D1000
WHITCO B/CERS, INC.

HEARING, NECESSITY FOR

REVIEW BOARD DENIED PETITION FOR RECONSIDERATION AND AFFIRMED DECISION GRANTING FM B/C APPLICATION. APPLICANT PERMITTED TO SUBSTITUTE DECEASED PRINCIPAL'S SON, WHO HAD BEEN PREVIOUSLY PROPOSED FOR LESS THAN FULL-TIME INTEGRATION, INTO FATHER'S FULL-TIME ROLE. PETITIONERS RAISED NO NEW FACTS REQUIRING ADDITIONAL HEARING.
BC DOCKET 78-243 94FCC2D0429
PEOPLES B/CING CORP.

INQUIRY BY FCC, SEE ALSO INVESTIGATION OR NOTICE OF INQUIRY

RULES ADOPTED FOR COMPUTATION AND ASSESSMENT OF END USER AND CARRIER'S CARRIER ACCESS CHARGES AND CREATION OF AN EXCHANGE CARRIER ASSOCIATION TO PREPARE ACCESS CHARGE TARIFFS AND DISTRIBUTE POOLED ACCESS CHARGE REVENUES.
CC DOCKET 78-72 94FCC2D0852
MTS/WATS MARKET STRUCTURE

INSTRUCTIONAL TELEVISION FIXED SERVICE

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

INTERFERENCE, COCHANNEL

COMMISSION REAFFIRMED GRANT OF CP FOR AM STATION. SECTION 73.37(B)(2) OF RULES WAIVED AND INTERNATIONAL TREATIES NOT CONSIDERED A BAR TO GRANT OF CP.
DOCKET 20969
LARES B/CING CORP. 94FCC2D0841

INTERLOCUTORY RULING APPEAL FROM

REVIEW BOARD DENIED APPEAL OF DISMISSAL OF TV RENEWAL APPLICATION BECAUSE LICENSEE FAILED TO COMPLY WITH VALID DISCOVERY REQUESTS AND ORDERS. ASSERTED GROUNDS FOR NON-COMPLIANCE WERE PREVIOUSLY REJECTED BY BOARD, COMMISSION, AND COURTS. ALSO, APPEAL FROM DISMISSAL OF LATE-FILED PETITION TO INTERVENE IS DENIED BECAUSE RULE 1.223 REQUIREMENTS NOT MET. BC DOCKET 82-339
FAITH CENTER, INC. 94FCC2D0756

INTERNATIONAL AGREEMENTS AND TREATIES

COMMISSION REAFFIRMED GRANT OF CP FOR AM STATION. SECTION 73.37(B)(2) OF RULES WAIVED AND INTERNATIONAL TREATIES NOT CONSIDERED A BAR TO GRANT OF CP.
DOCKET 20969
LARES B/CING CORP. 94FCC2D0841

INTERNATIONAL COMMUNICATIONS

NOI ADOPTED RE INTEGRATED DIGITAL SERVICE NETWORKS (ISDN), ITS EVOLUTION, CURRENT STANDARDIZATION EFFORTS AND POSSIBLE U.S. IMPLEMENTATIONS.
GEN. DOCKET 83-841
INTEGRATED SERVICES DIGITAL NETWORKS 94FCC2D1289

INTERVENTION, REQUEST FOR DENIED

PETITIONER TO INTERVENE WAS DILATORY-- HE HAD FOUR YEARS TO PARTICIPATE BUT DECLINED TO DO SO OTHER THAN AS A WITNESS. HE WILL NOT AT THIS LATE STAGE BE PERMITTED TO ATTEMPT TO VINDICATE HIS PRIVATE RIGHTS.
WKKQ, INC. 94FCC2D0482

REVIEW BOARD DENIED APPEAL OF DISMISSAL OF TV RENEWAL APPLICATION BECAUSE LICENSEE FAILED TO COMPLY WITH VALID DISCOVERY REQUESTS AND ORDERS. ASSERTED GROUNDS FOR NON-COMPLIANCE WERE PREVIOUSLY REJECTED BY BOARD, COMMISSION, AND COURTS. ALSO, APPEAL FROM DISMISSAL OF LATE-FILED PETITION TO INTERVENE IS DENIED BECAUSE RULE 1.223 REQUIREMENTS NOT MET.
BC DOCKET 82-339
FAITH CENTER, INC. 94FCC2D0756

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679
RKO GENERAL, INC. (KHJ-TV) 94FCC2D0879

INTERVENTION, RIGHT TO, SEE ALSO PARTICIPATION

APPELLANT LISTENER GROUPS HAD NOT MET PARTICIPATION REQUIREMENTS OF SEC. 1.223(B). NEVERTHELESS, BECAUSE OF THEIR LONG-STANDING INTEREST IN EXISTING STATION, BOARD WILL PERMIT SUPPLEMENTAL SHOWING OF HOW THEIR INTERVENTION AS PARTIES COULD ILLUMINATE ISSUES IN CASE.
BC DOCKET 82-371
GAF B/CING CO., INC. 94FCC2D0203

ISSUE, RULE 1.65, SEE ALSO APPLICATION, AMENDMENT OF

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531
GLOBAL B/CING GROUP, INC 94FCC2D0809

LICENSE, ASSIGNMENT OF, BY RECEIVER IN BANKRUPTCY

APPLICATION FOR ASSIGNMENT OF LICENSE GRANTED. VIOLATION OF SEC. 310(D) OF COMMUNICATIONS ACT OF 1934, AS AMENDED, REQUIRING PRIOR COMMISSION CONSENT TO TRANSFER OF CONTROL OR ASSIGNMENT OF LICENSE, WAS NOT DISQUALIFYING WHERE APPLICATION WAS PROMPTLY FILED.
D.H. OVERMYER TELECASTING CO. INC. 94FCC2D0117

WHILE COMMISSION HAS GENERAL POLICY OF NOT QUESTIONING APPOINTMENT OF RECEIVER OR TRUSTEE IN BANKRUPTCY BY STATE AND FEDERAL COURTS, WHERE SUCH AN APPOINTMENT INVOLVES ENFORCEMENT OF REVERSIONARY INTEREST IN B/C LICENSE AND RECOGNITION OF SECURITY INTEREST IN LICENSE BY CREDITORS, APPLICATION SEEKING CONSENT TO ASSIGN B/C LICENSE TO RECEIVER OR TRUSTEE IS UNACCEPTABLE FOR FILING.
KIRK MERKLEY 94FCC2D0829

LICENSE, ASSIGNMENT OF, INVOLUNTARY

APPLICATION FOR ASSIGNMENT OF LICENSE GRANTED. VIOLATION OF SEC. 310(D) OF COMMUNICATIONS ACT OF 1934, AS AMENDED, REQUIRING PRIOR COMMISSION CONSENT TO TRANSFER OF CONTROL OR ASSIGNMENT OF LICENSE, WAS NOT DISQUALIFYING WHERE APPLICATION WAS PROMPTLY FILED.
D.H. OVERMYER TELECASTING CO. INC. 94FCC2D0117

LIGHTING, SPECIFICATIONS

NOI ADOPTED SEEKING INFORMATION TO AID COMMISSION IN FORMULATING REGULATORY POLICY FOR LIGHTING DEVICES USING RADIO FREQUENCY (RF) ENERGY. PART 18 SUBPARTS H AND E (BY REFERENCE) CURRENTLY APPLIES TO RF LIGHTING DEVICES. THESE RULES, HOWEVER, ARE NOT CONSIDERED APPROPRIATE FOR RF LIGHTING DEVICES.
GEN. DOCKET 83-806
RF LIGHTING DEVICES 94FCC2D1341

PETITIONS FOR WAIVER OF EQUIPMENT AUTHORIZATION REQUIREMENTS OF SECTION 18.142 FOR NEW RADIO FREQUENCY LIGHTING DEVICES GRANTED. INTERIM RELIEF GRANTED IN ORDER NOT TO DELAY INTRODUCTION OF ENERGY SAVING TECHNOLOGY.
RF LIGHTING DEVICES 94FCC2D1351

LOW POWER COMMUNICATIONS DEVICE

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED COMMISSION'S ORIGINAL DECISION.
94FCC2D0531

MEASUREMENT, RELIABILITY OR ACCURACY OF

REVIEW BOARD GRANTS SUMMARY DECISION ON PROHIBITED CONTOUR OVERLAP ISSUE, INVOLVING SECTION 73.37(A), AND DENIES APPLICATION FOR AM STATION. JOINT FIELD INTENSITY MEASUREMENTS DEMONSTRATED OVERLAP, WHICH WAS CONFIRMED BY DATA AVERAGING METHODOLOGY USED TO EVALUATE ALL AVAILABLE SETS OF DATA EXCEPT CERTAIN HIGHLY SUSPECT DATA.
BC DOCKET 81-606
GSM MEDIA CORP. 94FCC2D1168

MESSAGE TELECOMMUNICATIONS SERVICE

MEMORANDUM OPINION AND ORDER ADOPTED DENYING PETITIONS TO REJECT OR SUSPEND AND INVESTIGATE AND PERMITTING AT&T TO CONDUCT AND EXPERIMENT WITH ITS MTS RATES IN TRIAL STATE OF NEW YORK, CALIFORNIA, AND IOWA TO EXPIRE ON DEC. 31, 1983.
AT&T CO. 94FCC2D0551

MICROWAVE, DOMESTIC PUBLIC POINT-TO-POINT, TECHNICAL REQUIR

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING. COMMISSION CONCLUDED THAT TECHNICAL STANDARDS, LICENSING, AND FREQUENCY COORDINATION REQUIREMENTS APPLIED TO THIS SERVICE WILL REMAIN UNCHANGED. LOW POWER POINT-TO-POINT MICROWAVE SERVICE WILL NOT BE EXTENDED TO 24 GHZ BAND.
GEN. DOCKET 79-337
AMENDMENT OF PART 94 AND 15 94FCC2D0032

MINORITY OWNERSHIP, EFFECT ON APPLICATION

REVIEW BOARD AFFIRMS ALJ'S GRANT TO FM B/C APPLICANT WHO HAS MODERATE COMPARATIVE COVERAGE PREFERENCE FOR SERVING NIGHTTIME WHITE AREA. WINNING APPLICANT'S SMALL ATTRIBUTABLE OWNERSHIP INTEREST IN LOCAL B/C PRODUCTION COMPANY IS DE MINIMIS, AND ITS 50% INTEGRATION CREDIT WITH MINORITY OWNERSHIP ENHANCEMENT DEEMED EQUAL TO ANOTHER'S 52% CREDIT.
BC DOCKET 79-56
GOLDEN STATE B/CING CORP. 94FCC2D0212

MINORITY OWNERSHIP, FACTOR IN COMPARATIVE PROCEEDING

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531
GLOBAL B/CING GROUP, INC 94FCC2D0809

REVIEW BOARD AFFIRMS I.D., 91 FCC 2D 1198, GRANT OF FM STATION CP TO ONE OF TWO COMPETING 100% INTEGRATED APPLICANTS. WINNER HAS SUBSTANTIAL ENHANCEMENT CREDIT FOR 100% FEMALE OWNERSHIP PARTICIPATION IN MANAGEMENT; LOSER'S CREDIT IS INSIGNIFICANT BECAUSE ITS INTEGRATED MINORITY OWNERSHIP IS ONLY 15%.
BC DOCKET 81-551
HORNE INDUSTRIES, INC. 94FCC2D0815

MISCONDUCT

REVIEW BOARD AFFIRMS GRANT OF CHALLENGER'S APPLICATION IN COMPARATIVE FM RENEWAL PROCEEDING. INCUMBENT IS NOT AWARDED RENEWAL EXPECTANCY AND RECEIVES SUBSTANTIAL COMPARATIVE DEMERIT ON PAST MISCONDUCT. LOSING COMPETING APPLICANT ACHIEVES SLIGHT SPECIALIZED PROGRAM FORMAT PREFERENCE FOR FIRST NIGHTTIME SPANISH PROGRAMMING AND SLIGHT REPORTING DEMERIT. BC DOCKET 80-479
UNITED B/CING CO., INC. 94FCC2D0938

MISREPRESENTATION, CHARACTER QUALIFICATIONS

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531
GLOBAL B/CING GROUP, INC 94FCC2D0809

MISREPRESENTATION, FINANCIAL QUALIFICATIONS

APPLICANT FOUND FINANCIALLY UNQUALIFIED BECAUSE OF LACK OF GOOD CAUSE FOR LATE-FILED FINANCIAL AMENDMENT AND FAILURE TO DEMONSTRATE REASONABLE ASSURANCE, ON THE MERITS, THAT SUFFICIENT FINANCIAL RESOURCES WOULD BE AVAILABLE. SUBSTANTIAL COMPARATIVE DEMERIT ASSESSED FOR LACK OF CANDOR IN SETTING FORTH PROPOSED FINANCIAL RESOURCES, AND PRIMA FACIE BASIS FOR REMAND NOTED. BC DOCKET 80-460
COASTAL BEND FAMILY TV, INC. 94FCC2D0648

MOBILE RADIO SERVICE, CELLULAR

APPLICATIONS FOR REVIEW OF STAFF ACTIONS RETURNING AMENDMENTS TO CELLULAR APPLICATIONS AS MAJOR GRANTED. APPLICATIONS GRANTED IN PART CONCERNING AMENDMENTS REMANDED TO COMMON CARRIER BUREAU AND DENIED IN ALL OTHER RESPECTS.
CELLULAR COMMUNICATIONS SYSTEMS 94FCC2D0074

MULTIPOINT DISTRIBUTION SERVICE (MDS)

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

NETWORK PROGRAM PROCUREMENT PRACTICES

IN THIS TENTATIVE DECISION AND REQUEST FOR FURTHER COMMENT THE COMMISSION REVIEWED ITS NETWORK TV FINANCIAL INTEREST AND SYNDICATION RULES (47 C.F.R. SEC. 73.658(J)). COMMISSION CONCLUDED THAT FINANCIAL INTEREST RULE COULD BE ELIMINATED WITHOUT ADVERSE CONSEQUENCE TO PUBLIC BUT THAT MODIFIED VERSION OF SYNDICATION RULE SHOULD BE RETAINED.
BC DOCKET 82-345
AMENDMENT OF PART 47 94FCC2D1019

NETWORK REGULATION

IN THIS TENTATIVE DECISION AND REQUEST FOR FURTHER COMMENT THE COMMISSION REVIEWED ITS NETWORK TV FINANCIAL INTEREST AND SYNDICATION RULES (47 C.F.R. SEC. 73.658(J)). COMMISSION CONCLUDED THAT FINANCIAL INTEREST RULE COULD BE ELIMINATED WITHOUT ADVERSE CONSEQUENCE TO PUBLIC BUT THAT MODIFIED VERSION OF SYNDICATION RULE SHOULD BE RETAINED.
BC DOCKET 82-345
AMENDMENT OF PART 47 94FCC2D1019

NIGHTTIME COVERAGE, SEE ALSO WHITE AREA

REVIEW BOARD AFFIRMS ALJ'S GRANT TO FM B/C APPLICANT WHO HAS MODERATE COMPARATIVE COVERAGE PREFERENCE FOR SERVING NIGHTTIME WHITE AREA. WINNING APPLICANT'S SMALL ATTRIBUTABLE OWNERSHIP INTEREST IN LOCAL B/C PRODUCTION COMPANY IS DE MINIMIS, AND ITS 50% INTEGRATION CREDIT WITH MINORITY OWNERSHIP ENHANCEMENT DEEMED EQUAL TO ANOTHER'S 52% CREDIT.
BC DOCKET 79-56
GOLDEN STATE B/CING CORP. 94FCC2D0212

OBSCENE, PROFANE, INDECENT LANGUAGE

APPLICATION FOR REVIEW OF DENIAL OF COMPLAINT AGAINST RAHALL B/CING OF INDIANA, INC. (WFBQ-FM) DENIED. COMMISSION FOUND NO ERROR IN BUREAU'S ACTIONS.
DECENCY IN B/CING, INC. 94FCC2D1162

OWNERSHIP AND MANAGEMENT, INTEGRATION OF.

REVIEW BOARD DENIED PETITION FOR RECONSIDERATION AND AFFIRMED DECISION GRANTING FM B/C APPLICATION. APPLICANT PERMITTED TO SUBSTITUTE DECEASED PRINCIPAL'S SON, WHO HAD BEEN PREVIOUSLY PROPOSED FOR LESS THAN FULL-TIME INTEGRATION, INTO FATHER'S FULL-TIME ROLE. PETITIONERS RAISED NO NEW FACTS REQUIRING ADDITIONAL HEARING.
BC DOCKET 78-243
PEOPLES B/CING CORP. 94FCC2D0429

REVIEW BOARD AFFIRMS I.D., GRANTS TV APPLICATION WHERE ONLY PREFERENCE AWARDED WINNING APPLICANT WAS FOR SUPERIOR INTEGRATION. NO DIVERSIFICATION PREFERENCE AWARDED FOR INSIGNIFICANT CROSS INTERESTS, AND BOARD WILL NOT CREATE NOVEL COMPARATIVE PREFERENCE FOR COMMUNITY ORGANIZATIONS.
BC DOCKET 82-420
PITTSFIELD COMMUNITY TV ASSOCIATION 94FCC2D1320

PROCEEDING REMANDED ON FINANCIAL ISSUE AND ON COMPARATIVE ISSUE TO EXPLORE INTEGRATION PROPOSAL.
BC DOCKET 81-528
WASHINGTON'S CHRISTIAN TV OUTREACH 94FCC2D1360

OWNERSHIP DISCLOSURE, SEE ALSO DISCLOSURE

REVIEW BOARD AFFIRMS I.D. AND GRANTS APPLICATION WITH SUBSTANTIAL DIVERSIFICATION AND INTEGRATION PREFERENCES AND SLIGHT-TO-MODERATE COMPARATIVE DEMERIT FOR CARELESS LACK OF CANDOR IN REPORTING PRINCIPAL'S VOTING INTEREST IN ANOTHER LICENSEE AS NONVOTING AND FAILING TO REPORT OTHER LICENSEE'S APPLICATION FOR, AND SUBSEQUENT GRANT OF, TV STATION IN REGION. BC DOCKET 80-734
SUPERIOR B/CING OF CALIFORNIA 94FCC2D0904

PARTY JOINDER OF

COMPETING APPLICANTS MADE PARTIES TO REMANDED PROCEEDING INVOLVING SAME LICENSEE. PARTIES TO SELECT REPRESENTATIVE COUNSEL AND ALJ TO EXERCISE BROAD DISCRETION IN EXPEDITING CASE. COMMISSION WILL INVOKE COLLATERAL ESTOPPEL TO PRECLUDE RELITIGATION OF COMMON ISSUES. DURING PENDENCY OF INQUIRY INTO LICENSEE'S QUALIFICATIONS, RULES AUTHORIZING AMENDMENTS TO APPLICATIONS ARE SUSPENDED. 94FCC2D0890
RKO GENERAL, INC.

PAST PERFORMANCE, RECORD OF

REVIEW BOARD AFFIRMS GRANT OF CHALLENGER'S APPLICATION IN COMPARATIVE FM RENEWAL PROCEEDING. INCUMBENT IS NOT AWARDED RENEWAL EXPECTANCY AND RECEIVES SUBSTANTIAL COMPARATIVE DEMERIT ON PAST MISCONDUCT. LOSING COMPETING APPLICANT ACHIEVES SLIGHT SPECIALIZED PROGRAM FORMAT PREFERENCE FOR FIRST NIGHTTIME SPANISH PROGRAMMING AND SLIGHT REPORTING DEMERIT. BC DOCKET 80-479 94FCC2D0938
UNITED B/CING CO., INC.

PETITION TO DENY

PETITION TO DENY CERTAIN LICENSE RENEWAL APPLICATIONS DISMISSED AND/OR DENIED. WHERE MINORITIES OR WOMEN ARE NOT PRESENT ON LICENSEE'S STATE IN PERCERTAGE BEARING A REASONABLE RELATIONSHIP TO THEIR PRESENCE IN LOCAL LABOR FORCE AND LICENSEE HAS NOT MADE REASONABLE EFFORT TO RECRUIT AND HIRE MINORITIES AND WOMEN, APPROPRIATE REMEDIAL SANCTIONS WILL BE ORDERED. 94FCC2D0275
LOUISIANA/MISSISSIPPI B/C STATIONS

PLEADING DISMISSAL OF

REVIEW BOARD GRANTED JOINT REQUEST FOR APPROVAL OF AGREEMENT CALLING FOR GRANT OF ONE APPLICATION AND DISMISSAL OF COMPETING APPLICATIONS. UNAUTHORIZED PLEADING SEEKING CONDITION ON GRANT DISMISSED. BOARD ON ITS OWN MOTION, HOWEVER, ADDED CONDITION TO THE AWARD OF CP.
BC DOCKET 81-733
WHITCO B/CERS, INC. 94FCC2D1000

PRIVILEGED COMMUNICATIONS SEE ALSO INFORMATION, CONFIDENTIAL

DISCOVERY GRANTED IN PART AND CLAIM OF ATTORNEY-CLIENT PRIVILEGE DISALLOWED ON FINDING THAT APPLICANTS WAIVED RIGHT TO ASSERT PRIVILEGE. DISCOVERY DENIED WITH RESPECT TO DOCUMENTS PROTECTED BY ATTORNEY-WORK-PRODUCT DOCTRINE.
CC DOCKET 82-587
A.S.D. ANSWER SERVICE, INC. 94FCC2D0539

PROCEEDING TERMINATION OF

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING. COMMISSION CONCLUDED THAT TECHNICAL STANDARDS, LICENSING, AND FREQUENCY COORDINATION REQUIREMENTS APPLIED TO THIS SERVICE WILL REMAIN UNCHANGED. LOW POWER POINT-TO-POINT MICROWAVE SERVICE WILL NOT BE EXTENDED TO 24 GHZ BAND.
GEN. DOCKET 79-337
AMENDMENT OF PART 94 AND 15 94FCC2D0032

PROGRAMMING PROPOSAL

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531
GLOBAL B/CING GROUP, INC 94FCC2D0809

PROGRAMMING REQUIREMENTS

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670
COMMERCIAL TV STATIONS 94FCC2D0678

PROGRAMMING SPECIALIZED

REVIEW BOARD AFFIRMS GRANT OF CHALLENGER'S APPLICATION IN
COMPARATIVE FM RENEWAL PROCEEDING. INCUMBENT IS NOT AWARDED
RENEWAL EXPECTANCY AND RECEIVES SUBSTANTIAL COMPARATIVE
DEMERIT ON PAST MISCONDUCT. LOSING COMPETING APPLICANT
ACHIEVES SLIGHT SPECIALIZED PROGRAM FORMAT PREFERENCE FOR
FIRST NIGHTTIME SPANISH PROGRAMMING AND SLIGHT REPORTING
DEMERIT. BC DOCKET 80-479
94FCC2D0938
UNITED B/CING CO., INC.

RADIO FREQUENCY DEVICE, AUTHORIZATION

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF
RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR
COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR
CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN
ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15,
APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PRO-
CEDURE MP-4.
94FCC2D0508
CORDLESS TELEPHONES

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF
RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO
PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED
COMMISSION'S ORIGINAL DECISION.
94FCC2D0531

RATINGS, DISTORTION OF, SEE ALSO HYPOING

COMMISSION WILL NO LONGER MAINTAIN POLICIES AGAINST MISUSE
OF AUDIENCE RATINGS DATA OR USE OF INACCURATE OR EXAGGERATED
COVERAGE MAPS OR COVERAGE CLAIMS BY B/C LICENSEES.
94FCC2D0619
B/C REGULATION

RECONSIDERATION, PETITION FOR, DENIAL OF

REVIEW BOARD DENIED PETITION FOR RECONSIDERATION AND AF-
FIRMED DECISION GRANTING FM B/C APPLICATION. APPLICANT PER-
MITTED TO SUBSTITUTE DECEASED PRINCIPAL'S SON, WHO HAD BEEN
PREVIOUSLY PROPOSED FOR LESS THAN FULL-TIME INTEGRATION,
INTO FATHER'S FULL-TIME ROLE. PETITIONERS RAISED NO NEW
FACTS REQUIRING ADDITIONAL HEARING.
BC DOCKET 78-243
94FCC2D0429
PEOPLES B/CING CORP.

PETITION FOR RECONSIDERATION OF REVIEW BOARD DECISION, 93 FCC2D 643, DENIED. PETITIONER ESSENTIALLY REARGUES POINTS IT PREVIOUSLY MADE.
BC DOCKET 81-306
CANNON'S POINT B/CING CO. 94FCC2D0072

PETITION FOR RECONSIDERATION OF HENRY C. ARMSTRONG, III, FCC 83R-16, 53 RR 2D 474 (1983) DENIED. PETITIONER ESSENTIALLY REARGUES POINTS PREVIOUSLY MADE BEFORE BOARD.
PR DOCKET 81-826
HENRY CO. ARMSTRONG, III 94FCC2D0268

ORDER ADOPTED GRANTING PARTIAL RECONSIDERATION OF COMMISSION'S REPORT AND ORDER, WHERE PETITIONER HAD SHOWN WILLINGNESS TO USE CIRCUIT-MULTIPLICATION EQUIPMENT TO INCREASE EFFECTIVE CAPACITY OF ITS CABLE CIRCUITS.
CC DOCKET 81-343
PACIFIC TELECOMMUNICATIONS 94FCC2D0867

PETITION FOR RECONSIDERATION OF GTE SATELLITE CORP., 90 FCC 2D 1009 (1982), DENIED, AND RELATED APPLICATION OF GSAT FOR AUTHORITY TO CONSTRUCT AND OPERATE EARTH STATION GRANTED. ACTION AFFIRMS UNDERLYING DECISION WITHOUT RESTRICKING, TELECOMMUNICATIONS SERVICES TO CONSUMERS.
GTE SATELLITE CORP. 94FCC2D1184

PETITION FOR RECONSIDERATION OF RECENT AMENDMENTS TO SECTION 61.38 OF RULES, GOVERNING COST SUPPORT MATERIAL REQUIRED TO BE FILED WITH TARIFFS DENIED. PETITIONER OFFERED NO BASIS FOR ASSERTIONS THAT INFORMATION NO LONGER REQUIRED IS NEEDED FOR COMMISSION REVIEW OF TARIFFS, NOR FOR ITS CONTENTION THAT NOTICE AND COMMENT WERE REQUIRED BY ADMINISTRATIVE PROCEDURE ACT.
AMENDMENT OF SECTION 61.38 94FCC2D1107

REMAND

PROCEEDING REMANDED BECAUSE FACTUAL BASIS UPON WHICH ALJ RELIED IN GRANTING APPLICATIONS AND TERMINATING PROCEEDING WAS INCORRECT.
BC DOCKET 82-701
TRIO B/CERS, INC. 94FCC2D0934

PROCEEDING REMANDED ON FINANCIAL ISSUE AND ON COMPARATIVE ISSUE TO EXPLORE INTEGRATION PROPOSAL.
BC DOCKET 81-528
WASHINGTON'S CHRISTIAN TV OUTREACH 94FCC2D1360

REMAND FROM COURT OF APPEALS

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679
RKO GENERAL, INC. (KHJ-TV) 94FCC2D0879

RENEWAL, APPLICANT V. NEW APPLICANT

REVIEW BOARD AFFIRMS GRANT OF CHALLENGER'S APPLICATION IN COMPARATIVE FM RENEWAL PROCEEDING. INCUMBENT IS NOT AWARDED RENEWAL EXPECTANCY AND RECEIVES SUBSTANTIAL COMPARATIVE DEMERIT ON PAST MISCONDUCT. LOSING COMPETING APPLICANT ACHIEVES SLIGHT SPECIALIZED PROGRAM FORMAT PREFERENCE FOR FIRST NIGHTTIME SPANISH PROGRAMMING AND SLIGHT REPORTING DEMERIT. BC DOCKET 80-479
UNITED B/CING CO., INC. 94FCC2D0938

RENEWAL, OF LICENSE, DENIED OR DISMISSED

REVIEW BOARD DENIED APPEAL OF DISMISSAL OF TV RENEWAL APPLICATION BECAUSE LICENSEE FAILED TO COMPLY WITH VALID DISCOVERY REQUESTS AND ORDERS. ASSERTED GROUNDS FOR NON-COMPLIANCE WERE PREVIOUSLY REJECTED BY BOARD, COMMISSION, AND COURTS. ALSO, APPEAL FROM DISMISSAL OF LATE-FILED PETITION TO INTERVENE IS DENIED BECAUSE RULE 1.223 REQUIREMENTS NOT MET. BC DOCKET 92-339
FAITH CENTER, INC. 94FCC2D0756

REPORTS, REQUIRED TO BE FILED

NPRM ADOPTED PROPOSING A PLAN FOR COMMISSION TO MONITOR THE EFFECTS OF INTERSTATE ACCESS CHARGES AND VARIOUS RATE CHANGES ON AVAILABILITY OF LOCAL SERVICE.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE (PHASE IV) 94FCC2D0396

REVIEW BY REVIEW BOARD

REVIEW BOARD DENIED PETITION FOR RECONSIDERATION AND AFFIRMED DECISION GRANTING FM B/C APPLICATION. APPLICANT PERMITTED TO SUBSTITUTE DECEASED PRINCIPAL'S SON, WHO HAD BEEN PREVIOUSLY PROPOSED FOR LESS THAN FULL-TIME INTEGRATION, INTO FATHER'S FULL-TIME ROLE. PETITIONERS RAISED NO NEW FACTS REQUIRING ADDITIONAL HEARING.
BC DOCKET 78-243
PEOPLES B/CING CORP. 94FCC2D0429

REVIEW BOARD AFFIRMS ALJ'S GRANT TO FM B/C APPLICANT WHO HAS MODERATE COMPARATIVE COVERAGE PREFERENCE FOR SERVING NIGHTTIME WHITE AREA. WINNING APPLICANT'S SMALL ATTRIBUTABLE OWNERSHIP INTEREST IN LOCAL B/C PRODUCTION COMPANY IS DE MINIMIS, AND ITS 50% INTEGRATION CREDIT WITH MINORITY OWNERSHIP ENHANCEMENT DEEMED EQUAL TO ANOTHER'S 52% CREDIT.
BC DOCKET 79-56
GOLDEN STATE B/CING CORP. 94FCC2D0212

REVIEW BOARD DENIED APPEAL OF DISMISSAL OF TV RENEWAL APPLICATION BECAUSE LICENSEE FAILED TO COMPLY WITH VALID DISCOVERY REQUESTS AND ORDERS. ASSERTED GROUNDS FOR NON-COMPLIANCE WERE PREVIOUSLY REJECTED BY BOARD, COMMISSION, AND COURTS. ALSO, APPEAL FROM DISMISSAL OF LATE-FILED PETITION TO INTERVENE IS DENIED BECAUSE RULE 1.223 REQUIREMENTS NOT MET. BC DOCKET 82-339
FAITH CENTER, INC. 94FCC2D0756

REVIEW BOARD AFFIRMS I.D., FINANCIALLY DISQUALIFIES ONE COMMERICAL VHF TV APPLICANT, AND GRANTS COMPETING APPLICATION. DISQUALIFIED APPLICANT RELIED HEAVILY ON EQUIPMENT ON HAND WHICH WAS IN POOR CONDITION AND WAS NOT SHOWN TO BE FUNCTIONAL IN QUALITY AND ADEQUATE IN AMOUNT, AND SUBSTANTIALLY UNDERESTIMATED ITS PROGRAMMING COSTS.
BC DOCKET 80-484
GACO COMMUNICATIONS CORP. 94FCC2D0761

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775
BEAUFORT COUNTY B/CING CO. 94FCC2D0572

REVIEW BOARD AFFIRMS I.D., 91 FCC 2D 1198, GRANT OF FM STATION CP TO ONE OF TWO COMPETING 100% INTEGRATED APPLICANTS. WINNER HAS SUBSTANTIAL ENHANCEMENT CREDIT FOR 100% FEMALE OWNERSHIP PARTICIPATION IN MANAGEMENT; LOSER'S CREDIT IS INSIGNIFICANT BECAUSE ITS INTEGRATED MINORITY OWNERSHIP IS ONLY 15%.
BC DOCKET 81-551
HORNE INDUSTRIES, INC. 94FCC2D0815

REVIEW BOARD AFFIRMS I.D. AND GRANTS APPLICATION WITH SUBSTANTIAL DIVERSIFICATION AND INTEGRATION PREFERENCES AND SLIGHT-TO-MODERATE COMPARATIVE DEMERIT FOR CARELESS LACK OF CANDOR IN REPORTING PRINCIPAL'S VOTING INTEREST IN ANOTHER LICENSEE AS NONVOTING AND FAILING TO REPORT OTHER LICENSEE'S APPLICATION FOR, AND SUBSEQUENT GRANT OF, TV STATION IN REGION. BC DOCKET 80-734
SUPERIOR B/CING OF CALIFORNIA 94FCC2D0904

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT AFTER FINDING IT WILL NOT IMPEDE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION OF TV SERVICE AS REQUIRED BY SEC. 307(B) OF COMMUNICATIONS ACT. SINCE COMPETING APPLICATIONS WERE FOR DIFFERENT SUBURBS OF A LARGE CITY AND SINCE TV CHANNELS MUST SERVE BROADER AREAS THAN RADIO STATIONS, NO SEC. 307(B) PREFERENCE COULD HAVE BEEN AWARDED TO EITHER APPLICANT. BC DOCKET 81-310
BUENA VISTA TELECASTERS - TEXAS,INC. 94FCC2D0525

RULE MAKING, NOTICE OF PROPOSED

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670
COMMERCIAL TV STATIONS 94FCC2D0678

RULES, AMENDMENT OF

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

RULES, WAIVER OF

PETITION FOR WAIVER OF RULES PRESCRIBING RATE STRUCTURE FOR USE OF LOCAL TRANSPORT FACILITIES TO ORIGINATE OR TERMINATE INTERSTATE OR FOREIGN TELECOMMUNICATIONS GRANTED. RULES HAD ASSUMED EQUAL INTERCONNECTION OPPORTUNITY FOR ALL INTER-EXCHANGE CARRIERS. 94FCC2D0545
AT&T CO.

PETITIONS FOR WAIVER OF EQUIPMENT AUTHORIZATION REQUIREMENTS OF SECTION 18.142 FOR NEW RADIO FREQUENCY LIGHTING DEVICES GRANTED. INTERIM RELIEF GRANTED IN ORDER NOT TO DELAY INTRODUCTION OF ENERGY SAVING TECHNOLOGY. 94FCC2D1351
RF LIGHTING DEVICES

SATELLITE DIRECT BROADCAST

REALLOCATION OF SPECTRUM TO ENABLE ESTABLISHMENT OF NEW DIRECT B/C SATELLITE SERVICE AFFIRMED ON RECONSIDERATION, GIVEN POLICIES AND PROCEDURES ADOPTED TO PROTECT LEGITIMATE INTERESTS OF EXISTING USERS OF FREQUENCY BAND. 94FCC2D0741
DIRECT B/C SATELLITE SERVICE

SATELLITE DOMESTIC COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0001
ADVANCED BUSINESS COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED TO SATELLITE PRIVATE LINE CARRIER. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0039
AMERICAN SATELLITE CO.

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0344
AT&T CO.

COMMISSION ASSIGNS ORBITAL LOCATIONS FOR NEW AND PREVIOUSLY
AUTHORIZED DOMESTIC FIXED SATELLITES, MODIFYING PREVIOUS
1980 PLAN, 84 FCC 2D 584 (1981). ACTION RESULTS FROM REDUCED
ORBITAL SPACING CRITERIA IN 4/6 GHZ AND 12/14 GHZ BANDS
ADOPTED CONCURRENTLY IN REPORT AND ORDER IN CC DKT. 81-704.
DOMESTIC FIXED-SATELLITE SERVICE 94FCC2D0129

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE
STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO
MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS
CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0271
HUGHES COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DE-
MONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CON-
SISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0437
RAINBOW SATELLITE, INC.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON
MAINTENANCE OF SUFFICIENT TRAFFIC FILL ON SATELLITE SYSTEM.
PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES
PUBLIC INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0441
RCA AMERICAN COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON
MAINTENANCE OF SUFFICIENT TRAFFIC FILL ON SATELLITE SYSTEM.
PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES
PUBLIC INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0447
SATELLITE BUSINESS SYSTEMS

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE
STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO
MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS
CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0457
S. PACIFIC COMMUNICATIONS CO.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.
U.S. SATELLITE SYSTEMS, INC. 94FCC2D0462

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. PREVIOUS ASSIGNMENTS FOR ADVANCED WESTAR SATELLITES IN 86 FCC 2D 196 (1981) ARE NULL AND VOID.
WESTERN UNION TELEGRAPH CO. 94FCC2D0467

ON REMAND FROM COURT OF APPEALS FOR D.C. CIRCUIT, COMMISSION EXPLAINS FURTHER ITS DECISION THAT RCA'S TARIFF REVISIONS FOR DOMESTIC SATELLITE SERVICES, ARE UNJUST AND UNREASONABLE UNDER SECTION 201(B) OF ACT.
CC DOCKET 80-766
RCA AMERICAN COMUNICATIONS, INC. 94FCC2D1338

SATELLITE EARTH STATION, FACILITIES

PETITION FOR RECONSIDERATION OF GTE SATELLITE CORP., 90 FCC 2D 1009 (1982), DENIED, AND RELATED APPLICATION OF GSAT FOR AUTHORITY TO CONSTRUCT AND OPERATE EARTH STATION GRANTED. ACTION AFFIRMS UNDERLYING DECISION WITHOUT RESTRICKING, TELECOMMUNICATIONS SERVICES TO CONSUMERS.
GTE SATELLITE CORP. 94FCC2D1184

SATELLITE LAUNCH AUTHORITY

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY.
ADVANCED BUSINESS COMMUNICATIONS 94FCC2D0001

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED TO SATELLITE PRIVATE LINE CARRIER. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0039
AMERICAN SATELLITE CO.

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0044
AT&T CO.

COMMISSION ASSIGNS ORBITAL LOCATIONS FOR NEW AND PREVIOUSLY AUTHORIZED DOMESTIC FIXED SATELLITES, MODIFYING PREVIOUS 1980 PLAN, 84 FCC 2D 584 (1981). ACTION RESULTS FROM REDUCED ORBITAL SPACING CRITERIA IN 4/6 GHZ AND 12/14 GHZ BANDS ADOPTED CONCURRENTLY IN REPORT AND ORDER IN CC DKT. 81-704.
DOMESTIC FIXED-SATELLITE SERVICE 94FCC2D0129

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0271
HUGHES COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0437
RAINBOW SATELLITE, INC.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON MAINTENANCE OF SUFFICIENT TRAFFIC FILL ON SATELLITE SYSTEM. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0441
RCA AMERICAN COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON MAINTENANCE OF SUFFICIENT TRAFFIC FILL ON SATELLITE SYSTEM. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0447
SATELLITE BUSINESS SYSTEMS

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0457
S. PACIFIC COMMUNICATIONS CO.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0462
U.S. SATELLITE SYSTEMS, INC.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. PREVIOUS ASSIGNMENTS FOR ADVANCED WESTAR SATELLITES IN 86 FCC 2D 196 (1981) ARE NULL AND VOID. 94FCC2D0467
WESTERN UNION TELEGRAPH CO.

SATELLITE ORBIT

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0001
ADVANCED BUSINESS COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED TO SATELLITE PRIVATE LINE CARRIER. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0039
AMERICAN SATELLITE CO.

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE
STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO
MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS
CONSISTENT WITH COMMISSION'S POLICIES AND SERVES THE PUBLIC
INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0044
AT&T CO.

COMMISSION ASSIGNS ORBITAL LOCATIONS FOR NEW AND PREVIOUSLY
AUTHORIZED DOMESTIC FIXED SATELLITES, MODIFYING PREVIOUS
1980 PLAN, 84 FCC 2D 584 (1981). ACTION RESULTS FROM REDUCED
ORBITAL SPACING CRITERIA IN 4/6 GHZ AND 12/14 GHZ BANDS
ADOPTED CONCURRENTLY IN REPORT AND ORDER IN CC DKT. 81-704.
94FCC2D0129
DOMESTIC FIXED-SATELLITE SERVICE

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE
STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO
MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS
CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE AND NECESSITY. 94FCC2D0271
HUGHES COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC
INTEREST, CONVENIENCE, AND NECESSITY. 94FCC2D0437
RAINBOW SATELLITE, INC.

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON
MAINTENANCE OF SUFFICIENT TRAFFIC FILL ON SATELLITE SYSTEM.
PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES
PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.
94FCC2D0441
RCA AMERICAN COMMUNICATIONS

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN
DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON
MAINTENANCE OF SUFFICIENT TRAFFIC FILL ON SATELLITE SYSTEM.
PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES
PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.
94FCC2D0447
SATELLITE BUSINESS SYSTEMS

APPLICATION TO CONSTRUCT AND LAUNCH AN ADDITIONAL SPACE STATION IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY.
S. PACIFIC COMMUNICATIONS CO. 94FCC2D0457

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE GRANTED CONDITIONED ON DEMONSTRATION OF FIRM FINANCIAL QUALIFICATIONS. PROPOSAL CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.
U.S. SATELLITE SYSTEMS, INC. 94FCC2D0462

APPLICATIONS TO CONSTRUCT AND LAUNCH SPACE STATIONS IN DOMESTIC FIXED SATELLITE SERVICE IS GRANTED TO MEET LICENSEE'S CURRENT TRAFFIC PROJECTIONS. PROPOSAL IS CONSISTENT WITH COMMISSION'S POLICIES AND SERVES PUBLIC INTEREST, CONVENIENCE AND NECESSITY. PREVIOUS ASSIGNMENTS FOR ADVANCED WESTAR SATELLITES IN 86 FCC 2D 196 (1981) ARE NULL AND VOID.
WESTERN UNION TELEGRAPH CO. 94FCC2D0467

SETTLEMENT

REVIEW BOARD AFFIRMS I.D., FINANCIALLY DISQUALIFIES ONE COMMERICAL VHF TV APPLICANT, AND GRANTS COMPETING APPLICATION. DISQUALIFIED APPLICANT RELIED HEAVILY ON EQUIPMENT ON HAND WHICH WAS IN POOR CONDITION AND WAS NOT SHOWN TO BE FUNCTIONAL IN QUALITY AND ADEQUATE IN AMOUNT, AND SUBSTANTIALLY UNDERESTIMATED ITS PROGRAMMING COSTS.
BC DOCKET 80-484
GACO COMMUNICATIONS CORP. 94FCC2D0761

REVIEW BOARD GRANTED JOINT REQUEST FOR APPROVAL OF AGREEMENT CALLING FOR GRANT OF ONE APPLICATION AND DISMISSAL OF COMPETING APPLICATIONS. UNAUTHORIZED PLEADING SEEKING CONDITION ON GRANT DISMISSED. BOARD ON ITS OWN MOTION, HOWEVER, ADDED CONDITION TO THE AWARD OF CP.
BC DOCKET 81-733
WHITCO B/CERS, INC. 94FCC2D1000

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT AFTER FINDING IT WILL NOT IMPEDE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION OF TV SERVICE AS REQUIRED BY SEC. 307(B) OF COMMUNICATIONS ACT. SINCE COMPETING APPLICATIONS WERE FOR DIFFERENT SUBURBS OF A LARGE CITY AND SINCE TV CHANNELS MUST SERVE BROADER AREAS THAN RADIO STATIONS, NO SEC. 307(B) PREFERENCE COULD HAVE BEEN AWARDED TO EITHER APPLICANT. BC DOCKET 81-310
BUENA VISTA TELECASTERS - TEXAS,INC. 94FCC2D625

SITE AVAILABILITY

IN HEARING MATTER OF MUTUALLY EXCLUSIVE CP APPLICATIONS FOR FM STATION, REVIEW BOARD AFFIRMED ALJ'S GRANT. WINNING APPLICANT FOUND TO BE FINANCIALLY QUALIFIED AND ENTITLED TO DIVERSIFICATION, COVERAGE, AND AUXILIARY POWER PREFERENCES. PETITION FOR SITE AVAILABILITY ISSUE DENIED.
BC DOCKET 82-629
WHITE MOUNTAIN FM, INC. 94FCC2D1423

STANDING, SEE ALSO PARTY IN INTEREST

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679
RKO GENERAL, INC. (KHJ-TV) 94FCC2D879

STATION SEPARATION

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90
FM B/C STATIONS 94FCC2D0152

SYNDICATION, NETWORK

IN THIS TENTATIVE DECISION AND REQUEST FOR FURTHER COMMENT THE COMMISSION REVIEWED ITS NETWORK TV FINANCIAL INTEREST AND SYNDICATION RULES (47 C.F.R. SEC. 73.658(J)). COMMISSION CONCLUDED THAT FINANCIAL INTEREST RULE COULD BE ELIMINATED WITHOUT ADVERSE CONSEQUENCE TO PUBLIC BUT THAT MODIFIED VERSION OF SYNDICATION RULE SHOULD BE RETAINED.
BC DOCKET 82-345
AMENDMENT OF PART 47 94FCC2D1019

TABLE OF ASSIGNMENT, SEE FREQUENCY ASSIGNMENT

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90
FM B/C STATIONS 94FCC2D0152

TARIFF, AMENDMENT OF

MEMORANDUM OPINION AND ORDER ADOPTED DENYING PETITIONS TO REJECT OR SUSPEND AND INVESTIGATE AND PERMITTING AT&T TO CONDUCT AND EXPERIMENT WITH ITS MTS RATES IN TRIAL STATE OF NEW YORK, CALIFORNIA, AND IOWA TO EXPIRE ON DEC. 31, 1983.
AT&T CO. 94FCC2D0551

TARIFF, COST SUPPORT MATERIAL

PETITION FOR RECONSIDERATION OF RECENT AMENDMENTS TO SECTION 61.38 OF RULES, GOVERNING COST SUPPORT MATERIAL REQUIRED TO BE FILED WITH TARIFFS DENIED. PETITIONER OFFERED NO BASIS FOR ASSERTIONS THAT INFORMATION NO LONGER REQUIRED IS NEEDED FOR COMMISSION REVIEW OF TARIFFS, NOR FOR ITS CONTENTION THAT NOTICE AND COMMENT WERE REQUIRED BY ADMINISTRATIVE PROCEDURE ACT.
AMENDMENT OF SECTION 61.38 94FCC2D1107

TARIFF, EXPERIMENTAL

MEMORANDUM OPINION AND ORDER ADOPTED DENYING PETITIONS TO REJECT OR SUSPEND AND INVESTIGATE AND PERMITTING AT&T TO CONDUCT AND EXPERIMENT WITH ITS MTS RATES IN TRIAL STATE OF NEW YORK, CALIFORNIA, AND IOWA TO EXPIRE ON DEC. 31, 1983.
AT&T CO. 94FCC2D0551

TARIFF, INVESTIGATION

PART TIME/FULL TIME RATE STRUCTURE BASED ON 60/40 PERCENT DIVISION OF PRESENT AND FUTURE REVENUE REQUIREMENTS ADOPTED AS REASONABLE FOR AT&T'S SERIES 7000 TERRESTRIAL TV TRANSMISSION SERVICES. FURTHER ACTION INVESTIGATING UNJUST DISCRIMINATION DEFERRED UNTIL FURTHER NOTICE.
AT&T CO. 94FCC2D0566

TARIFF, REJECTION OF

AT&T'S APPLICATION FOR SECTION 214 AUTHORITY TO OFFER BASIC PACKET SWITCHING SEVICE GRANTED, WITH CONDITIONS ATTACHED TO AUTHORIZATION.
BASIC PACKET SWITCHING SERVICE 94FCC2D0048

TARIFF, SUSPENSION

ON REMAND FROM COURT OF APPEALS FOR D.C. CIRCUIT, COMMISSION EXPLAINS FURTHER ITS DECISION THAT RCA'S TARIFF REVISIONS FOR DOMESTIC SATELLITE SERVICES, ARE UNJUST AND UNREASONABLE UNDER SECTION 201(B) OF ACT.
CC DOCKET 80-766
RCA AMERICAN COMUNICATIONS, INC. 94FCC2D1338

TAX CERTIFICATE, SEE ALSO CATV CROSS OWNERSHIP

PETITION FOR TAX CERTIFICATE GRANTED FOR SALE OF MULTIPOINT DISTRIBUTION SYSTEM BASED UPON FINDING THAT ITS OPERATIONS WERE TECHNICALLY AS WELL AS FUNCTIONALLY INTEGRATED IN LARGE PART WITH CABLE SYSTEM THAT WAS SOLD TO PROMOTE COMMISSION'S POLICY AGAINST OWNERSHIP OF CO-LOCATED TV STATION AND CABLE SYSTEM.
GEORGIA CABLEVISION CORP. 94FCC2D0207

TECHNICAL STANDARDS

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15, APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PROCEDURE MP-4.
CORDLESS TELEPHONES 94FCC2D0508

TELEPHONE EQUIPMENT, REGISTRATION OF

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

TELEVISION STATION, AUTHORIZATION, SEE ALSO CONST. PERMIT

REVIEW BOARD AFFIRMS I.D., FINANCIALLY DISQUALIFIES ONE COMMERICAL VHF TV APPLICANT, AND GRANTS COMPETING APPLICATION. DISQUALIFIED APPLICANT RELIED HEAVILY ON EQUIPMENT ON HAND WHICH WAS IN POOR CONDITION AND WAS NOT SHOWN TO BE FUNCTIONAL IN QUALITY AND ADEQUATE IN AMOUNT, AND SUBSTANTIALLY UNDERESTIMATED ITS PROGRAMMING COSTS.
BC DOCKET 80-484
GACO COMMUNICATIONS CORP. 94FCC2D0761

REVIEW BOARD AFFIRMS I.D. AND GRANTS APPLICATION WITH SUBSTANTIAL DIVERSIFICATION AND INTEGRATION PREFERENCES AND SLIGHT-TO-MODERATE COMPARATIVE DEMERIT FOR CARELESS LACK OF CANDOR IN REPORTING PRINCIPAL'S VOTING INTEREST IN ANOTHER LICENSEE AS NONVOTING AND FAILING TO REPORT OTHER LICENSEE'S APPLICATION FOR, AND SUBSEQUENT GRANT OF, TV STATION IN REGION. BC DOCKET 80-734
SUPERIOR B/CING OF CALIFORNIA 94FCC2D0904

TELEX

MEMORANUDM OPINION, ORDER AND CERTIFICATE ADOPTED AUTHORIZING WESTERN UNION FACILITIES TO PROVIDE TELETEX SERVICE WITHIN U.S. AND BETWEEN U.S. AND GERMANY.
WESTERN UNION TELEGRAPH CO. 94FCC2D0472

TRANSMISSION FIRST LOCAL

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775
BEAUFORT COUNTY B/CING CO. 94FCC2D0572

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT AFTER FINDING IT WILL NOT IMPEDE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION OF TV SERVICE AS REQUIRED BY SEC. 307(B) OF COMMUNICATIONS ACT. SINCE COMPETING APPLICATIONS WERE FOR DIFFERENT SUBURBS OF A LARGE CITY AND SINCE TV CHANNELS MUST SERVE BROADER AREAS THAN RADIO STATIONS, NO SEC. 307(B) PREFERENCE COULD HAVE BEEN AWARDED TO EITHER APPLICANT. BC DOCKET 81-310
BUENA VISTA TELECASTERS - TEXAS,INC. 94FCC2D0625

TRUSTEE IN BANKRUPTCY

WHILE COMMISSION HAS GENERAL POLICY OF NOT QUESTIONING APPOINTMENT OF RECEIVER OR TRUSTEE IN BANKRUPTCY BY STATE AND FEDERAL COURTS, WHERE SUCH AN APPOINTMENT INVOLVES ENFORCEMENT OF REVERSIONARY INTEREST IN B/C LICENSE AND RECOGNITION OF SECURITY INTEREST IN LICENSE BY CREDITORS, APPLICATION SEEKING CONSENT TO ASSIGN B/C LICENSE TO RECEIVER OR TRUSTEE IS UNACCEPTABLE FOR FILING.
KIRK MERKLEY 94FCC2D0829

WIDE AREA TELEPHONE SERVICE (WATS)

RULES ADOPTED FOR COMPUTATION AND ASSESSMENT OF END USER AND CARRIER'S CARRIER ACCESS CHARGES AND CREATION OF AN EXCHANGE CARRIER ASSOCIATION TO PREPARE ACCESS CHARGE TARIFFS AND DISTRIBUTE POOLED ACCESS CHARGE REVENUES.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE 94FCC2D0852

PETITION FOR WAIVER OF RULES PRESCRIBING RATE STRUCTURE FOR USE OF LOCAL TRANSPORT FACILITIES TO ORIGINATE OR TERMINATE INTERSTATE OR FOREIGN TELECOMMUNICATIONS GRANTED. RULES HAD ASSUMED EQUAL INTERCONNECTION OPPORTUNITY FOR ALL INTEREXCHANGE CARRIERS.
AT&T CO. 94FCC2D0545

SECTION UNITED STATES CODE

COMMUNICATIONS ACT OF 1934, AS AMENDED

201 47USC 201

COMMISSION ADOPTED NPRM PROPOSING PROCEDURES FOR DETARIFFING
OF EMBEDDED CPE OWNED BY BELL SYSTEM, INDEPENDENT TELEPHONE
COMPANIES, AND RECORD CARRIERS.
COMPUTER II IMPLEMENTATION 94FCC2D0076

NPRM ADOPTED PROPOSING A PLAN FOR COMMISSION TO MONITOR THE
EFFECTS OF INTERSTATE ACCESS CHARGES AND VARIOUS RATE
CHANGES ON AVAILABILITY OF LOCAL SERVICE.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE (PHASE IV) 94FCC2D0396

201(B) 47USC 201(B)

AT&T'S REFUSAL TO HONOR MCI'S ORDER FOR TELPAK CIRCUITS IN
1975 ON BASIS OF CUSTOMER PREMISES TARIFF RESTRICTIONS WAS
UNJUST, UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF
SECTION 201(B) AND 202(A) OF COMMUNICATIONS ACT AND RESULTED
IN INJURY TO MCI. DAMAGES ASSESSED. PREJUDGEMENT INTEREST
AWARDED ON CONTINGENCY BASIS.
CC DOCKET 81-217
MCI V. AT&T 94FCC2D0332

202 47USC 202

NPRM ADOPTED PROPOSING A PLAN FOR COMMISSION TO MONITOR THE
EFFECTS OF INTERSTATE ACCESS CHARGES AND VARIOUS RATE
CHANGES ON AVAILABILITY OF LOCAL SERVICE.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE (PHASE IV) 94FCC2D0396

202(A) 47USC 202(A)

AT&T'S REFUSAL TO HONOR MCI'S ORDER FOR TELPAK CIRCUITS IN
1975 ON BASIS OF CUSTOMER PREMISES TARIFF RESTRICTIONS WAS
UNJUST, UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF
SECTION 201(B) AND 202(A) OF COMMUNICATIONS ACT AND RESULTED
IN INJURY TO MCI. DAMAGES ASSESSED. PREJUDGEMENT INTEREST
AWARDED ON CONTINGENCY BASIS.
CC DOCKET 81-217
MCI V. AT&T 94FCC2D0332

SECTION   UNITED STATES CODE

203   47USC 203

RULES ADOPTED FOR COMPUTATION AND ASSESSMENT OF END USER AND CARRIER'S CARRIER ACCESS CHARGES AND CREATION OF AN EXCHANGE CARRIER ASSOCIATION TO PREPARE ACCESS CHARGE TARIFFS AND DISTRIBUTE POOLED ACCESS CHARGE REVENUES.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE   94FCC2D0852

205   47USC 205

COMMISSION ADOPTED NPRM PROPOSING PROCEDURES FOR DETARIFFING OF EMBEDDED CPE OWNED BY BELL SYSTEM, INDEPENDENT TELEPHONE COMPANIES, AND RECORD CARRIERS.
COMPUTER II IMPLEMENTATION   94FCC2D0076

212   47USC 212

ORDER ADOPTED GRANTING TRANSFER OF CONTROL OF SOUTHERN PACIFIC COMMUNICATIONS CO. AND SOUTHERN PACIFIC SATELLITE CO.'S LICENSES AND AUTHORIZATION TO GTE CORP.
GTE CORP. AND SOUTHERN PACIFIC CO.   94FCC2D0235

214   47USC 214

COMMISSION ASSIGNS ORBITAL LOCATIONS FOR NEW AND PREVIOUSLY AUTHORIZED DOMESTIC FIXED SATELLITES, MODIFYING PREVIOUS 1980 PLAN, 84 FCC 2D 584 (1981). ACTION RESULTS FROM REDUCED ORBITAL SPACING CRITERIA IN 4/6 GHZ AND 12/14 GHZ BANDS ADOPTED CONCURRENTLY IN REPORT AND ORDER IN CC DKT. 81-704.
DOMESTIC FIXED-SATELLITE SERVICE   94FCC2D0129

PETITION FOR RECONSIDERATION OF GTE SATELLITE CORP., 90 FCC 2D 1009 (1982), DENIED, AND RELATED APPLICATION OF GSAT FOR AUTHORITY TO CONSTRUCT AND OPERATE EARTH STATION GRANTED. ACTION AFFIRMS UNDERLYING DECISION WITHOUT RESTRICKING, TELECOMMUNICATIONS SERVICES TO CONSUMERS.
GTE SATELLITE CORP.   94FCC2D1184

SECTION UNITED STATES CODE

214 47USC (C)(214)

AT&T'S APPLICATION FOR SECTION 214 AUTHORITY TO OFFER BASIC PACKET SWITCHING SEVICE GRANTED, WITH CONDITIONS ATTACHED TO AUTHORIZATION.
BASIC PACKET SWITCHING SERVICE 94FCC2D0048

302 47USC 302

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15, APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PROCEDURE MP-4.
CORDLESS TELEPHONES 94FCC2D0508

303(R) 47USC 303(R)

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING. COMMISSION CONCLUDED THAT TECHNICAL STANDARDS, LICENSING, AND FREQUENCY COORDINATION REQUIREMENTS APPLIED TO THIS SERVICE WILL REMAIN UNCHANGED. LOW POWER POINT-TO-POINT MICROWAVE SERVICE WILL NOT BE EXTENDED TO 24 GHZ BAND.
GEN. DOCKET 79-337
AMENDMENT OF PART 94 AND 15 94FCC2D0032

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15, APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PROCEDURE MP-4.
CORDLESS TELEPHONES 94FCC2D0508

307(B) 47USC 307(B)

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90
FM B/C STATIONS 94FCC2D0152

SECTION UNITED STATES CODE

COMMUNICATIONS ACT OF 1934, AS AMENDED

REVIEW BOARD AFFIRMS I.D. AND GRANTS FM CP TO APPLICANT PROPOSING FIRST LOCAL TRANSMISSION SERVICE, PURSUANT TO SEC. 307(B) OF COMMUNICATIONS ACT. BOARD REJECTED LOSING APPLICANT'S POST-HEARING AMENDMENT, WHICH SOUGHT TO CHANGE PROPOSED COMMUNITY, FOR LACK OF GOOD CAUSE; DOCTRINE OF JUDICIAL ESTOPPEL APPLIES.
BC DOCKET 80-775
BEAUFORT COUNTY B/CING CO. 94FCC2D0572

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT AFTER FINDING IT WILL NOT IMPEDE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION OF TV SERVICE AS REQUIRED BY SEC. 307(B) OF COMMUNICATIONS ACT. SINCE COMPETING APPLICATIONS WERE FOR DIFFERENT SUBURBS OF A LARGE CITY AND SINCE TV CHANNELS MUST SERVE BROADER AREAS THAN RADIO STATIONS, NO SEC. 307(B) PREFERENCE COULD HAVE BEEN AWARDED TO EITHER APPLICANT. BC DOCKET 81-310
BUENA VISTA TELECASTERS - TEXAS,INC. 94FCC2D0625

309 47USC 309

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

COMMISSION ASSIGNS ORBITAL LOCATIONS FOR NEW AND PREVIOUSLY AUTHORIZED DOMESTIC FIXED SATELLITES, MODIFYING PREVIOUS 1980 PLAN, 84 FCC 2D 584 (1981). ACTION RESULTS FROM REDUCED ORBITAL SPACING CRITERIA IN 4/6 GHZ AND 12/14 GHZ BANDS ADOPTED CONCURRENTLY IN REPORT AND ORDER IN CC DKT. 81-704.
DOMESTIC FIXED-SATELLITE SERVICE 94FCC2D0129

310(D) 47USC 310(D)

APPLICATION FOR ASSIGNMENT OF LICENSE GRANTED. VIOLATION OF SEC. 310(D) OF COMMUNICATIONS ACT OF 1934, AS AMENDED, REQUIRING PRIOR COMMISSION CONSENT TO TRANSFER OF CONTROL OR ASSIGNMENT OF LICENSE, WAS NOT DISQUALIFYING WHERE APPLICATION WAS PROMPTLY FILED.
D.H. OVERMYER TELECASTING CO. INC. 94FCC2D0117

SECTION UNITED STATES CODE

313 47USC 313

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF
CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE
DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS
ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

501 47USC 501

PETITION FOR RECONSIDERATION OF HENRY C. ARMSTRONG, III,
FCC 83R-16, 53 RR 2D 474 (1983) DENIED. PETITIONER
ESSENTIALLY REARGUES POINTS PREVIOUSLY MADE BEFORE BOARD.
PR DOCKET 81-826
HENRY CC. ARMSTRONG, III 94FCC2D0268

FEDERAL COMMUNICATIONS COMMISSION
SECTION UNITED STATES CODE

01.3

PETITIONS FOR WAIVER OF EQUIPMENT AUTHORIZATION REQUIREMENTS OF SECTION 18.142 FOR NEW RADIO FREQUENCY LIGHTING DEVICES GRANTED. INTERIM RELIEF GRANTED IN ORDER NOT TO DELAY INTRODUCTION OF ENERGY SAVING TECHNOLOGY.
RF LIGHTING DEVICES 94FCC2D1351

01.65

REVIEW BOARD AFFIRMS ALJ'S GRANT TO FM B/C APPLICANT WHO HAS MODERATE COMPARATIVE COVERAGE PREFERENCE FOR SERVING NIGHTTIME WHITE AREA. WINNING APPLICANT'S SMALL ATTRIBUTABLE OWNERSHIP INTEREST IN LOCAL B/C PRODUCTION COMPANY IS DE MINIMIS, AND ITS 50% INTEGRATION CREDIT WITH MINORITY OWNERSHIP ENHANCEMENT DEEMED EQUAL TO ANOTHER'S 52% CREDIT.
BC DOCKET 79-56
GOLDEN STATE B/CING CORP. 94FCC2D0212

DISCOVERY GRANTED IN PART AND CLAIM OF ATTORNEY-CLIENT PRIVILEGE DISALLOWED ON FINDING THAT APPLICANTS WAIVED RIGHT TO ASSERT PRIVILEGE. DISCOVERY DENIED WITH RESPECT TO DOCUMENTS PROTECTED BY ATTORNEY-WORK-PRODUCT DOCTRINE.
CC DOCKET 82-587
A.S.D. ANSWER SERVICE, INC. 94FCC2D0539

REVIEW BOARD DECISION MODIFIED. DIVERSIFICATION AND MINORITY OWNERSHIP ENTITLED TO LESS SIGNIFICANCE IN INTERIM PROCEEDING WHEREAS B/C EXPERIENCE HAS MORE SIGNIFICANCE THAN IN PERMANENT LICENSING PROCEEDING. PETITION TO ADD MISREPRESENTATION AND PROPOSED PROGRAMMING ISSUES BASED ON ALLEGATIONS THAT PROGRAM PLANS HAVE CHANGED DENIED.
BC DOCKET 82-531
GLOBAL B/CING GROUP, INC 94FCC2D0809

COMMISSION REMANDED COMPARATIVE PROCEEDING TO ALJ FOR EXPEDITED CONSIDERATION OF RENEWAL APPLICANT'S QUALIFICATIONS. CASE BEFORE COMMISSION BY VIRTUE OF COURT REMAND ORDER DIRECTING COMMISSION TO INQUIRE INTO IMPACT OF LICENSEE'S QUALIFICATION IN RELATED CASE.
DOCKET 16679
RKO GENERAL, INC. (KHJ-TV) 94FCC2D0879

SECTION UNITED STATES CODE

MUTUALLY EXCLUSIVE APPLICATIONS DESIGNATED FOR HEARING. FAILURE TO FILE AN APPLICATION FOR TRANSFER OF CONTROL BASED ON GRADUAL CHANGE OF MAJORITY OF BOARD MEMBERS OF LICENSEE'S PARENT, NONPROFIT, NON-STOCK ENTITY WILL NOT REFLECT ADVERSELY ON LICENSEE WHERE REQUIREMENT FOR SUCH APPLICATION IS UNCLEAR AND LICENSEE HAS OTHERWISE NOTIFIED COMMISSION OF CHANGES. MM DOCKET 83-667
SEVEN LOCKS B/CING CO. 94FCC2D0829

01.102(A)

PETITION FOR RECONSIDERATION OF HENRY C. ARMSTRONG, III, FCC 83R-16, 53 RR 2D 474 (1983) DENIED. PETITIONER ESSENTIALLY REARGUES POINTS PREVIOUSLY MADE BEFORE BOARD.
PP DOCKET 81-826
HENRY CO. ARMSTRONG, III 94FCC2D0268

01.106

PETITION FOR RECONSIDERATION OF GTE SATELLITE CORP., 90 FCC 2D 1009 (1982), DENIED, AND RELATED APPLICATION OF GSAT FOR AUTHORITY TO CONSTRUCT AND OPERATE EARTH STATION GRANTED. ACTION AFFIRMS UNDERLYING DECISION WITHOUT RESTRICKING, TELECOMMUNICATIONS SERVICES TO CONSUMERS.
GTE SATELLITE CORP. 94FCC2D1184

01.115(G)

UNDER COMMISSION'S PERSONAL ATTACK RULE, B/CER INCURS OBLIGATIONS ONLY WHEN AN ATTACK IS MADE UPON HONESTY, CHARACTER, INTEGRITY OR LIKE PERSONAL QUALITIES OF AN IDENTIFIED PERSON OR GROUP, DURING DISCUSSION OF CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE.
EULOGIO CARDONA Y BELTRAN 94FCC2D0146

PETITION FOR RECONSIDERATION MUST BE TIMELY FILED. FOLLOW-UP COMPLAINT MUST BE FILED WITHIN REASONABLE TIME (NORMALLY WITHIN 30 DAYS) AFTER COMMISSION DENIAL OF INITIAL COMPLAINT.
ACCURACY IN MEDIA 94FCC2D0501

APPLICATION FOR REVIEW OF BUREAU RULING DENYING COMPLAINT AGAINST CBS TV NETWORK DENIED. COMPLAINANT HAS FAILED TO ESTABLISH THAT CBS DID NOT PRESENT CONTRASTING VIEWPOINTS IN ITS OVERALL PROGRAMMING ON ISSUF OF "NATIONAL DEFENSE."
AMERICAN SECURITY COUNCIL 94FCC2D0521

01.221(C)

MUTUALLY EXCLUSIVE APPLICATIONS DESIGNATED FOR HEARING. FAILURE TO FILE AN APPLICATION FOR TRANSFER OF CONTROL BASED ON GRADUAL CHANGE OF MAJORITY OF BOARD MEMBERS OF LICENSEE'S PARENT, NONPROFIT, NON-STOCK ENTITY WILL NOT REFLECT ADVERSELY ON LICENSEE WHERE REQUIREMENT FOR SUCH APPLICATION IS UNCLEAR AND LICENSEE HAS OTHERWISE NOTIFIED COMMISSION OF CHANGES.
MM DOCKET 83-667
94FCC2D0899
SEVEN LOCKS B/CING CO.

01.223

REVIEW BOARD DENIED APPEAL OF DISMISSAL OF TV RENEWAL APPLICATION BECAUSE LICENSEE FAILED TO COMPLY WITH VALID DISCOVERY REQUESTS AND ORDERS. ASSERTED GROUNDS FOR NON-COMPLIANCE WERE PREVIOUSLY REJECTED BY BOARD, COMMISSION, AND COURTS. ALSO, APPEAL FROM DISMISSAL OF LATE-FILED PETITION TO INTERVENE IS DENIED BECAUSE RULE 1.223 REQUIREMENTS NOT MET.
BC DOCKET 82-339
94FCC2D0756
FAITH CENTER, INC.

01.223(B)

APPELLANT LISTENER GROUPS HAD NOT MET PARTICIPATION REQUIREMENTS OF SEC. 1.223(B). NEVERTHELESS, BECAUSE OF THEIR LONGSTANDING INTEREST IN EXISTING STATION, BOARD WILL PERMIT SUPPLEMENTAL SHOWING OF HOW THEIR INTERVENTION AS PARTIES COULD ILLUMINATE ISSUES IN CASE.
BC DOCKET 82-371 94FCC2D0203
GAF B/CING CO., INC.

01.227(B)

WHERE AN APPLICATION FILED LATE BECAUSE AIR CARRIER COULD NOT PROVIDE NEXT DAY DELIVERY DUE TO GROUNDING AT AN INTERMEDIATE STOP, UNUSUAL AND COMPELLING CIRCUMSTANCES ARE DEMONSTRATED TO WARRANT WAIVER OF SECTIONS 73.3572(C) AND 1.227(B) OF RULES.
94FCC2D0069
CALDWELL TV ASSOCIATES, LTD.

FEDERAL COMMUNICATIONS COMMISSION
SECTION UNITED STATES CODE

01.276(A)

REVIEW BOARD GRANTED JOINT REQUEST FOR APPROVAL OF AGREEMENT CALLING FOR GRANT OF ONE APPLICATION AND DISMISSAL OF COMPETING APPLICATIONS. UNAUTHORIZED PLEADING SEEKING CONDITION ON GRANT DISMISSED. BOARD ON ITS OWN MOTION, HOWEVER, ADDED CONDITION TO THE AWARD OF CP.
BC DOCKET 81-733
WHITCO B/CERS, INC. 94FCC2D1000

01.415

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670
COMMERCIAL TV STATIONS 94FCC2D0678

01.419

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670
COMMERCIAL TV STATIONS 94FCC2D0678

01.1231

NPRM ADOPTED SOLICITING COMMENT ON REGULATORY PROPOSALS THAT WOULD AMEND POLICIES WITH RESPECT TO COMMERCIAL TV PROGRAMMING, COMMERCIALIZATION, ASCERTAINMENT, AND PROGRAM LOGGING.
MM DOCKET 83-670
COMMERCIAL TV STATIONS 94FCC2D0678

02.

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

SECTION UNITED STATES CODE

15.

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING. COMMISSION CONCLUDED THAT TECHNICAL STANDARDS, LICENSING, AND FREQUENCY COORDINATION REQUIREMENTS APPLIED TO THIS SERVICE WILL REMAIN UNCHANGED. LOW POWER POINT-TO-POINT MICROWAVE SERVICE WILL NOT BE EXTENDED TO 24 GHZ BAND.
GEN. DOCKET 79-337
AMENDMENT OF PART 94 AND 15 94FCC2D0032

MEMORANDUM OPINION AND ORDER ADOPTED AMENDING PART 15 OF RULES CONCERNING RADIO NOISE EMISSIONS MEASUREMENTS FOR COMPUTING DEVICES. THIS ACTION MAKES A NUMBER OF MINOR CHANGES IN SPECIFIC INSTRUCTIONS CONTAINED IN PROCEDURE. IN ADDITION, MEASUREMENT PROCEDURES ARE REMOVED FROM PART 15, APPENDIX A AND WILL BE PUBLISHED AS FCC MEASUREMENT PROCEDURE MP-4.
CORDLESS TELEPHONES 94FCC2D0508

15.4

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED COMMISSION'S ORIGINAL DECISION.
94FCC2D0531

15.7

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED COMMISSION'S ORIGINAL DECISION.
94FCC2D0531

15.118

MEMORANDUM OPINION AND ORDER ADOPTED RECONSIDERING WAIVER OF RULES FOR CORDLESS TELEPHONE. THIS ACTION RESPONDS TO PETITIONS FOR RECONSIDERATION OF WAIVER ORDER AND REAFFIRMED COMMISSION'S ORIGINAL DECISION.
94FCC2D0531

SECTION UNITED STATES CODE

18.

NOI ADOPTED SEEKING INFORMATION TO AID COMMISSION IN FORMULATING REGULATORY POLICY FOR LIGHTING DEVICES USING RADIO FREQUENCY (RF) ENERGY. PART 18 SUBPARTS H AND E (BY REFERENCE) CURRENTLY APPLIES TO RF LIGHTING DEVICES. THESE RULES, HOWEVER, ARE NOT CONSIDERED APPROPRIATE FOR RF LIGHTING DEVICES.
GEN. DOCKET 83-806
RF LIGHTING DEVICES 94FCC2D1341

18.142

PETITIONS FOR WAIVER OF EQUIPMENT AUTHORIZATION REQUIREMENTS OF SECTION 18.142 FOR NEW RADIO FREQUENCY LIGHTING DEVICES GRANTED. INTERIM RELIEF GRANTED IN ORDER NOT TO DELAY INTRODUCTION OF ENERGY SAVING TECHNOLOGY.
RF LIGHTING DEVICES 94FCC2D1351

21.

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

22.23(C)(1)

APPLICATIONS FOR REVIEW OF STAFF ACTIONS RETURNING AMENDMENTS TO CELLULAR APPLICATIONS AS MAJOR GRANTED. APPLICATIONS GRANTED IN PART CONCERNING AMENDMENTS REMANDED TO COMMON CARRIER BUREAU AND DENIED IN ALL OTHER RESPECTS.
CELLULAR COMMUNICATIONS SYSTEMS 94FCC2D0074

61.38

PETITION FOR RECONSIDERATION OF RECENT AMENDMENTS TO SECTION 61.38 OF RULES, GOVERNING COST SUPPORT MATERIAL REQUIRED TO BE FILED WITH TARIFFS DENIED. PETITIONER OFFERED NO BASIS FOR ASSERTIONS THAT INFORMATION NO LONGER REQUIRED IS NEEDED FOR COMMISSION REVIEW OF TARIFFS, NOR FOR ITS CONTENTION THAT NOTICE AND COMMENT WERE REQUIRED BY ADMINISTRATIVE PROCEDURE ACT.
AMENDMENT OF SECTION 61.38 94FCC2D1107

FEDERAL COMMUNICATIONS COMMISSION
SECTION UNITED STATES CODE

62.21

ORDER ADOPTED GRANTING TRANSFER OF CONTROL OF SOUTHERN
PACIFIC COMMUNICATIONS CO. AND SOUTHERN PACIFIC SATELLITE
CO.'S LICENSES AND AUTHORIZATION TO GTE CORP.
GTE CORP. AND SOUTHERN PACIFIC CO. 94FCC2D0235

64.702

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF
CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE
DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS
ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

AT&T'S APPLICATION FOR SECTION 214 AUTHORITY TO OFFER BASIC
PACKET SWITCHING SEVICE GRANTED, WITH CONDITIONS ATTACHED TO
AUTHORIZATION.
BASIC PACKET SWITCHING SERVICE 94FCC2D0048

COMMISSION ADOPTED NPRM PROPOSING PROCEDURES FOR DETARIFFING
OF EMBEDDED CPE OWNED BY BELL SYSTEM, INDEPENDENT TELEPHONE
COMPANIES, AND RECORD CARRIERS.
COMPUTER II IMPLEMENTATION 94FCC2D0076

68.

NPRM ADOPTED FOR REGISTRATION UNDER PART 68 OF RULES OF
CHANNEL SERVICE UNITS FOR DIRECT CONNECTION TO DATAPHONE
DIGITAL SERVICE. ORDER DECIDING THAT CHANNEL SERVICE UNITS
ARE CUSTOMER-PROVIDED EQUIPMENT UNDER COMPUTER II.
CC DOCKET 81-216
AMENDMENT OF PART 68 94FCC2D0005

69.1(B)

PETITION FOR WAIVER OF RULES PRESCRIBING RATE STRUCTURE FOR
USE OF LOCAL TRANSPORT FACILITIES TO ORIGINATE OR TERMINATE
INTERSTATE OR FOREIGN TELECOMMUNICATIONS GRANTED. RULES HAD
ASSUMED EQUAL INTERCONNECTION OPPORTUNITY FOR ALL INTER-
EXCHANGE CARRIERS.
AT&T CO. 94FCC2D0545

SECTION UNITED STATES CODE

69.101

PETITION FOR WAIVER OF RULES PRESCRIBING RATE STRUCTURE FOR USE OF LOCAL TRANSPORT FACILITIES TO ORIGINATE OR TERMINATE INTERSTATE OR FOREIGN TELECOMMUNICATIONS GRANTED. RULES HAD ASSUMED EQUAL INTERCONNECTION OPPORTUNITY FOR ALL INTEREXCHANGE CARRIERS.
AT&T CO.
94FCC2D0545

69.112

PETITION FOR WAIVER OF RULES PRESCRIBING RATE STRUCTURE FOR USE OF LOCAL TRANSPORT FACILITIES TO ORIGINATE OR TERMINATE INTERSTATE OR FOREIGN TELECOMMUNICATIONS GRANTED. RULES HAD ASSUMED EQUAL INTERCONNECTION OPPORTUNITY FOR ALL INTEREXCHANGE CARRIERS.
AT&T CO.
94FCC2D0545

69.602

RULES ADOPTED FOR COMPUTATION AND ASSESSMENT OF END USER AND CARRIER'S CARRIER ACCESS CHARGES AND CREATION OF AN EXCHANGE CARRIER ASSOCIATION TO PREPARE ACCESS CHARGE TARIFFS AND DISTRIBUTE POOLED ACCESS CHARGE REVENUES.
CC DOCKET 78-72
MTS/WATS MARKET STRUCTURE
94FCC2D0852

73.37(A)

REVIEW BOARD GRANTS SUMMARY DECISION ON PROHIBITED CONTOUR OVERLAP ISSUE, INVOLVING SECTION 73.37(A), AND DENIES APPLICATION FOR AM STATION. JOINT FIELD INTENSITY MEASUREMENTS DEMONSTRATED OVERLAP, WHICH WAS CONFIRMED BY DATA AVERAGING METHODOLOGY USED TO EVALUATE ALL AVAILABLE SETS OF DATA EXCEPT CERTAIN HIGHLY SUSPECT DATA.
BC DOCKET 81-606
GSM MEDIA CORP.
94FCC2D1169

73.37(B)(2)

COMMISSION REAFFIRMED GRANT OF CP FOR AM STATION. SECTION 73.37(B)(2) OF RULES WAIVED AND INTERNATIONAL TREATIES NOT CONSIDERED A BAR TO GRANT OF CP.
DOCKET 20969
LARES B/CING CORP.
94FCC2D0341

SECTION UNITED STATES CODE

73.202(B)

FINAL RULE MAKING ORDER ADOPTED TO PERMIT OPERATION OF AN INCREASED NUMBER OF FM B/C STATIONS. RULE CHANGES WERE NEEDED TO MEET DEMAND FOR FM B/C SERVICE THAT COULD NOT BE SATISFIED UNDER PRESENT RULES. NEW RULES ALLOW CLASS A STATIONS TO OPERATE ON ALL CHANNELS, AUTHORIZE THREE NEW CLASSES OF STATIONS AND RECLASSIFY EXISTING STATIONS.
BC DOCKET 80-90
FM B/C STATIONS 94FCC2D0152

73.3580(F)

MUTUALLY EXCLUSIVE APPLICATIONS DESIGNATED FOR HEARING. FAILURE TO FILE AN APPLICATION FOR TRANSFER OF CONTROL BASED ON GRADUAL CHANGE OF MAJORITY OF BOARD MEMBERS OF LICENSEE'S PARENT, NONPROFIT, NON-STOCK ENTITY WILL NOT REFLECT ADVERSELY ON LICENSEE WHERE REQUIREMENT FOR SUCH APPLICATION IS UNCLEAR AND LICENSEE HAS OTHERWISE NOTIFIED COMMISSION OF CHANGES. MM DOCKET 83-667
SEVEN LOCKS B/CING CO. 94FCC2D0999

73.658(J)

IN THIS TENTATIVE DECISION AND REQUEST FOR FURTHER COMMENT THE COMMISSION REVIEWED ITS NETWORK TV FINANCIAL INTEREST AND SYNDICATION RULES (47 C.F.R. SEC. 73.658(J)). COMMISSION CONCLUDED THAT FINANCIAL INTEREST RULE COULD BE ELIMINATED WITHOUT ADVERSE CONSEQUENCE TO PUBLIC BUT THAT MODIFIED VERSION OF SYNDICATION RULE SHOULD BE RETAINED.
BC DOCKET 82-345
AMENDMENT OF PART 47 94FCC2D1019

73.687

REVIEW BOARD GRANTED JOINT REQUEST FOR APPROVAL OF AGREEMENT CALLING FOR GRANT OF ONE APPLICATION AND DISMISSAL OF COMPETING APPLICATIONS. UNAUTHORIZED PLEADING SEEKING CONDITION ON GRANT DISMISSED. BOARD ON ITS OWN MOTION, HOWEVER, ADDED CONDITION TO THE AWARD OF CP.
BC DOCKET 81-733
WHITCO B/CERS, INC. 94FCC2D1000

SECTION UNITED STATES CODE

73.3522(A)(2)

COMPETING APPLICANTS MADE PARTIES TO REMANDED PROCEEDING
INVOLVING SAME LICENSEE. PARTIES TO SELECT REPRESENTATIVE
COUNSEL AND ALJ TO EXERCISE BROAD DISCRETION IN EXPEDITING
CASE. COMMISSION WILL INVOKE COLLATERAL ESTOPPEL TO PRECLUDE
RELITIGATION OF COMMON ISSUES. DURING PENDENCY OF INQUIRY
INTO LICENSEE'S QUALIFICATIONS, RULES AUTHORIZING AMENDMENTS
TO APPLICATIONS ARE SUSPENDED. 94FCC2D0890
RKO GENERAL, INC.

73.3525(A)

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT AFTER FINDING IT
WILL NOT IMPEDE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION
OF TV SERVICE AS REQUIRED BY SEC. 307(B) OF COMMUNICATIONS
ACT. SINCE COMPETING APPLICATIONS WERE FOR DIFFERENT SUBURBS
OF A LARGE CITY AND SINCE TV CHANNELS MUST SERVE BROADER
AREAS THAN RADIO STATIONS, NO SEC. 307(B) PREFERENCE COULD
HAVE BEEN AWARDED TO EITHER APPLICANT. BC DOCKET 81-310
BUENA VISTA TELECASTERS - TEXAS,INC. 94FCC2D0625

73.3572(A)(1)

REVIEW BOARD AFFIRMS ALJ'S DISMISSAL OF APPLICATION WHERE
APPLICANT PROPOSED MAJOR CHANGE TO ITS APPLICATION WITHIN
MEANING OF SECTION 73.3572(A)(1).
MM DOCKET 83-61
TREFOIL B/CING CO., INC. 94FCC2D0923

73.3572(C)

WHERE AN APPLICATION FILED LATE BECAUSE AIR CARRIER COULD
NOT PROVIDE NEXT DAY DELIVERY DUE TO GROUNDING AT AN INTER-
MEDIATE STOP, UNUSUAL AND COMPELLING CIRCUMSTANCES ARE DE-
MONSTRATED TO WARRANT WAIVER OF SECTIONS 73.3572(C) AND
1.227(B) OF RULES. 94FCC2D0069
CALDWELL TV ASSOCIATES, LTD.

73.3594

MUTUALLY EXCLUSIVE APPLICATIONS DESIGNATED FOR HEARING.
FAILURE TO FILE AN APPLICATION FOR TRANSFER OF CONTROL BASED
ON GRADUAL CHANGE OF MAJORITY OF BOARD MEMBERS OF LICENSEE'S
PARENT, NONPROFIT, NON-STOCK ENTITY WILL NOT REFLECT AD-
VERSELY ON LICENSEE WHERE REQUIREMENT FOR SUCH APPLICATION
IS UNCLEAR AND LICENSEE HAS OTHERWISE NOTIFIED COMMISSION OF
CHANGES. MM DOCKET 83-667
SEVEN LOCKS B/CING CO. 94FCC2D0899

FEDERAL COMMUNICATIONS COMMISSION
SECTION UNITED STATES CODE

73.4035

COMMISSION WILL NO LONGER MAINTAIN POLICIES AGAINST MISUSE OF AUDIENCE RATINGS DATA OR USE OF INACCURATE OR EXAGGERATED COVERAGE MAPS OR COVERAGE CLAIMS BY B/C LICENSEES.
B/C REGULATION 94FCC2D0619

73.4090

COMMISSION WILL NO LONGER MAINTAIN POLICIES AGAINST MISUSE OF AUDIENCE RATINGS DATA OR USE OF INACCURATE OR EXAGGERATED COVERAGE MAPS OR COVERAGE CLAIMS BY B/C LICENSEES.
B/C REGULATION 94FCC2D0619

74.

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112
INSTRUCTIONAL TV FIXED SERVICE 94FCC2D1203

76.54(B)

GRANTED IN PART REQUEST OF TV B/C STATION TO BE DECLARED SIGNIFICANTLY VIEWED. STATION MET TEST LEVELS IN SEVEN COUNTIES IN 1976, BUT NO LONGER MEETS LEVELS IN ONE COUNTY TODAY.
OCTAGON B/CING CO. 94FCC2D0861

76.501(A)(2)

PETITION FOR TAX CERTIFICATE GRANTED FOR SALE OF MULTIPOINT DISTRIBUTION SYSTEM BASED UPON FINDING THAT ITS OPERATIONS WERE TECHNICALLY AS WELL AS FUNCTIONALLY INTEGRATED IN LARGE PART WITH CABLE SYSTEM THAT WAS SOLD TO PROMOTE COMMISSION'S POLICY AGAINST OWNERSHIP OF CO-LOCATED TV STATION AND CABLE SYSTEM.
GEORGIA CABLEVISION CORP. 94FCC2D0207

SECTION UNITED STATES CODE

94\.

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING. COMMISSION CONCLUDED THAT TECHNICAL STANDARDS, LICENSING, AND FREQUENCY COORDINATION REQUIREMENTS APPLIED TO THIS SERVICE WILL REMAIN UNCHANGED. LOW POWER POINT-TO-POINT MICROWAVE SERVICE WILL NOT BE EXTENDED TO 24 GHZ BAND.
GEN. DOCKET 79-337 94FCC2D0032
AMENDMENT OF PART 94 AND 15

RULES CHANGES REALLOCATE EIGHT CHANNELS FROM INSTRUCTIONAL TV FIXED SERVICE (ITFS) TO MULTIPOINT DISTRIBUTION SERVICE (MDS) TO PERMIT OPERATION OF MULTICHANNEL MDS SYSTEMS. EXISTING ITFS LICENSEES, PERMITTEES AND APPLICANTS ARE GRANDFATHERED. ITFS LICENSEES MAY LEASE EXCESS CHANNEL CAPACITY ON FACILITIES FOR OTHER COMMUNICATION SERVICES.
GEN. DOCKET 80-112 94FCC2D1203
INSTRUCTIONAL TV FIXED SERVICE

U.S. GOVERNMENT PRINTING OFFICE : 1986 O - 484-010